

(2006) 02 DEL CK 0177
In the Delhi High Court
Case No : FAO (OS) 229 of 2004

Shri Jai Prakash Goel

APPELLANT

Vs

Shri O.P. Goel and Others

RESPONDENT

Date of Decision : 24-02-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 15, Order 32 Rule 3, Order 43 Rule 1, 104

Delhi High Court Act, 1966 — Section 10(1), 5(2)

Citation : (2006) 129 DLT 437 : (2006) 88 DRJ 182

Hon'ble Judges : T.S. Thakur, J; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : V.B. Andley, Adv Hima Kohli, for the Appellant; Lalit Gupta, for the Respondent No. 2 and Nitin Goel, for the Respondent No. 3, for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.—This appeal has been filed u/s 10(1) of the Delhi High Court Act, 1966 (hereinafter referred to as "the said Act") impugning the order dated 20.09.2004 passed by a learned single Judge of this Court disposing of is Nos. 9693/1999, 13292/2000, 12548/2000 and 5197/2004 in Test Case No. 10/1987 which is a petition filed by the appellant / petitioner for grant of probate in respect of an alleged will left by the father (Late Jugal Kishore Goel) of the appellant and the respondents. is No. 9693/1999 was an application under Order 32 Rules 3 and 15 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") for appointment of a guardian ad litem for Respondent No. 3 (Shri Brahm Prakash Goel) on account of his mental infirmity and consequent inability to look after and protect his interest in the pending probate proceedings (i.e., Test Case No. 10/1987). I.A. 12548/2000 sought the same relief as is 9693/1999. By is 13292/2000, the said Shri Brahm Prakash Goel sought to withdraw the No Objection to the grant of probate which he had earlier given on 27.04.1988. is 5197/2004 was filed by the appellant / petitioner seeking dismissal of the above three applications. The learned Single Judge who heard

these applications was primarily concerned with the question of appointment of a guardian ad litem for Shri Brahm Prakash Goel and, in appointing his wife (Mrs Meena Goel) as the guardian, he disposed of all the applications.

2. The alleged will of Late Jugal Kishore Goel is of 27.08.1983 and in terms of which immovable properties belonging to him were apparently bequeathed absolutely and forever in favor of the petitioner / appellant and his sons leaving nothing for the other children (including the said Brahm Prakash Goel). It was also provided that all debts and liabilities including Estate Duty be first paid out of the cash and movable properties that may be left by the Testator and the residual cash and movables were to belong to and vest in his three sons, namely, Jai Prakash Goel (the appellant herein), Satya Prakash Goel and Brahm Prakash Goel in equal shares. Satya Prakash Goel had filed objections to the grant of probate. However, as mentioned above, Brahm Prakash (respondent No. 3 herein) had given his no objection by means of an affidavit dated 27.04.1988. A similar no objection was given by the widow of the Testator, namely, Late Muthri Devi. It is pertinent to note that the latter is also alleged to have left a will dated 07.06.1988 and in respect of which probate proceedings are pending before the District court. Interestingly, under this will, the portion of the property bequeathed in favor of Brahm Prakash Goel was by way of creation of a trust for his benefit on the purported ground of improper, unattached and estranged behavior of his wife towards him "Brahm Prakash. Earlier, Brahm Prakash had filed is 10110/1998 praying that he be permitted to withdraw his no objection to the grant of probate. However, that application was dismissed as withdrawn on 20.05.1999.

3. As noted above, the impugned order was essentially concerned with the question as to whether a guardian ad litem should be appointed for respondent No. 4 (Respondent No. 3 herein), namely, Shri Brahm Prakash Goel, who had filed is No. 9693/1999 invoking the provisions of Order 32 Rules 3 and 15. It was prayed therein that the wife of Brahm Prakash, namely, Mrs Meena Goel be appointed as his guardian ad litem. By virtue of the impugned order, the learned Single Judge was of the opinion that although Brahm Prakash Goel would not be a person of unsound mind, there was no manner of doubt that he was incapable of protecting his interest in the litigation by reason of his mental infirmity and infliction of an abnormally low I.Q. (Intelligence Quotient). The learned Single Judge was also of the view that the creation of a trust by virtue of the alleged will of the mother of the parties herein was also an indication that the petitioner/appellant must have been aware of the advisability of having a guardian ad litem appointed for him as, in fact, it was the petitioner / appellant who was appointed as a trustee for the benefit of Brahm Prakash Goel under the said alleged will. The learned Single Judge was also of the view that in the first instance, it was the petitioner's duty to have drawn the attention of the court to the mental infirmity of his brother Brahm Prakash. It was recorded by the learned Single Judge that it is not in dispute that Brahm Prakash was slow of understanding and is afflicted with mild mental retardation. It was pointed out that in the order

dated 06.12.1999, it had been recorded that there was no objection to the fact that Shri Brahm Prakash is slow of understanding.

4. In the proceedings before the Single Judge, by an order dated 29.09.2000, Brahm Prakash was directed to appear before the Director, Institute of Human behavior and Allied Sciences, Shahdara, Delhi for his examination on 31.10.2000. On that date, the petitioner presented himself before the Institute and was directed to come again on 07.11.2000 at 10.00 a.m. for psycho diagnosis. On 07.11.2000, Brahm Prakash Goel was advised I.Q. (Intelligence Quotient) assessment and was directed to come again on 21.11.2000. The Out Patient Card reveals that on 21.11.2000, testing was in progress and he was directed to come again on 23.11.2000 at 9.30 a.m. On that date, the I.Q. assessment was done and Brahm Prakash Goel was asked to come on 25.11.2000 at 9.30. a.m. and in the Out Patient Card entry of 25.11.2000, it was recorded that the report would be attached. Ultimately, the certificate was given by the said Institute dated 28.11.2000 signed by Dr S.N. Sengupta, Associate Professor, Deptt. of Psychiatry of the said Institute. The certificate reveals that Brahm Prakash Goel's I.Q. was noted to be 50 which indicated mild degree of mental retardation. On the basis of this certificate which showed the I.Q. of Brahm Prakash to be 50, the learned Single Judge was of the unequivocal opinion that he was a person incapable, by reason of his mental infirmity of protecting his interest in the present litigation and, accordingly, he appointed Mrs Meena Goel, wife of Shri Brahm Prakash as his guardian ad litem.

5. The present appeal u/s 10(1) of the said Act has been filed impugning this order dated 20.09.2004 passed by the learned Single Judge holding the said Shri Brahm Prakash Goel to be of such mental infirmity as would make him incapable of protecting his interest in the ongoing litigation and thereby appointing his wife Mrs Meena Goel as guardian ad litem. A series of grounds of appeal have been indicated. However, the main contentions are as follows:-

i) The medical certificate indicating an I.Q. of 50 is not a valid certificate as it has been procured by collusion and the same was not the result of a procedure which required admission in the said institute;

ii) That a proper and just enquiry as contemplated under Order 32 Rule 15 of the Code was not conducted by the learned Single Judge before passing the impugned order;

iii) That Brahm Prakash Goel could not be held to be mentally infirm and incapable of looking after his interest in view of the fact that he had been signing affidavits and applications, he had a Ration Card as Head of his family, he had been maintaining and had been operating a bank account, had been maintaining a diary and had been taking petrol on credit from a Petrol Pump.

6. It was also urged by Mr V.B. Andley, the learned senior counsel, who appeared on behalf of the petitioner / appellant that the impugned order would operate to nullify the no objection earlier given by the said Brahm Prakash on 27.04.1998 to

the grant of probate of the will in question. As such, it would work serious prejudice to the cause of the petitioner / appellant. He, however, submitted that if the impugned orders were to operate prospectively, then he would have no grievance on this score.

7. The learned counsel appearing on behalf of the respondent No. 3 opposed the admission of the appeal on the ground that it was not maintainable. He also advanced arguments on merits indicating as to how the learned Single Judge's order did not suffer from any legal infirmity. Since the "threshold" argument has been seriously advanced, it must first be decided as to whether the appeal in itself is maintainable.

8. In this context, it was contended by the learned counsel for the respondent No. 3 that this is an appeal u/s 10(1) of Delhi High Court Act, 1966 which provides that where a Single Judge of the High Court exercises ordinary civil jurisdiction conferred by Sub-section (2) of Section 5 of the said Act on that court, an appeal shall lie from the "judgment" of the Single Judge to a Division Bench of that High Court. He contended that the order which is impugned herein is not one which can be regarded as a "judgment" and, Therefore, no appeal would lie from it. It was further contended that it was not an appealable order in terms of Section 104 read with Order 43 Rule 1 of the Code and, Therefore, for such an order to be termed as a "judgment", the tests laid down by the Supreme Court in the case of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, would have to be satisfied. On the other hand, Mr Andley contended that the order which is impugned herein is of such a nature that it would vitally affect the interest of the petitioner / appellant and as such would qualify as a "judgment" and would, Therefore, be appealable in terms of Section 10(1) of the said Act.

9. The interpretation of Section 10(1) read with Section 5(2) of the said Act had come up for consideration before a Full Bench of this court in University of Delhi and Another Vs. Hafiz Mohd. Said and Others, . While considering the purport and scope of the expression "judgment", the Full Bench was of the view that only appeals from those orders enumerated under Order 43 Rule 1 of the Code could qualify as "judgments". The full Bench held:-

Our conclusion, Therefore, is that an appeal u/s 10(1) of the said Act against the order of a Single Judge in the exercise of ordinary civil jurisdiction to a Division Bench lies only in those cases where an order is a "judgment" as defined in the Code. In other words, apart from the orders which have the force of the decree, appeals will, Therefore, lie only against those orders passed by the Single Judge which are mentioned in Section 104 read with Order 43 Rule 1 of the Code and no appeal will lie against other orders which are outside these two provisions.

10. However, this view taken by a Full Bench of this court has been held to be no longer good law by the Supreme Court in the case of Jugal Kishore Paliwal Vs. S. Sat Jit Singh and Another, . In Jugal Kishore (supra), the Supreme Court categorically held that the aforesaid Full Bench decision in the case of the

University of Delhi (supra) was no longer good law in view of the earlier decision of the Supreme Court in the case of Shah Babulal Khimji (supra), where the Supreme Court laid down various parameters and conditions under which an appeal could lie from an order of the Single Judge to the Division Bench.

11. This takes us to the discussion of the decision of the Supreme Court in Shah Babulal Khimji's case (supra). That was a case wherein the question of maintainability of an appeal under Clause 15 of the Letters Patent of the Bombay High Court was in question. The discussion centered essentially on two aspects:-

- a) the scope of Section 104 read with Order 43 Rule 1 of the Code in the context of appeals under the Letters Patent and;
- b) the true scope, meaning and purport of the word "judgment" used in Clause 15 of the said Letters Patent.

Insofar as the first aspect is concerned, the Supreme Court held:-

78. Thus, after considering the arguments of counsel for the parties on the first limbs of the questions, our conclusions are:-

(1) That there is no inconsistency between Section 104 read with Order 43 Rule 1 and the appeals under the Letters Patent and there is nothing to show that the Letters Patent in any way excludes or overrides the application of Section 104 read with Order 43 Rule 1 or to show that these provisions would not apply to internal appeals within the High Court.

(2) That even if it be assumed that Order 43 Rule 1 does not apply to Letters Patent appeals, the principles governing these provisions would apply by process of analogy.

(3) That having regard to the nature of the orders contemplated in the various clauses of Order 43 Rule 1, there can be no doubt that these orders purport to decide valuable rights of the parties in ancillary proceedings even though the suit is kept alive and that these orders do possess the attributes or character of finality so as to be judgments within the meaning of Clause 15 of the Letters Patent and hence, appellable to a larger Bench.

(4) The concept of the Letters Patent governing only the internal appeals in the High Courts and the CPC having no application to such appeals is based on a serious misconception of the legal position.

12. Since, by virtue of the decision in the case of Jugal Kishore Paliwal (supra), the principles enunciated in Shah Babulal Khimji (supra) would apply also to appeals u/s 10(1) of the said Act, it becomes immediately clear that the aforesaid conclusions which have been rendered in respect of appeals under the Letters Patent would also apply to appeals u/s 10(1) of the said Act. From the above conclusions, it can be easily discerned that orders specified under Order 43 Rule 1 or Section 104 would clearly be, by analogy, orders appealable u/s 10(1) of the said Act. At the same time it did not mean that an order not covered

by Section 104 read with Order 43 Rule 1 of the Code would, ipso facto, not be an appealable order. Such an order would, however, only be an appealed order if it fell within the meaning of "judgment" as used in Section 10(1) of the said Act in the context of the Supreme Court decisions. Now, the impugned order is not one of the orders specified in Section 104 or Order 43 Rule 1 of the Code. Therefore, it becomes necessary to examine the scope of the word "judgment" used in the said Section 10(1). In Shah Babulal Khimji's case (supra), the Supreme Court observed that the word "judgment" appearing in Clause 15 of the Letters Patent had undoubtedly a concept of finality though not in the narrow sense as engrafted in the Code. The court held that a judgment can be of three kinds:-

(1) A final judgment. A judgment which decides all the questions or issues in controversy so far as the Trial Judge is concerned and leaves nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the Trial Judge indisputably and unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench.

(2) A preliminary judgment. This kind of a judgment may take two forms "(a) where the Trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the Trial Judge would be a judgment finally deciding the cause so far as the Trial Judge is concerned and Therefore appealable to the larger Bench. (b) Another shape which a preliminary judgment may take is that where the Trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g., bar of jurisdiction, res judicata, a manifest defect in the suit, absence of notice u/s 80 and the like, and these objections are decided by the Trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the Trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, Therefore, be construed to be a judgment so as to be appealable to a larger Bench.

3. Intermediary or interlocutory judgment. Most of the interlocutory orders which contain the quality of finality are clearly specified in Clauses (a) to (w) of Order 43 Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, Therefore, appealable. There may also be interlocutory orders which are not covered by Order 43 Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a

valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. For instance, where the Trial Judge in a suit under Order 37 of the CPC refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiff's case on his own evidence without being given a chance to rebut that evidence. As such an order vitally affects a valuable right of the defendant it will undoubtedly be treated as a judgment within the meaning of the Letters Patent so as to be appealable to a larger Bench. Take the converse case in a similar suit where the Trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff still possesses his full right to show that the defense is false and succeed in the suit. Thus, such an order passed by the Trial Judge would not amount to a judgment within the meaning of Clause 15 of the Letters Patent but will be purely an interlocutory order. Similarly, suppose the Trial Judge passes an order setting aside an ex parte decree against the defendant, which is not appealable under any of the clauses of Order 43 Rule 1 though an order rejecting an application to set aside the decree passed ex parte falls within Order 43 Rule 1 Clause (d) and is appealable, the serious question that arises is whether or not the order first mentioned is a judgment within the meaning of Letters Patent. The fact, however, remains that the order setting aside the ex parte decree puts the defendant to a great advantage and works serious injustice to the plaintiff because as a consequence of the order, the plaintiff has now to contest the suit and is deprived of the fruits of the decree passed in his favor. In these circumstances, Therefore, the order passed by the Trial Judge setting aside the ex parte decree vitally affects the valuable rights of the plaintiff and hence amounts to an interlocutory judgment and is Therefore, appealable to a larger Bench."

The court further observed that:-

114. In the course of the trial, the Trial Judge may pass a number of orders whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or the other, e.g., an order refusing an adjournment, an order refusing to summon an additional witness or documents, an order refusing to condone delay in filing documents, after the first date of hearing an order of costs to one of the parties for its default or an order exercising discretion in respect of a procedural matter against one party of the other. Such orders are purely interlocutory and cannot constitute judgments because it will always be open to the aggrieved party to make a grievance of the order passed against the party concerned in the appeal against the final judgment passed by the Trial Judge.

And finally the court concluded that:-

115. Thus, in other words every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. Similarly, orders passed by the Trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score can be corrected by the appellate court in appeal against the final judgment.

It was also pointed out by the Supreme Court that the following considerations must prevail with the court:-

119. Apart from the tests laid down by Sir White, C.J., the following considerations must prevail with the court:

(1) That the Trial Judge being a senior court with vast experience of various branches of law occupying a very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus, any discretion exercised or routine orders passed by the Trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice to one party or the other cannot be treated as a judgment otherwise the appellate court (Division Bench) will be flooded with appeals from all kinds of orders passed by the Trial Judge. The courts must give sufficient allowance to the Trial Judge and raise a presumption that any discretionary order which he passes must be presumed to be correct unless it is ex facie illegally erroneous or causes grave and substantial injustice.

(2) That the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in controversy in an ancillary proceedings or in the suit itself or in a part of the proceedings.

(3) The tests laid down by Sir White, C.J. as also by Sir Couch, C.J. as modified by later decisions of the Calcutta High Court itself which have been dealt with by us elaborately should be borne in mind.

120. Thus, these are some of the principles which might guide a Division Bench in deciding whether an order passed by the Trial Judge amounts to a judgment within the meaning of the Letters Patent"

13. In a more recent case, the Supreme Court in *Employer in Relation to Managment of Central Mine Planning and Design Institute Ltd. Vs. Union of India and Another*, , following the earlier decision in *Shah Babulal Khimji* (supra), concluded:-

"From the above discussion, it follows that to determine the question whether an interlocutory order passed by one Judge of a High Court falls within the meaning of "judgment" for purposes of Letters Patent the test is: Whether the order is a

final determination affecting vital and valuable rights and obligations of the parties concerned. This has to be ascertained on the facts of each case."

14. It may also be pointed out that applying the principles enunciated in *Shah Babulal Khimji (supra)*, this court has held appeals to be not maintainable in the case of *Swadeshi Polytex Ltd. Vs. V.K. Goel and others*, , *Hari Singh v. Khariti Lal & Sons* 1995 (32) DRJ, *Shri Vinod Gupta and others Vs. Shri Braham Vira Gupta and others*, and *Kusum Duggal v. Kaushalya Jhingran and Anr.* 2000 (55) DRJ 831.

15. Keeping these principles in mind, it is to be examined as to whether the impugned order would qualify to be a "judgment" for the purposes of Section 10(1) of the said Act. The impugned order has essentially decided that *Brahm Prakash Goel*, who has an I.Q. of 50 and, Therefore, suffers from mild mental retardation, is so mentally infirm that he would be incapable of protecting his interest in the pending probate proceedings. In point of fact, this by itself does not, in any way, affect the petitioner / appellant. Whether a person is adjudged to be mentally infirm and consequently a guardian ad litem is appointed for such a person, does not impinge upon the issues in controversy in the probate proceedings. However, according to Mr Andley, an order such as this would gain in importance if the factual matrix of the present case is considered. He contends that *Brahm Prakash Goel* had earlier given his no objection to the grant of probate and now by virtue of this order, he would retract that no objection and contest the probate proceedings. As such, the petitioner / appellant's vital and valuable rights would be affected and work serious injustice to the petitioner / appellant. I am not impressed by this argument. All that the learned Single Judge has done is to appoint a guardian ad litem for *Brahm Prakash Goel* who has been medically determined to have an I.Q. of 50. Though the Learned Single Judge has not, while disposing of all the said applications, expressly held that *Brahm Prakash Goel* is permitted to withdraw his no objection given by him earlier, the consequential disposal of, inter alia, is No. 13292/2000 would result in the said *Brahm Prakash Goel* going back on his no objection given earlier. But, that in itself is not impermissible in law. In fact, in a judgment of the Karnatka High Court in the case of *H.L. Kumar and Another Vs. Jayamma*, , a learned Single Judge permitted a person who had expressly assented to the grant of probate to come forward subsequently to oppose the grant holding that there was no such inhibition under the Indian Succession Act, 1925. The learned Single Judge observed that:-

If the court adopts a contrary attitude, genuine opposition to claims may be defeated by technicalities. So long as the Court has not acted upon the assent and granted the probate, it would be well within its jurisdiction to permit the party to oppose the grant. The Act and the Rules do not provide to the contrary.

I agree with these observations and also note that it will be open to the parties in the probate proceedings to show under what circumstances the first no objection was given by *Brahm Prakash* and under what circumstances he is now retracting

the same. The worth and weightage of these acts is also to be examined. These are considerations which will undoubtedly be engaging the court hearing the probate matter. Probate is yet to be granted and since the grant of a probate operates as a judgment in rem, the court has to carefully consider all aspects before it passes a final order. The passing of the impugned order does not mean that the petitioner / appellant is precluded from raising questions with regard to the retraction of the no objection earlier given by Brahm Prakash. All that has happened is that as a matter of fact Brahm Prakash Goel has retracted or withdrawn his no objection which he had given earlier. The effect of this, in law, is yet to be examined and will undoubtedly form part of the "judgment" finally disposing of the probate proceedings. The aggrieved party then would have an opportunity to appeal. The situation presenting itself here would be similar to the one discussed by the Supreme Court in Shah Babulal Khimji's case supra where the defendant's leave to defend in a suit under Order 37 of the Code is allowed by the Trial Court. Although the plaintiff is adversely affected but the damage is indirect, remote and minimal because the plaintiff possesses his full right to show that the defense is false and succeed in the suit. Similar is the situation here. In the probate proceedings it is open to the appellant / petitioner to contend and demonstrate that the withdrawal would be of no legal effect. In the same way, it would be open to the Respondent No. 3 to demonstrate and establish that the no objection given by him earlier was not voluntary or for any other reason not binding on him.

16. Another important aspect to be kept in mind is that even if Brahm Prakash had not sought withdrawal of his no objection, it was not as if the probate proceedings were going uncontested. The other brothers (other than the petitioner / appellant) were already contesting the grant of probate. As such, I do not find the impugned order to be one which could be regarded as a "judgment" in the sense explained by the Supreme Court in the case of Shah Babulal Khimji (supra). It has certainly not decided a matter of moment nor does it affect the vital and valuable rights of the parties or work any serious injustice to the appellant / petitioner. At this juncture, it would also be relevant to remember what the Supreme Court said in Shah Babulal Khimji (supra) to the effect that the Trial Judge being a senior court with vast experience of various branches of law occupying very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well-settled principles of civil justice and thus any discretion exercised while passing an order by the Trial Judge in the course of a suit which may cause some inconvenience or to some extent prejudice to one party or the other, cannot be treated as a "judgment" and that Division Benches must give sufficient allowance to the Trial court and raise a presumption that any discretionary orders which he passes must be presumed to be correct unless it is ex facie illegal, erroneous or causes grave or substantial injustice. I do not find the impugned order to be one such order.

17. Accordingly, in view of the discussion above, I hold that the appeal is not maintainable u/s 10(1) of the said Act. The issues with regard to the merits of

the matter, Therefore, need not be gone into in view of the fact that I have held that the appeal itself is not maintainable. The appeal is dismissed and the parties are left to bear their own costs.

T.S. Thakur, J.—I have had the advantage of going through the judgment proposed by my esteemed brother Badar Durrez Ahmed, J. While I respectfully agree with the view that the order under appeal before us does not tantamount to a judgment within the contemplation of Section 10(1) of the Delhi High Court Act, 1966 , I would like to add a few words of my own.

2. The appeal arises out of an order passed by a Single Judge of this Court in Probate proceedings instituted by the appellant. On an application filed by the wife of the respondent Brahm Prakash Goel, the Single Judge has recorded a finding that the said respondent was incapable of protecting his interest in the proceedings on account of his mental infirmity. The Court has on that finding appointed a guardian ad litem. The appellant assails the validity of that order primarily on the ground that the same is based on material which did not establish the alleged infirmity of the respondent. The order is alternatively challenged on the ground that the same would have the effect of relieving the respondent of the no objection which he had given to the grant of the probate prayed for by the appellant.

3. Two distinct issues, fall for our consideration, in regard to which learned counsel for the parties made their submissions at considerable length. The first of these issues touches the maintainability of the present appeal u/s 10(1) of the Delhi High Court Act, 1966. The second issue was whether the learned Single Judge was on merits justified in holding that respondent Brahm Prakash suffered from a mental infirmity. I shall briefly deal with both these aspects to the extent it is in my view necessary to elucidate the order proposed by brother Badar Durrez Ahmed, J.

4. The maintainability of an appeal u/s 10(1) of the Delhi High Court Act, 1966, depends entirely on whether the order under appeal tantamounts to a "judgment" within the meaning of the said provision. The decisions of the Supreme Court in Shah Babulal Khimji Vs. Jayaben D. Kania and Another, , Jugal Kishore Paliwal Vs. S. Sat Jit Singh and Another, and Employer in Relation to Managment of Central Mine Planning and Design Institute Ltd. Vs. Union of India and Another, authoritatively state the tests that are applicable while determining whether or not an order is a judgment so as to be appealable under the Letters Patent. Applying those tests to appeals u/s 10(1) of the Delhi High Court Act, 1966, which also uses the expression "Judgment", the order under appeal in the present case does not satisfy the requirements of a judgment and is not, Therefore, appealable as observed by Badar Durrez Ahmed, J. I must however hasten to add that the view expressed by us should not be understood to mean that no order passed under Order 32 of the CPC can in any situation be held to be a judgment under the Letters Patent. We say so because while an order under Order 32 of the CPC may either appoint or refuse appointment of a guardian ad

litem, the maintainability of an appeal against any such order would depend upon the circumstances in which the appointment is made and the party at whose instance the same is made. For instance, if the appointment of a guardian ad litem is made at the instance of the plaintiff though opposed by the defendant, the same may place the defendant at a great disadvantage in contesting the suit or proceedings. An appeal against any such order, at the instance of the defendant who may assert that he suffers from no disability shall be maintainable u/s 10(1) of the Delhi High Court Act or the Letters Patent, as the case may be. It cannot in any such situation be said that the defendant suffers only an indirect or remote disadvantage which may as well be redressed in appeal. The fact of the matter is that in any such case by putting the defense of the suit in the hands of a guardian for the defendant, the latter is totally disabled from having a free hand in contesting the suit in the manner or on the lines he wishes to do. Suffice it to say that the question of maintainability of the appeal, shall have to be seen in the facts and circumstances of each case, no matter the source of power for making the order under appeal may in all such cases be common.

5. That brings me to the question whether the order under appeal was independent of the question of maintainability of the present appeal, in any manner unjustified or unfair to the appellant. As noticed by Badar Durrez Ahmed, J, the appellant's main grievance arises out of an apprehension that the appointment of a guardian ad litem, would necessarily imply that the no objection given by the defendant earlier to the grant of the probate becomes redundant. That is because the no objection of a person who suffers from a mental infirmity and who is on the finding recorded by the Court incapable of protecting his interest in the pending litigation would be of no value whatsoever. Two reasons militate against that line of argument urged on behalf of the appellant. The first is that if the defendant is on an enquiry conducted by the Court, held to be incapable of protecting his interest, the Court would be duty bound to appoint a guardian for him. That enquiry has been held in the present case and based on the opinion of the medical experts the Court has held the defendant to be suffering from a mental infirmity that makes him incapable of protecting his interest. The second reason which would render the appellant's reliance upon the defendants' no objection, untenable is that the probate proceedings have not yet been concluded and the other parties to the said proceedings are in any case contesting the same. The Court has, Therefore, to answer the questions that arise for consideration on merits regardless whether the mentally infirm defendant had at an earlier stage granted a no objection in favor of the appellant. The suit has to go through the travails of a trial, in which it will be inconsequential whether the relief prayed for by the plaintiff is opposed by one or more than one defendants.

6. With the above observations, I agree to the dismissal of the appeal, as proposed.