

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INTERIM APPLICATION NO.708 OF 2023
IN
SUIT NO.1151 OF 2019**

Ajay Amarchand Chhabria and Anr. ... Applicants/Plaintiffs
versus

Amarchand Daulatram Chhabria (HUF)
and Ors. ... Respondents

WITH
INTERIM APPLICATION NO.133 OF 2024
IN
SUIT NO.1151 OF 2019

Shonali Dabrai ... Applicant
and

Ajay Amarchand Chhabria and Anr. ... Plaintiffs
versus

Amarchand Daulatram Chhabria (HUF)
and Ors. ... Respondents

Mr. Sharan Jagtiani, Sr. Advocate with Ms. Apurva Manwani, Ms. Vandana Mehta for Applicants/Plaintiffs.

Ms. Shraddha Chheda i/by Navdeep Vora and Associates, for Defendant No.1.

Mr. Ashish Kamat, Sr. Advocate with Ms. Akanksha Saxena i/by Ms. Sampada Mahadik for Applicant in IA No.133 of 2024 and for Defendant Nos.4 to 7, 9, 10, 12, 13 and 15 in Suit No.1151 of 2019.

Mrs. Chandan Bhat, Official Assignee present.

CORAM: N.J.JAMADAR, J.

CLOSED FOR ORDERS ON : 7 APRIL 2025

PRONOUNCED ON : 4 JULY 2025

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ORDER :

1. These Interim Applications, inter alia, revolve around the state of health of PC (D3) and the necessity of appointment of a guardian ad litem for PC

(D3).

2. Since in IA No.708 of 2023, the application was pursued in respect of prayer clauses (b) and (c); seeking a direction for medical examination of PC (D3) and appointment of fit and proper person as an administrator to administer the affairs of PC (D3) under the supervision of this Court, including to act as a guardian of PC (D3), and in IA No.133 of 2024, SD (D5) seeks her appointment as the guardian of the person and properties of PC (D3) both the applications were heard together and are being determined by this common order.

BACKGROUND FACTS :

3. AC (P1) is the son of ADC (D2). PC (D3) is the mother of AC (P1). VC (D4) and SD (D5) are the brother and sister, respectively, of AC (P1). AVC (D6) and SAC (D7) are the children of VC (D4). AVC – HUF (D1) is the HUF which was managed and run by its Karta ADC (D2). PC (P2) is the son of AC (P1).

4. AC (P1) and PC (P2) have instituted the suit in their capacity as the coparceners of ADC - HUF (D1) seeking dissolution of the said HUF and partition of the properties of the said HUF in accordance with the assertion that the Plaintiffs, ADC (D2) and Defendant Nos.4 to 7 are the coparceners of ADC – HUF (D1). Since 1980, various properties were acquired by utilizing the funds of ADC – HUF (D1) in the names of Defendant Nos.2 to 4 and

Defendant Nos.9 to 15 (HUF Companies).

5. Differences arose between the Plaintiffs, on the one part, and Defendant Nos.2 to 7, on the other part, as the Defendants surreptitiously disposed off various HUF properties, including the bank accounts and shares in HUF Companies by entering into various deeds, mis-utilizing the Power of Attornies and taking undue advantage of the failing mental health of PC (D3).

6. It was, inter alia, asserted that the even ADC (D2) was suffering from ailments, which deprived him of the power of independent judgment. Taking undue advantage of the precarious physical and mental health of ADC (D2) and PC (D3), it was alleged, Defendant Nos.4 and 5 have dissipated or otherwise usurped ADC HUF's properties.

7. The Plaintiffs have, thus, prayed for dissolution of ADC – HUF (D1); a declaration that the properties enlisted in Exhibit U to the plaint, are the properties of ADC – HUF (D1); ADC – HUF (D1) has interest in the Companies enlisted in Exhibit V; direct the Defendants to render accounts of the transactions in relation to HUF properties; declare that the Gift Deed dated 15 November 2014, whereby ADC (D2) and PC (D3) have purportedly gifted their 12.5% each in favour of VC (D4) as null, void and inoperative. Pending the final hearing and disposal, the Plaintiffs have also sought appointment of Medical Officers / team to examine PC (D3) and submit a report of examination to the Court.

IA No.708 of 2023

8. It would be necessary to immediately note that in IA No.708 of 2023, the Plaintiffs have sought diverse interim reliefs apart from the directions for the medical examination of ADC (D2) and PC (D3). By an order dated 20 August 2018, this Court declined to grant ad-interim relief. Thereafter, the Defendants, including ADC (D2), filed affidavits in reply in opposition to the prayers in the Interim Application. ADC (D2) passed away on 7 November 2022. Thus, the prayer clauses (b) and (c) in IA No.708 of 2023 remain confined to PC (D3).

9. In IA No.708 of 2023, in the context of the prayer of the medical examination of, and appointment of an administrator/guardian for, PC (D3), it was asserted that PC (D3) has been suffering from Alzheimer / Dementia and was not in a position to take independent and rational decisions. PC (D3) was legally incapable of entering into any contract whatsoever. When PC (D3) was admitted in Breach Candy Hospital, it was recorded in the medical case history that PC (D3) was a known case of Alzheimer / Dementia. Thus, the Plaintiffs aver, PC (D3) could not have and did not validly transfer her right, title and interest in any of the properties in favour of any of the co-defendants. ADC (D2), her deceased husband, had no authority to act upon the purported Power of Attorney given by PC (D3). The said Gift dated 13 June 2018 was stated to be void *ab initio*. It was, therefore, necessary to examine PC (D3) to

ascertain her mental state, and whether the transfer of properties which stood in the name of PC (D3) in favour of VC (D4) and /or SD (D5), were the genuine transactions done by a person in a sound state of mind.

10. The Plaintiffs have also assailed the transfer of PC's (D3) entire share in the Silver Oak Bungalow located at Pune, by way of gift in favour of VC (D4) on the said count.

11. Defendant Nos.5 to 7, 9, 10, 12, 13 and 15 have filed affidavits in reply resisting the prayers in the Interim Application, including those of medical examination of PC (D3) and the appointment of an administrator. The allegations in the application regarding the state of health of ADC (D2) and PC (D3) were categorically denied. It was contended, such allegations were made with an oblique motive to cause further discomfort and trauma to PC (D3) at an advanced age. The challenge to the legality and validity of the transactions effected by PC (D3) on the ground of the alleged impaired mental capacity of PC (D3) was stoutly controverted. It was contended that AC (P1) has abdicated his responsibility to take care of his parents, and, instead made wild and baseless allegations.

12. Additional affidavit and affidavit in rejoinder followed.

IA No.133 of 2024 :

13. SD (35), daughter of ADC (D2) and PC (D3), has taken out this application seeking her appointment as a guardian of PC (D3). In the

Application, SD (D5) asserts that the death of ADC (D2), on 7 November 2022, has aggravated the mental trauma and shock to PC (D3). The mental condition of PC (D3) has become unstable. PC (D3) has been under the care and custody of SD (D5) and VC (D4). Since the Plaintiffs themselves have prayed for appointment of a guardian, it would be just and proper that SD (D5) be appointed as a guardian. Allegations of neglect and indifference are made against the Plaintiffs. In addition to the appointment of SD (D5), as a guardian of PC (D3), SD (D5) has sought leave to represent PC (D3) in other proceedings and before other authorities.

14. The Plaintiffs have resisted the application by filing affidavit in reply. At the outset, the Plaintiffs contend that in the affidavit in reply to IA No.708 of 2023, the Defendants have categorically denied that PC (D3) has been suffering from any mental illness. Yet the instant application is filed for appointment of guardian of PC (D3) under the guise that PC (D3) has been in a state of shock and trauma due to the death of ADC (D2). Till the filing of the instant application, Defendant Nos.4 and 5 never expressed any apprehension regarding the state of health of PC (D3). The Plaintiffs contend that the instant application has been preferred with a view to suppress the actual mental condition of PC (D3).

15. The Plaintiffs have also contested the competence of SD (D5) to be appointed as a guardian of PC (D3). It is alleged, SD (D5) has consistently

acted adverse to the interest of the Plaintiffs, who are coparceners of ADC – HUF (D1). The conduct of SD (D5), according to the Plaintiffs, is such that the it disentitles SD (D5) from being appointed as a guardian of the deceased.

16. It was alleged that taking undue advantage of the state of health of PC (D3), Defendant Nos.4 and 5 have rendered themselves responsible for usurping the assets and investments standing in the name of PC (D3). In substance, SD (D5) has not been acting in the interest of PC (D3) and has been actively involved in compromising the interest of the Plaintiffs also.

17. In the wake of the aforesaid pleadings and the material on record, I have heard Mr. Sharan Jagtiani, the learned Senior Advocate for the Applicants/Plaintiffs in IA No.708 of 2023, Ms.Shraddha Chheda, learned Counsel for ADC – HUF (D1), Mr. Ashish Kamat, the learned Senior Advocate for Defendant Nos.4 to 7, 9, 10, 12, 13 and 15 and the Applicant in IA no.133 of 2024.

18. Before noting the submissions canvassed on behalf of the parties, it may be apposite to note that in order to ascertain the condition of PC (D3), Mrs. Bhat, Official Assignee was appointed to visit the premises wherein PC (D3) resides and submit a report to the Court. Mrs. Bhat, Official Assignee, has visited the said place, interacted with PC (D3) and ascertained her condition. Report came to be filed by Mrs. Bhat of the said visit and assessment.

19. At the outset, Mr. Jagtiani, the learned Senior Advocate for the Plaintiffs would submit that the Defendants have made an endeavour to deny the fact, which could not have been denied. There is contemporaneous material in the form of the medical case record, which unmistakably indicates that when PC (D3) was admitted in the hospital, it was clearly mentioned that PC (D3) was a known case of Alzheimer / Dementia. The condition of PC (D3) has worsened over a period of time. Therefore, the Plaintiffs had sought the medical examination of PC (D3) to have a clear picture about the state of health of PC (D3).

20. Mr. Jagtiani would urge that, it is not a case where the Plaintiffs seek roving inquiry into the health of PC (D3). The Plaintiffs have brought adequate material on record to sustain an inference that PC (D3) has not been in a fit mental state since many years prior to the institution of the suit. The medical examination of PC (D3) along with the medical record would also indicate the state of mind of PC (D3) at the time of the execution of the various instruments and transfer of assets in favour of VC (D4) and SD (D5).

21. Mr. Jagtiani made a strenuous effort to persuade the Court to hold that the said exercise, in the circumstances of the case, does not partake the character of collection of evidence, which is the principal objection on behalf of the Defendants. Whether the Medical Officer would be in a position to throw light on the state of health of PC (D3), at the time the alleged transfers were

effected, and what weight is to be attached to the said opinion, would be matters for adjudication. Thus, the prayer to examine PC (D3) by an expert, cannot be contested on the said count.

22. Mr. Jagtiani made an endeavour to take the Court through the documents to show the instances where the funds have been transferred from the accounts of PC (D3). Mr. Jagtiani would further urge, in view of the prayer of the Defendants to appoint SD (D5) as a guardian of the person and property of PC (D3), the necessity of appointment of a guardian can hardly be disputed. Before appointing a guardian, the Court must make requisite inquiry and come to a conclusion that the person in respect of whom a guardian is to be appointed is either of unsound mind or incapable, by reason of any mental infirmity, of protecting his interest. Such an opinion can only be recorded after the Court first has PC (D3) medically examined.

23. To buttress this submission, Mr. Jagtiani placed a very strong reliance on a judgment of a learned Single Judge of Delhi High Court in the case of Dr. Styra Paul V/s. The State and Ors.¹ and a judgment of the Division Bench of this Court in the case of Somnath Dnyanoba Mahapure V/s. Tipanna Ramchandra Jannu².

24. At any rate, Mr. Jagtiani would urge, SD (D5) cannot be said to be a fit and proper person. The material on record would indicate, according to Mr.

1 2011 SCC Online Del 1503

2 1972 SCC Online Bom 74

Jagtiani, that SD (D5) has acted in a prejudicial and unfair manner. Apparently, the interest of SD (D5) is adverse to that of PC (D3) and the Plaintiffs. When there are allegations of exercising undue influence and coercion quo SD(D5), and the transactions executed by SD (D5), on behalf of PC (D3), and also the transfers in favour of SD (D5) are specifically assailed, SD (D5) cannot be appointed as a guardian.

25. Reliance was also placed on the judgment of a learned Single Judge of the Delhi High Court in the case of S.D. V/s. Govt. of NCT of Delhi and Ors.³

26. Per contra, Mr. Ashish Kamat, the learned Senior Advocate for the Defendants, stoutly resisted the prayers on behalf of the Plaintiffs. It was submitted that to bolster up their case, the Plaintiffs, especially AC (P1) have made wild and baseless allegations against not only PC (D3) but also ADC (D2). Bald allegations were made in the Application to the effect that ADC(D2) had been suffering from Alzheimer / Dementia. In contrast, there is material on record in the form of communication by ADC (D2), refuting the allegations of the Plaintiffs. The material on record also indicates that ADC (D2) had even participated in the mediation proceedings. Yet, to advance the malafide claim, AC (P1) falsely claimed that even ADC (D2) was suffering from mental ailments. The application was stated to be bereft of any material to substantiate the contentions therein. In the absence thereof, it cannot be

3 2021 SCC Online Del 4856

said that PC (D3) was not in a position to understand the nature and consequence of the act, whereby PC (D3) purportedly transferred her interest in the suit properties.

27. Mr. Kamat joined the issue on the aspect of the state of illness which finds mention in the medical case records. It was submitted that AC (P1) was instrumental in getting an incorrect history recorded. The contemporaneous record, however, indicates that PC (D3) was not suffering from Alzheimer / Dementia, as alleged.

28. Mr. Kamat would further urge that the the submission that, the medical examination of PC (D3) would reveal her state of health as of the dates of the alleged transfer of properties is even more preposterous. On the one hand, the present examination of PC (D3) would, by no stretch of imagination, reveal the mental state of PC (D3) prior to 6-7 years. On the other hand, the said course is legally impermissible as it would amount to the Court lending its hand in the collection of evidence. Mr. Kamat would urge, such a course can never be adopted.

29. To lend support to this submission, Mr. Kamat placed reliance on the judgment of the Supreme Court in the case of Padam Sen and Anr. V/s. State of Uttar Pradesh⁴ and a judgment of the learned Single Judge of the Madras High Court in the case of S. Anand and ors. V/s. A. Jeyabalan and Ors.⁵

4 1960 SCC Online SC 77

5 CRP PD(MD) No.870 of 2012 dated 26 Sept. 2019

30. Mr. Kamat would further submit that there is no impediment in appointing SD (D5) as the legal guardian of PC (D3). It was forcefully submitted that the Plaintiffs have harassed and abandoned PC (D3). In contrast, PC (D3) has been kept in a room in hotel Sea-Palace, of which ADC – HUF (D1), is a part owner. In effect, PC (D3) is in the custody of SD (D5). Under the prevalent statutory regime, there is no prohibition for appointment of SD (D5) as a guardian of PC (D3). The boogie that the interest of SD (D5) is adverse to that of PC (D3) and the Plaintiffs is unsustainable. Nothing could be brought on record to show that the interest of SD (D5) is adverse to that of the Plaintiffs. In these circumstances, according to Mr. Kamat, SD (D5) deserves to be appointed as a guardian of PC (D3).

31. Reliance was placed on the Division Bench judgments of this Court in the cases of Nirupama Jitendra Mehta V/s. State of Maharashtra⁶ and Rajni Hariom Sharma V/s. Union of India and Anr.⁷

32. Order XXXII of the Code regulates the procedure of Suits by or against minors or persons of unsound mind. Rules 1 to 14 of Order XXXII deal with the procedure to be followed when the Plaintiff or Defendant is a minor.

33. Under Rule 3 of Order XXXII, where the Defendant is a minor, the Court on being satisfied of the fact of his minority, is enjoined to appoint a proper person to be guardian for the suit, i.e., guardian-ad-litem for such minor. Such

⁶ WP 3313 of 2021 Dt. 17 Dec. 2021 and

⁷ 2020 SCC Online Bom 880.

an order for appointment of a guardian can be passed on an Application for and on behalf of the minor or the Plaintiff. Sub-Rule 3 of Rule 3, provides that 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 fit person to be so appointed.

34. By virtue of the provisions contained in Rule 15 of Order XXXII, the Rules prescribed in Rule 1 to 14 apply to the persons of unsound mind. Rule 15 of Order XXXII reads as under:

“15. Rules 1 to 4 (except rule 2-A) to apply to persons of unsound mind.— Rules 1 to 14 (except rule 2-A) shall, so far as may be, apply to persons adjudged, before or during the pendency of the suit, to be of 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.”

35. Evidently, Rule 15 addresses two situations. First, case of a person who is adjudged to be of unsound mind. Second, though the person has not been adjudged to be unsound mind, the Court, on enquiry finds such person to be incapable, by reason of any mental infirmity, of protecting his interest.

36. Where it is found that the defendant is either of unsound mind or incapable of protecting his interest, it is the bounden duty of the Court to

appoint a guardian ad-litem before proceeding with the suit. A decree passed against a person who falls within the ambit of Rule 15 of Order XXXII, without appointing a guardian ad-litem is held to be a nullity.

37. A useful reference in this context may be made to the judgment of the Supreme Court in the case of Ram Chandra Arya V Man Singh & Anr.⁸ wherein it was enunciated that it is now a well-settled principle that if a decree is passed against a minor without appointment of a guardian, the decree is a nullity and is void and not merely voidable. The said principle becomes applicable to the case of a person of unsound mind, in view of the Rule 15 Order XXXII of the Code. Thus, the decree obtained in the said case against the Defendant therein, who was a person of unsound mind, was treated as without jurisdiction and void.

38. In the facts of the case at hand, it is the latter part of Rule 15 of Order XXXII which may have application. Before adverting to delve into the controversy on facts, it may be necessary to appreciate the nature of the enquiry, that is envisaged by Rule 15 of Order XXXII of the Code.

39. On its plain reading, the latter part of the Rule 15 does not in terms spells out the nature of the enquiry that is warranted to determine the aspect as to whether a person, who is not adjudged to be of unsound mind, is

8 AIR 1968 SC 954.

incapable of protecting his interest, by reason of any mental infirmity. Nor the stage at which such enquiry ought to be conducted is expressly indicated.

40. Having regard to the object of the said provision, which is essentially in the nature of exercise of parens patrie jurisdiction to protect the interest of a person who is incapable of prosecuting or defending his cause effectively, the enquiry need not be very elaborate. If on the basis of the material placed on record or the examination of the person, the Court forms a *prima facie* opinion that on account of infirmity, which may arise on account of severe physical ailment or otherwise, he is incapable of protecting his interest, such enquiry may be sufficient. Of course the Court can always take the assistance of medical experts to form such an opinion as to the incapacity of a person on account of mental infirmity. Thus, the nature and extent of enquiry turns upon the facts of a given case.

41. In the case of Somnath Dnyanoba Mahapure (supra), on which reliance was placed by Mr. Jagtiani, a Division Bench of this Court, enunciated that, if the Court entertains doubt about the mental capacity or the soundness of the mind of a person, 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 such person may be kept. The quantum and extent of enquiry must be left in each case to the circumstances prevailing in that case.

42. In the case of Dr. Styra Paul (supra) on which reliance was placed by Mr. Jagtiani, after following the judgment in the case of Somnath Dnyanoba Mahapure (supra), the duty of the Court was expounded as under:-

“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.”

43. Reverting to the facts of the case at hand, at the outset, it is necessary to note that the substratum of the application of the Plaintiffs or for that matter, the Plaintiffs' case is that, PC (D3) has been suffering from Alzheimer/dementia since long and her condition has deteriorated over a period of time. The Plaintiffs seek appointment of an independent Administrator on the said count. The thorough medical examination of PC (D3) is prayed for not to demonstrate the fact that PC (D3) is incapable of protecting her interest but to assail legality and validity of the transactions

purportedly executed by PC (D3) in favour of the co-Defendants. To put in other words, the Plaintiffs insist for medical examination of PC (D3) principally to establish its case that the co-Defendant Nos. 4 and 5 have taken undue advantage of the unsound mind and mental infirmity which PC (D3) has been suffering from and have, thereby, unjustly enriched themselves at the expense of the Plaintiffs. Keeping in view, this nature of the stand of the Plaintiffs, the quantum and extent of the enquiry warranted in the facts of the case is required to be determined.

44. There can be no duality of opinion that the Court ought to examine a person who is stated to be suffering from such mental infirmity as to render him incapable of protecting his interest. In the case at hand, this Court did make an inquiry with the Defendants as to whether PC (D3) could be produced before this Court to facilitate the inquiry for the purpose of forming an opinion. It was informed to the Court that PC (D3) was not in a position to be produced before the Court. In this view of the matter, the Court considered it appropriate to depute an Officer of this Court to visit the premises where PC (D3) was housed and note the condition of PC (D3).

45. Mrs. Bhat, Official Assignee, visited the room No.403, Sea Palace, Colaba, Mumbai, wherein PC (D3) has been staying. In the report submitted by Mrs. Bhat, it is recorded that PC (D3) appeared to be around 85 years of

age. PC (D3) appeared to be sick. She did not speak. She was not able to do anything on her own without the support and help of attendant.

46. In the light of the aforesaid report of the Official Assignee, coupled with the fact that both the Plaintiffs and Defendant Nos.4 and 5 are, by and large, in unison on the point that PC (D3) is not in a position to take rational decisions to protect her interest, this Court did not consider it necessary to have further medical examination of PC (D3).

47. It is imperative to note that the Plaintiffs assert that, on account of the fact that PC (D3) has been suffering from Alzheimer / Dementia, she has been of unsound mind or suffering from mental infirmities since long and, on that count, the Plaintiffs have assailed the transactions entered into by, and on behalf of, PC (D3).

48. As noted above, Rule 15 of Order XXXII covers two distinct situations. A person need not be adjudged to be of unsound mind for the appointment of guardian ad-litem. If the person is incapable of protecting his interest on account of mental infirmity, then also guardian ad-litem must be appointed. Mental infirmity may arise on account of age, and severe and prolonged physical ailment or otherwise. On account of physical condition, a person may be rendered so weak and helpless that the mental faculties of the concerned person are not like the faculties of a normal and healthy person.

49. In the totality of the circumstances, in the case at hand, especially having regard to the stand of the Plaintiffs, this Court considers it appropriate to invoke the provisions of Order XXXII Rule 15 of the Code, and appoint a guardian ad litem for the Defendant No.3.

50. This propels the Court to two issues : first, the medical examination of PC (D3) for the purpose of ascertaining her condition as it obtained when the impugned transactions were effected and, second, who should be appointed as a guardian.

51. Strenuous effort was made by Mr. Jagtiani to urge that the medical examination of PC (D3) would equip the Court to determine the question in controversy in a more effective manner. The medical examination of PC (D3), in the light of the medical record produced by the Plaintiffs, Mr. Jagtiani would urge, would not be the exercise of collection of evidence. He invited attention of the Court to the averments in the plaint with regard to the examination of PC (D3) in the year 2016 and the admission of PC (D3) with a history of fall in the year 2019 and the medical record prepared by the Consultants.

52. Co-relating the entries in the medical papers, an endeavour was made to urge that the examination of PC (D3), in the context of the medical history, would throw light on the condition of PC (D3) during the relevant period. I have perused the documents pressed into service by Mr. Jagtiani as well as Mr. Kamat to substantiate their rival contentions as to the role of the

contesting parties in suppression of (on the part of the Defendants) and falsification of (on the part of the AC (P1), the record with regard to the mental state of PC (D3).

53. In the context of the enquiry at hand, and, especially the stage of the proceedings, I do not think it appropriate to delve deep into these aspects of the matter. It would be open for the parties, if they chose to, to prove those documents to substantiate their rival contentions. The fundamental question that wrenches to the fore is, whether the medical examination of PC (D3), at this stage, would be justifiable, especially in the context of the allegations of the Plaintiffs with regard to her mental condition.

54. I am unable to persuade myself to agree with the submissions of Mr. Jagtiani that such an exercise would not amount the Court lending its hand for the collection of evidence. Ordinarily, the Court cannot direct a party to undergo medical examination, unless the Court finds it absolutely necessary to determine the core question in controversy. A party cannot be compelled to subject herself to medical examination to facilitate the adversary to prove its case. If the Plaintiffs intend to bank upon the medical record to substantiate their claim that PC (D3) has been suffering from unsoundness of mind or mental infirmity of such order as to vitiate the transactions entered into by, and on her behalf, it is for the Plaintiffs to establish the said fact by leading cogent evidence.

55. Moreover, to what extent, the medical examination of PC (D3), at this stage, would indicate the condition of PC (D3) when the transactions were allegedly effected is itself highly debatable. The submission of Mr. Jagtiani that the utility of the medical examination of PC (D3) for the assessment of her condition at the time the impugned transactions were effected, is a matter which ought to be left to the experts, and, can be determined at the appropriate stage in the proceedings, does not merit acceptance. The submission, in effect, means that PC (D3) be made to suffer medical evaluation today, so as to draw an inference about her state of health prior to a number of years. The exercise is fraught with infirmities as it amounts to roving inquiry driven by object of obtaining evidence which prima facie appears to be in the corridor of uncertainty. I am, therefore, not inclined to accede to the submission of Mr. Jagtiani that in the peculiar facts of the case, the medical examination of PC (D3) is warranted. Hence, the prayer in the application of the Plaintiffs, to have a medical evaluation of PC (D3) deserves to be rejected.

56. Rule 4 of Order XXXII provides who may be appointed as guardian ad-litem. Sub-Rule (1) of Rule 4 provides that any person who is of sound mind and has attained majority may act as a next friend of a minor or as guardian for the suit. The proviso ensures that there must not be conflict of duty and interest of the guardian ad-litem. Thus, the proviso precludes the

appointment of a person whose interest is adverse to that of the minor and of the Defendant as a next friend (of the Plaintiff) and of the Plaintiff as a guardian ad litem (of the Defendant).

57. A conjoint reading of sub-rule (3) of Rule 3 and sub-rule (1) of Rule 4 would indicate that these rules are, in a sense, enabling provisions which regulate the appointment of next friend or guardian. Unsoundness of mind, minority and adverse interest of the concerned person are disqualifications. However, the absence of these disqualifications does not necessarily imply that the person who seeks the appointment as guardian has a right to be so appointed. The absence of these disqualifications simply qualifies such person to act as a guardian. In cases where the fitness and competence of the proposed guardian is put in contest, the Court would be enjoined to enquire into the fitness of the proposed guardian in the backdrop of the attendant circumstances.

58. In the case at hand, the prime objection of the Plaintiffs to the appointment of SD (D5) as a guardian of PC (D3) is that SD (D5) in connivance with VC (D4) has dissipated and usurped the property of ADC – HUF (D1) and has acted adverse to the interest of PC (D3). Various acts are attributed to SD (D5) to show that the interest of SD (D5) is adverse to that of PC (D3) and her acts and conduct have been prejudicial to the interest of the Plaintiffs. Since the legality and validity of the transactions entered into by SD

(D5) for and on behalf of PC (D3) have been questioned, it would not be appropriate to appoint SD (D5) as a guardian of PC (D3), was the thrust of the submission on behalf of the Plaintiffs.

59. In contrast, the facts that PC (D3) has been under the custody and care of SD (D5) and PC (D3) reposes trust and confidence in SD (D5) were pressed into service to boost the credentials of SD (D5). It was submitted that not an iota of material could be brought on record to show that SD (D5) has ever acted in a manner which can be considered as adverse to the interest of PC (D3).

60. At this juncture, it is necessary to clarify that since interim application, with diverse reliefs, is yet to be heard, it may not be apposite to delve deep into the allegations and counter-allegations which bear upon the merits of the matter.

61. Being mindful of this position, the Court proposes to examine the question of the fitness of SD (D5) for being appointed as guardian ad-litem of PC (D3). The nature of the dispute between the parties deserves to be kept in view. The core controversy is over the inheritance to the property of ADC (D2) and the rights of the parties in the property of ADC – HUF (D1). In plain terms, the fight is among the siblings over the joint family property. In a situation of the present nature, the element of adverse interest becomes complex. In a case, where the family has a dispute with the third party,

adverse interest can be discerned quite clearly. Where the children are litigating over the property of the parents in the evening of their life, the ascertainment of 'the interest' of the parent for whom the guardian is to be appointed, is not free from difficulties. The answer to the question what is 'the interest' of the parent often lies in the wishes of such parent. Where the parent is not in a position to articulate that 'interest', the determination as to whose interest is adverse to such parent, presents difficulty. Therefore, the question of interest of PC (D3) cannot be decided in the abstract on the basis of mere array of the parties as the Plaintiffs or Defendants.

62. The material on record, prima facie, indicates that SD (D5) has acted as the power of attorney holder of PC (D3) and ADC (D2) and has tendered a gift deed executed by PC (D3) in favour of VC (D4) for registration. It also appears that SD (D5) came to be included as a joint holder in the account maintained by ADC (D2) and PC (D3) with Bank of India, Electric House Branch and the operating instructions were changed to anyone.

63. At this stage, it needs to be clarified that this Court has not formed any opinion about the legality and validity of the aforesaid actions of SD (D5), but referred to them as illustrative cases of dealing with the property of PC (D3).

64. In the backdrop of the aforesaid material and considerations as regards the very "interest" of PC (D3), this Court is of the view that in the face of the allegations and counter-allegations as regards the dealing with the property of

PC (D3) and the ADC – HUF (D1), over which the Plaintiffs and D4 to D7 assert competing claims, the appointment of SD (D5), as a guardian ad-litem of PC (D3) may give rise to a situation of conflict of duty and interest of SD (D5). The appointment of SD(D3) as a guardian is fraught with the risk of loss of objectivity in the matter of representation of PC(D3). In these circumstances, the Court considers it appropriate to invoke the powers under sub-rule (4) of Rule 4 of Order XXXII and appoint an Officer of this Court to act as a guardian ad-litem of PC (D3).

65. At this stage, it is clarified that, in these applications, this Court did not examine the larger issue as to whether a guardian of the person and property of PC(D3), is required to be appointed. For that purpose a higher degree of proof of the state of mental health of PC(D3) may be required. That would also warrant the examination of the application of the provisions contained in The Mental Healthcare Act, 2017 and Rights of Persons with Disabilities Act, 2016. The decisions in the cases of Nirupama Mehta (Supra) and Rajni Sharma (Supra), on which reliance was placed by Mr. Kamat, were rendered in a completely different fact-situation where the person concerned was in a vegetative and comatose state and in exercise of plenary writ jurisdiction. Thus, the issue of appointment of a general guardian of PC(D3) is kept open for decision in an appropriate proceeding.

66. Hence, the following order :

ORDER

(i) Prayer clauses (b) and (c) of IA No.708 of 2023 stand rejected.

(ii) IA No.133 of 2024 stands partly allowed to the following extent only :

(a) Guardian ad-litem is appointed to represent PC (D3) in the suit.

(b) Ms. Charusheela Vaidya, Master and Assistant Prothonotary (Judicial) is appointed to act as a guardian ad-litem of PC (D3).

(c) The Plaintiffs and Defendant Nos.4 and 5 shall bear the costs to be incurred by the guardian ad-litem.

(N.J.JAMADAR, J.)