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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.3366 OF 2018

Mrs. Gulshan Rohinton Irani	]
age: 67 years, Indian inhabitant	]
Rustom Manzil, 2 nd floor, Right Wing	]
27 N.F. Road, Colaba Causeway	]
Mumbai 400 039	] <u>Petitioner</u>
presently residing at:	] Original
F/54, Cusrow Baug, Near BEST, Electric House,	] defendant
Colaba, Mumbai 400 001	] No.3
(Mother of the Plaintiff and Defendant No.1	]
and Partner of Defendant No.2 firm	]

V/s.

- | | |
|---|----------------|
| 1. Rayomand Rohinton Irani |] |
| Adult, Age: 43 years |] Respondent |
| Malegamwala Building No.2-D |] <u>No.1</u> |
| Flat No.20, 2 nd Floor, MMC Road |] Original |
| Mahim (West), Mumbai 400 016 |] Plaintiff. |
| |] |
| 2. Khoremmand Rohinton Irani |] Respondent |
| adult, aged: 38 years, Indian Inhabitant |] <u>No.2.</u> |
| residing at: F/54, Cusrow Baug |] Original |
| Near BEST Electric House |] Defendant |
| Colaba, Mumbai 400 001 |] No.1 |
| |] |
| 3. Cafe Mondegar |] Respondent |
| a registered Partnership firm |] <u>No.3</u> |
| at Cafe Mondegar, Ground floor, Metro House |] Original |
| Abubakar Manson, Shahid Bhagat Singh Road |] Defendant |
| Colaba Causeway, Mumbai 400 039 |] No.2 |
| |] |
| 4. Hoshang Rustam Yazdegardi |] |
| age: 39 years, Indian inhabitant |] |
| Of Mumbai residing at Fern House, 1 st Floor |] |
| Electric House, Colaba, Mumbai 400 001 and |] |

- also having address at Cafe Mondegar]
 Ground floor, Metro House,]
 Abubakar Manson, Shahid Bhagat Singh Road]
 Colaba Causeway, Mumbai 400 039]
]
 5. Nilofar Shahrukh Nooshian]
 age: 51 years, Indian Inhabitant]
 of Mumbai, residing at Jehangir Manson] Respondent
 3rd floor, Flat NO.1, A. Poddar Marg] Nos. 4 to 7
 Mumbai 400 020] Original
] Defendant
 6. Shahnaaz Rohington Irani] Nos. 4 to 7
 adult aged 55 years, Indian inhabitant]
 Alipur Trust Building, 4th floor, "D" Block]
 Shahid Bhagat Singh Road, Colaba]
 Mumbai 400 005.]
]
 7. Mehernaz Kaikhashroo Tirandazain]
 Adult, age: 44 years, Indian inhabitant]
 Alipur Trust building, 4th floor, "D" Block]
 Shahid Bhagat Singh Road, Colaba]
 Mumbai 400 005.]

Mr. Sharan Jagtiani a/w Mr. Astad Randeria i/by
 Mahendra C. Moholkar, for the Petitioner.

Mr. Cyrus Ardeshir a/w Mr. Ashish Kamath a/w Mr.
 Javeed Hussein and Ms. Reshma Khatri, Mubashir
 Hussein i/by Hussein & Co., for the Respondent No.1.

Mr. Arosh Bharucha a/w Mr. Jehangir Jejeebhoy a/w Mr.
 Maneck Mulla a/w Mr. Danesh Mehta a/w Mr. Siddha
 Panecha a/w Ms. Khushbhu Malvia I/by M. Mulla
 Associates, for respondent Nos. 3 to 7.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 5TH APRIL, 2018.

ORAL JUDGMENT :

1] Heard learned counsel for the petitioner and learned counsel for the respondents.

2] Rule.

3] Rule is made returnable forthwith with the consent of learned counsel for both the parties and the petition is taken up for final hearing.

4] By this petition filed under Article 227 of the Constitution of India, the petitioner is taking an exception to the order dated 13.2.2018 passed by Judge, City Civil Court, Greater Mumbai, in Notice of Motion No.532 of 2018 in Suit No.71 of 2018.

5] Present petitioner is defendant No.3 before the trial Court. The above said Notice of Motion was taken up by the respondent No.1-plaintiff requesting the trial Court to interview the petitioner, in the Judge's Chamber to examine her mental stability. It was also prayed that the petitioner be referred to Mental Health Review Board, constituted under the Mental Healthcare Act, 2017, with necessary direction to submit report to the Court.

6] The trial Court has, accordingly called the present petitioner, in the Court, for examining her. Then, with the consent

of learned counsel for the parties, the trial court called her alone in the Chamber and thereafter, he interviewed and questioned the petitioner for about 30 to 40 minutes in the recess, and formed opinion that she is required to be called for one or two occasion, again for the purpose of inquiry and for further questioning her. However, without commenting then about her ability and capacity to defend herself in the suit, trial Court was of the the view that further enquiry has to be conducted under Order XXXII Rule 15 of the Code of Civil Procedure, and for that purpose the petitioner is required to be examined by the medical experts.

7] Accordingly, the trial Court has in paragraph No.3 of it's order stated that, “for the purpose of enquiry under Order XXXII Rule 15 C.P.C. and for the purpose of satisfaction of the Court about the fact as to whether petitioner is really capable of protecting her interest and defend herself in the suit, the Dean of Sir J.J. Hospital, Byculla, Bombay can be directed to constitute such Board/Committee of experts for the purpose of examination of defendant No.3, in respect of her mental status for and for filing report or opinion of the Committee/Board of Experts”.

8] In view thereof, the learned trial Court Judge was pleased

to pass order to the effect that the enquiry under Order XXXII Rule 15 of the C.P.C. is already initiated. The Dean of Sir J.J. Hospital, Byculla, Bombay is directed to form a temporary Board or Committee of experts for the purpose of examination the the petitioner-defendant No.3 of her mental status or stability.

9] The said Committee was also directed to file report accordingly about her mental status and stability, which will be helpful to the trial Court for the purpose of inquiry under Order XXXII Rule 15 of C.P.C. Accordingly, defendant No.1 was directed to take the petitioner or the petitioner herself shall submit for the purpose of such examination before the Board/Committee of experts so constituted on the date or dates given by the Head of the Board or Committee of the Experts so formed. Further consequential directions are also given by the learned trial Court Judge.

10] While challenging this order of the trial Court, the submission of learned counsel for the petitioner is that the learned trial Court Judge has not even formed prima facie opinion that the petitioner is not mentally stable or not mentally able to defend herself and without forming such prima facie view or opinion, conversely observing that she is required to be called for one or two occasion

again for the purpose of inquiry and for further questioning, directed the petitioner to submit herself for medical examination to be conducted by the Board or Committee of experts. According to learned counsel for the petitioner, even in the Notice of Motion, there is no specific prayer that this enquiry was essential or it was sought for the purpose of the appointment of any person as guardian ad-litem to represent her legal rights and interests.

11] It is urged that by this Notice of Motion, respondent is seeking fishing and roving enquiry and if such enquiry is allowed on vague allegation that the party to the litigation is suffering from mental incapacity or ability, then in each and every case, the medical examination of the party would be called for. According to learned counsel for the petitioner, therefore, such enquiry, when it is not stated for the particular purpose for which it was necessary, at least it was not spelt out that for the appointment of any guardian ad-litem, enquiry was necessary, it should not have been allowed by the trial Court.

12] In support of this submission, learned counsel for the petitioner has specifically relied upon the provisions of order XXXII Rule 15 of C.P.C., to submit that if such enquiry is to be ordered, then

it should be only for the purpose of appointment of guardian which is not here in the case. The Court has also not come to the conclusion to form an opinion that the petitioner is incapable, by reason of unsoundness of mind or any other mental infirmity for protecting her interest

13] According to learned counsel for the petitioner, the trial Court has not have recorded prima facie opinion that on his interviewing or questioning with her, he found that she was unable to defend herself on account of her mental inability or incapacity and hence her medical examination was necessary. The only opinion formed by the trial Court, is that she is required to be called for one or two occasion, again for the purpose of enquiry and for further questioning her. However, as regards her ability and capacity to defend herself in the suit, the trial Court Judge has clearly stated that he was not commenting thereupon right now. It is urged that if according to learned trial Court Judge himself, petitioner was required to be called for one or two occasion, for the purpose of enquiry and for further questioning, then there was no reason for him to order her medical examination in such a haste. It could have done, if required or sought at appropriate stage. After his questioning was complete, trial court also would have been in a position to form

the necessary opinion. Hence, the trial Court should have waited till then before passing the impugned order.

14] Learned counsel for the the petitioner has then submitted that the Committee/Board of Experts to be formed under the Mental Healthcare Act, 2017 is yet not constituted by the State Government. Hence, the trial Court has committed an error in directing the medical examination of the petitioner under the provisions of the Mental Healthcare Act, 2017. On this court also, the impugned order is liable to be quashed and set aside.

15] Per contra, learned counsel for the respondent-plaintiff has submitted that it was not necessary for the trial Court Judge to form prima facie opinion about her mental incapability or stability before ordering her Medical Examination. According to him, for the purpose of satisfaction of the trial Court about the fact as to whether she was really capable to protect her interest and defend herself in the suit, was sufficient for directing the medical examination. It is submitted that the best person to form such an opinion about necessity of her medical examination was the trial Court judge himself, who has interviewed and questioned her for a period of about 30 to 40 minutes and thereafter knowing his limitation, of not being a

medical expert, being a layman has without expressing any opinion or without commenting upon right then about her capacity to defend herself in the suit, has thought it fit that further enquiry needs to be conducted and for that purpose directed the medical examination of the petitioner, to be conducted by the Medical Board or the Committee of experts.

16] According to learned counsel for respondent No.1-plaintiff, if the petitioner has consented for the interview and examination, in the Chamber of the trial Court Judge, the petitioner should not shy away from proceeding with further enquiry. After such interview or questioning by the trial Court Judge, if the trial Court was of the opinion that further enquiry is essential and for that purpose the medical examination is necessary, then now the petitioner cannot raise objection thereto, because this opinion is formed by the trial Court Judge, that too after questioning the petitioner, and it was with the consent of the petitioner. According to learned counsel for respondent No.1, therefore, no error, much less any illegality is committed by the trial Court in ordering such medical examination of petitioner.

17] It is further submitted that though the trial Court has

referred to the provisions of the Mental Healthcare Act, 2017, the trial Court, has in its order, made it specific that, if there is no Board constituted by the Government under the Mental Healthcare Act, then the Committee of Experts can also examine the petitioner. Therefore, the trial Court has not exceeded its jurisdiction in this respect also. According to learned counsel for respondent No.1 therefore, within the limited scope of the writ jurisdiction of this Court under Article 227 of Constitution of India, this Court should refrain itself from interfering in the discretion exercised by the trial Court.

18] In order to appreciate the rival submissions advanced at Bar, by learned counsel for both the parties, in my considered opinion it would be relevant to take note of certain facts including the relationship between the parties in this proceeding. The petitioner is the mother of respondent No.1-plaintiff and respondent No.2- the original defendant No.1. As per case of respondent No.1, the petitioner has executed or she was made to execute the Power of Attorney dated 29.7.2015 in favour of wife of respondent No.2. The suit is for declaration that the said Power of Attorney is null and void and also for injunction restraining respondent No.2 from acting on the General Power of attorney. In the plaint there are averments to the

effect that on account of her age and mental illness, the petitioner is not keeping good health and therefore, this power of attorney, being got executed from her, it be declared as null and void.

19] In the light of above facts, the first Notice of Motion No.3904 of 2017 was filed with a prayer that the petitioner should appear in person and depose on the bonafides and General Power of Attorney dated 29.7.2017 or any other power of attorney which may have been executed by her in favour of respondent No.2. Further prayer was also made that pending the hearing and final disposal of the suit, the Court may appoint medical expert to conduct the medical examination of the petitioner and submit report before the Court in order to ascertain her mental capacity and legal competence to act as a Principal and/or to execute the General Power of Attorney dated 29th July, 2017.

20] During the pendency of the said Notice of Motion, present Notice of Motion is filed seeking following reliefs :

“(a) Pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to direct defendant No.3 to appear in person before the Court and the Hon'ble Court to interview the defendant No.3, in the Judge's Chamber to examine the mental stability of the defendant No.3.

(b) Pending the hearing and final disposal of the suit, this Hon'ble Court may be pleased to refer the defendant No.3, to the Mental Health Review Board, constituted under Mental Healthcare Act, 2017, with the direction to submit the report to the Hon'ble Court.

21] It is true that in the Notice of Motion, it is not specifically stated that her medical examination or interview by the Court is necessary in view of provisions of Order XXXII Rule 15 C.P.C. for the purpose of appointment of guardian ad litem in order to defend her in the suit. However, in the affidavit which is filed in support of the Notice of Motion, in paragraph No.17 it is specifically stated that to assess, whether a person suffers from any unsoundness or mental infirmity which makes him incapable of protecting his/her interest in the litigations, the holding of an enquiry is a sine qua non and the Court is empowered to appoint guardian in the event a person is adjudged to be of unsound mind and or incapable of protecting his or her interest in a litigation or upon executing any documents, the consequences of such act in long run or future. It is further stated in paragraph No.18 that, "by virtue of Order XXXII Rule 15 C.P.C., such power is vested with the Court to order medical examination of a person even during the pendency of suit". It was further stated that,

“plain reading of Order XXXII Rule 15 C.P.C., shows that the Court should not wait for examining a person, as to whether he or she is mentally stable or not only at the time of examination of witness”.

22] Thus, though in the prayers made in the Notice of Motion, it was not specifically stated that such medical examination is necessary for the purpose of enquiry under Order XXXII Rule 15 C.P.C., the averments in the affidavit filed in support of the Notice of Motion, are sufficient to that effect.

23] It is pertinent to note that the trial Court has also in its order, considered the provisions of Order XXXII Rule 15 C.P.C. and specifically observed that, “the Court was of the opinion that in view of the Order XXXII Rule 15 C.P.C., inherent powers of Civil Court and as per the ratio laid down by the Division Bench of this Court, in the case of *Somnath -Vs- Tipanna Ramchandra Jannu*¹ the defendant No.3, who is mother of the plaintiff and defendant No.1, is required to be called for being questioning”. Further, in paragraph No.2 of its order, in the last two lines, trial Court has specifically stated that, “I am of the view that further inquiry has to be conducted under Order XXXII Rule 15 C.P.C”. Then in paragraph No.3 of the order, the trial

1 AIR 1973 Bombay 276

Court has referred to the provision of Order XXXII Rule 15 C.P.C., holding that, “for the purpose of further enquiry under Order XXXII Rule 15 C.P.C., for the purpose of of satisfaction of the Court about the facts as to whether defendant No.3 is really capable of protecting her interest and defend herself in the suit, her medical examination is necessary. Accordingly, the trial Court has directed that the Board/Committee of experts so constituted by the Dean of Sir J.J. Hospital, Byculla, Bombay, to file report/opinion about the mental status and stability to the Court, which will be helpful to the Court, for the purpose of enquiry under Order XXXII Rule 15 C.P.C.

24] Thus, the entire tenor of the affidavit filed in support of the Notice of Motion and the impugned order passed by the trial Court make it clear that the medical examination of the petitioner was ordered for the purpose of ascertaining her mental capability, in order to know whether she was suffering from any mental infirmity and whether she can defend the suit independently in her own capacity under the provisions of Order XXXII Rule 15 of C.P.C. These provisions are reproduced hereunder for ready reference:-

“15. Rules 1 to 14 (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”.

25] Reading of Provision of Order XXXII, Rule 15 C.P.C., thus makes it clear that the provisions of Rule 1 to 14 apply to the persons who are already adjudged to be of unsound mind and they also apply to the persons, who 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. This Rule, therefore, contemplates enquiry in order to ascertain whether a person, who is already not adjudged to be unsound mind, is incapable by reason of mental infirmity of protecting his interest, when suing or being sued.

26] How this enquiry is to be conducted, is left entirely to the discretion of Court though there are certain guidelines laid down by the Apex Court and also by various High Courts, including this Court on this aspect. Those guidelines cover not only the nature of the scope of such enquiries, but also as to whether the medical examination can be ordered, and if yes, in which situations it can be ordered.

27] In the present case, the trial Court has proceeded to observe that enquiry under Order XXXII Rule 15 C.P.C. is initiated with the consent of learned counsel for both the parties. The trial Court has called the petitioner to the Court for the purpose of interviewing and questioning, in order to satisfy itself, at least to form an opinion about further course of action to be taken. Thereafter the trial Court has interviewed and questioned the petitioner in his Chamber for 30 to 40 minutes alone and then formed an opinion that further enquiry also needs to be conducted and which enquiry according to the trial Court was necessary, in the nature of examination of the petitioner by medical expert. Therefore, the trial Court has acted in pursuance of Order XXXII Rule 15 C.P.C., directing the medical examination of the petitioner, in order to assist him to form an opinion about her mental status and stability to defend herself independently in the suit.

28] The Hon'ble Supreme Court has, in the case of *Sharda -vs- Dharampal*² considered the question whether Civil Court has power to direct the party to the lis to undergo the medical examination and also whether it would amount to violation of Article 01 of the

2 AIR 2003 Supreme Court 3450

Constitution of India. In paragraph No.27 of the judgment, the Hon'ble Apex Court, after considering the provisions of Order XXXII Rule 15, has held that :-

“The Court, however, indisputably is empowered to satisfy itself as to whether a party before it suffers from mental illness or not either for the purpose of appointment of a guardian in terms of Order 32 Rule 15 of Code of Civil Procedure or Section 41 of the Indian Lunacy Act as also for determination of his competence as a witness”.

29] In paragraph No.32 of judgment, the Hon'ble Apex Court, has highlighted that primary duty of the Court is to see that the truth is arrived at. In that context it has held that, “a party to a civil litigation, it is axiomatic, is not entitled to Constitutional protections under Article 20 of the Constitution of India. Thus the Civil Court although may not have any specific provisions in the Code of Civil Procedure and the Evidence Act, has an inherent power in terms of Section 151 of the Code of Civil Procedure, to pass all orders for doing complete justice to the parties to the suit and in certain cases medical examination by an expert in the field may not only found to be leading to truth of the matter but may also lead to removal of misunderstanding between the parties. It may bring the parties to terms”.

30] In paragraph Nos. 50, 51, 52 and 53 the Hon'ble Supreme Court, was pleased to observe that :-

“50. We wish to point out that the question as to whether a person is mentally ill or not although may be a subject matter of litigation, the Court having regard to the provisions contained in Order 32 Rule 15 of Code of Civil Procedure, Section 41 of the Indian Lunacy Act as also for the purpose of judging his competence to examine as a witness may issue requisite directions. It is, therefore, not correct to contend that for the aforementioned purposes the Court has no power at all. The prime concern of the Court is to find out as to whether a person who is said to be mentally ill could defend himself properly or not. Determination of such an issue although may have some relevance with the determination of the issue in the lis, nonetheless, the Court cannot be said to be wholly powerless in this behalf. Furthermore, it is one thing to say that a person would be subjected to test which would invade his right of privacy and may in some case amount to battery; but it is another thing to say that a party may be asked to submit himself to a psychiatrist or a psychoanalyst so as to enable the Court to arrive at a just conclusion. Whether the party to the marriage requires a treatment or not can be found out only in the event, he is examined by a properly qualified Psychiatrist. For the said purpose, it may not be necessary to submit himself to any blood test or other pathological tests.

51. If the Court for the purpose envisaged under Order 32 Rule 15 of Code of Civil Procedure or Section 41 of the Indian Lunacy Act can do it suo motu, there is no reason why it cannot do so on an application filed by a party to the marriage.

52. Even otherwise the Court may issue an appropriate direction so as to satisfy himself as to whether apart from treatment he requires adequate protection inter alia by way of legal aid so that he may not be subject to an unjust order because of his incapacity. Keeping in view of the fact that in a case of mental illness the Court has adequate power to examine the party or get him examined by a qualified doctor, we are of the opinion that in an appropriate case the Court may take recourse to such a procedure even at the instance of the party to the lis.

53. Furthermore, the Court must be held to have the requisite power even under Section 151 of Code of Civil Procedure to issue such direction either suo motu or otherwise which, according to him, would lead to the truth”.

only recognized the existence of the power but also encouraged the use of powers by the Civil Court to order medical examination, to find out as to whether a person, who is said to be mentally ill or incapable to defend himself, the court may issue appropriate direction either on the application of the party or even suo motu.

32] The Division Bench of Madras High Court, in the case of *G.V. Lakshminarayanan -vs- G.v. Nagammal and ors*³ was dealing directly with the Provisions of Order XXXII Rule 15 C.P.C. Therein the first respondent, has not so far been adjudged to be a person of unsound mind or a mentally infirm person and the same was in dispute for adjudication in the suit. The question was whether the first respondent could be directed to suffer medical examination to find out as to her mental infirmity. While answering this question, it was held that, by virtue of Order XXXII Rule 15 C.P.C., power is vested in the Court to order medical examination of a person even during the pendency of the suit to find out whether he is of unsound mind. To find out the same, the Court has always right and duty to exercise such power and the Court need not wait for examining the person as a witness to find out whether he/she mentally infirm or not. Such order for medical examination can be passed at interim

3 AIR 2007 MADRAS 231

stage also. It was further held that, “as medical evidence is also a mode to establish the claim, such a right could be exercised by the Court even as an interim measure. The relevant observations of the Division Bench of Madras High Court, in paragraph No.17 of the judgment, can be reproduced as follows :-

“17. A perusal of the Rule indicates that it applies to two classes of persons namely, persons who are already adjudged to be of unsound mind and the persons who are not so adjudged to be of unsound mind. In this case, the first respondent has not been so far adjudged to be a person of unsound mind or a mentally infirm person and the same is in dispute for adjudication in the suit. Nevertheless, the question is whether the first respondent could be directed to suffer for a medical examination to find out as to her mental infirmity. By virtue of Order XXXII Rule 15 of the Civil Procedure Code, power is vested on this Court to order medical examination of a person even during the pendency of the suit to be of unsound mind. To find out the same, the Court has always the right and duty to exercise such power. A plain reading of Order XXXII Rule 15 shows that the Court need not wait for examining a person as to whether he/she is mentally infirm or not only at the time of examination of witnesses. As the medical evidence is also a mode to establish the claim, such a right could be exercised by the Court even as an interim measure.

(emphasis supplied)

33] In paragraph No.20 of the said judgment, after taking resume of earlier decisions, the Division bench was in this case pleased to hold that :-

“From these decisions, the following principles emerge:

(1) Order XXXII, Rule 15 C.P.C. places persons of unsound mind or persons so adjudged in the same position as minors for purposes of Rules 1 to 14.

(2) Order XXXII Rule 15 C.P.C. applies not only to a person adjudged to be of unsound mind, as under the old Code, but also to a person of weak mind.

(3) Where it is alleged that a party to a suit is of unsound mind and the other party denies it, the Court must hold a Judicial Inquiry, and come to a definite conclusion, as to whether by reason of the unsoundness of mind or mental infirmity, he is incapable of protecting his interests in the suit.

(4) Mental infirmity may even be due to physical defects, if it renders him incapable of receiving any communication, or of communicating his wishes or thoughts to others.

(5) Whether a person is of unsound mind or mentally infirm for the purpose of the rule and the extent of the infirmity has to be found by the Court on inquiry.

(6) Where the question of unsoundness of mind arises not only under Order XXXII, Rule 15 C.P.C. but is also one of the issues in the suit, the Court has ample jurisdiction to enquire into that

question, and for that purpose seek medical opinion.

(7) The enquiry should consist not only of the examination of the witnesses produced by either party, but also of the examination of the alleged lunatic by the judge, either in open court or chambers, and as Courts are generally presided over by lay-men, as a matter of precaution, the evidence of medical expert should be taken.

(8) Of course, the opinion, of a doctor, as is the opinion of any other expert, under Section 45 of the Evidence Act, is only a relevant piece of evidence.

(9) The Court may also compel the attendance of the alleged lunatic before it, and to submit himself for medical examination. If the alleged lunatic is in custody, the Court may direct the next friend or any other person having custody to produce him before the medical expert for examination.

(10) Where the precaution of judicial enquiry is not observed, the person cannot be declared lunatic, and a guardian cannot be appointed for him.

(11) When a person is adjudged a lunatic irregularly and improperly, and notice was not served on him, and a guardian alone was allowed to appear and defend the suit and decree was passed owing to the guardian not putting up a proper defence, the alleged lunatic can treat the decree against him as an ex parte decree, and have it set aside under O.IX R.13 C.P.C”.

(emphasis supplied)

34] Learned counsel for the respondent No.1 has then placed reliance on the judgment of Supreme Court, in the case of *Parmanand Patel (dead) by Lrs and another -vs- Sudha A. Chowgule and others* ⁴, wherein, in the light of rival claims made by both parties about mental health of the plaintiff, the learned Single Judge of this Court, has directed the constitution of panel of doctors from J.J. Hospital, Bombay Hospital and Lilavati Hospital dealing with Psychiatric and Neurological Departments, to examine the said plaintiff and make the report directly to the Court. The said order was confirmed by the Division bench of this Court.

35] In this case, the trial Court, has also placed reliance on the judgment of this Court in the case of *Somnath -vs- Tipanna Ramchandra Jannu (supra)*, wherein this Court has held that even at the time of examination of plaintiff for the purpose of admission, if it contains a statement that the plaintiff is a person of unsound mind and that next friend is suing on his behalf, the Court must at once hold an inquiry for the purpose of recording a finding that the plaintiff is a person of unsound mind or mentally so infirm as incapable of protecting his own interest. It was held that, it is the duty of the Court to do so and it is not even necessary for next friend to make separate

4 (2009) 11 Supreme Court Cases 127

application for that purpose.

36] In paragraph No.17 of the judgment, this Court has observed that:-

“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 *exparte* inquiry for the court to give a finding and to admit the plaint and issue the process to the other side”.

(emphasis supplied)

37] Thus, if the Court entertains a doubt about mental capacity or soundness of the mind of the plaintiff, it is open to the Court to take further assistance in the form of medical examination and the evidence of Doctor, under whose observation plaintiff may be kept. It is categorically held that 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, the Court may not need much evidence beyond recording of the questions put to and answers given by the person concerned; whereas there can be other cases which are not so clear and more evidence may be necessary. It was then suggested 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 Section second part of Rule 15 of Order XXXII C.P.C., then enquiry be 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.

38] In paragraph No.18 of the said judgment, it was further held that:-

“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”.

39] Thus, the conspectus of legal position which emerges from the above discussion is that the Court has not only the power but also the duty to hold the inquiry and in that inquiry, to order such medical examination of the person alleged to be of unsound mind or mentally infirm. As a matter of fact, learned counsel for the petitioner is also not disputing this legal position. As per the legal premise, it is for the Court to decide how such enquiry should be conducted. The Court can call party himself for questioning and interviewing for the purpose of enquiry or/and if the Court deems it necessary, may order the medical examination of such person. In view of the ratio laid down by the Division Bench of this Court in *Somnath -vs- Tipanna (supra)*, even if there is “doubt” about mental condition of the party, then Court should not hesitate to exercise such power of enquiry. The Court can also do it suo motu, depending upon the facts and circumstances of the case.

40] Here in the case, as stated above, Notice of Motion was

filed particularly for holding necessary enquiry under Order XXXI Rule 15 C.P.C. Admittedly petitioner is not person who is already declared to be a person of unsound mind and therefore, the trial Court has rightly held enquiry to find out whether on account of her alleged mental infirmity, she is capable of protecting her interest, Therefore, with the consent of both parties, the trial Court Judge interviewed her alone in the chamber for about 30 to 40 minutes and while she was being interviewed, has formed an opinion that she is required to be called for one or two occasion for the purpose of enquiry and further questioning.

41] It is true that the learned trial Judge being a layman and not a medical expert, has refrained himself from making any comment about her ability or capacity to defend herself in the suit. However, at the same time, the learned trial Judge has found that “further enquiry is necessary” such further enquiry, he thought of in two modes, that is by calling her again for questioning and interviewing on one or two occasion and at the same time, directing her medical examination also, which according to him, would assist him for the purpose of satisfaction about the fact as to whether she is really capable of protecting her interest and defend herself in the suit.

42] As rightly submitted by learned counsel for respondent No.1, the trial Judge had an opportunity to interview the petitioner alone for 30 to 40 minutes and on the basis of such interview, he was the best person to form an opinion, to decide future course of action and accordingly he has formed opinion. That opinion may not be strictly speaking about her mental capacity as such, but that opinion is what further enquiry is required, which according to him was necessary in the form of her further interview on one or two occasions and also medical examination by the expert, which will assist him to arrive at opinion as to whether she is capable of defending herself or not. Hence, it would not be either proper or correct on the part of this Court to displace that opinion and substitute the opinion of this Court. As held by the Division Bench of this Court in the case of *Somnath -Vs- Tipanna Ramchandra Jannu (supra)*, even if there is “doubt” about mental capability of the party, then the best mode is to direct medical examination of such person. Even if there are rival claims about the mental health of a party, then also as held by the Apex Court in the case of *Parmanand Patel (dead) by Lrs -vs- Sudha A. Chowgule and others, (supra)*, there is need of further enquiry in the form of medical examination.

43] Here in the case, if for the purpose of enquiry under Order
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XXXII Rule 15, the trial Judge has thought it fit that medical examination will assist him for arriving at satisfaction of the Court about the fact as to whether petitioner is really capable of protecting her interest and defend herself in the suit. Hence, it has to be held that the opinion formed by the trial Judge needs to be given the primacy due to it and this Court should not interfere in the discretion exercised by the trial Court, which is based on the legal principles recorded above and which is also found to be appropriate in the particular facts of the present case. Ultimately the medical examination will be helpful for both parties to prove their respective claims in the trial Court. It will be also in the real and bonafide interest of the petitioner herself, who can defend herself, if found to be mentally sound and if not, she can also get assistance of someone to defend her interest.

44] Her medical examination has also become necessary particularly in the facts of the present case, the same advocate is representing her and defendant No.1. Hence, the interest of justice will always serve, if things become clear on the receipt of opinion of the medical expert, about mental ability of petitioner. Therefore, from this angle also, no case is made out for interference in the impugned order, passed by the trial Court.

45] As regards the grievance that no Board is constituted by Government under the Mental Healthcare Act, 2017, the impugned order shows that the trial Court being aware of the same, has directed the Dean of Sir J.J. Hospital, Byculla, to form a temporary Board or Committee of experts for the purpose of examination of the petitioner. Therefore, on this count also, I do not find any reason to interfere in the impugned order passed by the trial Court.

46] Whether this enquiry or medical examination is motivated or with an ulterior purpose to help the other parties in other proceedings, that cannot be and need not be enquired into at this stage. At this stage, what is essential is to ascertain whether the trial Court has rightly considered that for the purpose of further enquiry under Order XXXII Rule 15, her medical examination is necessary and it being one of the recognized mode which is approved by the Hon'ble Apex Court, no interference on any count is warranted in the impugned order passed by the trial Court.

47] The Writ Petition, therefore, being without merits stands dismissed.

48] Rule is discharged.