

**IN THE HIGH COURT OF SINDH AT KARACHI**

**Suit NO. 118 of 2012**

Plaintiff : Azhar Mukhtar,  
through: Mr. Jaffar Raza, Advocate.

Defendants: Mst. Tazeen & another

Date of hearing: 18.05.2015.

Date of announcement: 29.05.2015

**ORDER**

**SALAHUDDIN PANHWAR, J.** Through this order I am going to decide the application, filed by the counsel for the plaintiff whereby seeking an order on the reference of the Nazir dated 02.4.2015.

2. Para-3 of the reference, so submitted by the Nazir, being material and relevant is referred hereunder:-

“That learned counsel for the plaintiff/Manager had requested for the delivery of entire amount lying with Nazir Branch on account of Azhar Mukhtar. Therefore, keeping in view the afore-mentioned position, it is respectfully submitted that, orders are solicited to release the amount as available with Nazir Office as under Act, 2013, entire responsibility of the management, accounts rest on the Manager (Section, 36) and said manager had to submit his reports under section 40 of the Act, 2013 before concerned Court’

3. To have a brief notice of the back-ground of the said reference and application, it would be proper to give a short-details of facts, leading to said reference which are:-

i. The said suit was filed by the plaintiff, Azhar Mukhtar through his guardian for Partition/Administration/Permanent Injunction Damages & Recovery. A residential plot bearing No.J-49/II

admeasuring 616.3 Sq. yards approximately together with the single storey bungalow structured thereon. The plaintiff was 75% owner of said while 25% was in name of defendant Mst. Tazeen. The plaintiff was claimed to be mentally disordered so suit was filed by his guardian i.e his brother Arif Mukhtar s/o Mukhtar Ahmed.

ii. The said suit was decreed on compromise application, filed by the parties, on 25.7.2013. The clauses 3 to 5 of the compromise, being relevant are referred hereunder:-

“3. That the Nazir of this Hon’ble Court shall invest the 75% share of the plaintiff from the sale proceeds in the name of the Plaintiff in a profitable venture to ensure that regular profit is earned on the same;

4. That Mr. Arif Mukhtar, brother of the plaintiff and guardian ad litem, without any responsibility on his part, and being hereby unconditionally indemnified by the Defendants, shall utilize the Plaintiffs share from the above sale for the sole benefit of the plaintiff, including any and all medical, emergency, living and rehabilitation expenses. The Nazir shall dispense funds to Mr. Arif Mukhtar as and when required by him for the sole benefit of the plaintiff.

5. That Nazir of this Hon’ble Court shall after auctioning the house allow Mr. Arif Mukhtar to control and manage the expenses of the Plaintiff from the sale proceeds, deposited with the Nazir, on a monthly basis. In addition to the same, the Nazir upon satisfaction and production of receipts shall reimburse Mr. Arif Mukhtiar the expenses incurred in the rehabilitation of the plaintiff, prior to execution of instant agreement;”

4. The property was auctioned and the Nazir has made compliance of said order as share amount of the plaintiff and presently an amount of Rs.125,60,000/ (Rupees One Crore Twenty Five Lac Sixty Thousand only) are lying invested at NSC. At this juncture a reference to order dated 24.2.2015, passed by this Court, shall make status of the instant suit and orders passed

thereon. The relevant portions thereof, being material and relevant, are reproduced hereunder:-

“On a previous date my attention was drawn to the fact that Mr. Arif Mukhtar has filed an application under section 29 of the Mental Health Act, 2013 (a provincial statute) read with all enabling provisions of the same. Mr. Arif Mukhtar has prayed in that application, inter alia, that he may be appointed as the Plaintiff’s guardian and also the manager of the plaintiff’s property. **I may note that the aforementioned Act of 2013 constitutes a special court known and styled as the “Court of Protection”, which exercises the jurisdiction under the said Act. The application filed by Mr. Arif Mukhtar is now before the learned II-Additional District Judge, Karachi East acting as, and exercising the jurisdiction of, the Court of Protection.** Order sheet of the proceedings have been placed before me and it appears that the matter has been lingering for some time.

Learned counsel for Plaintiff states that..... In my view, since recourse has been taken to the appropriate proceedings (i.e, the application aforementioned), which are pending before the court specifically created for this purpose and having jurisdiction in respect of the same, **it would be more appropriate for the said Court of Protection to dispose of the application** and all matters pending in the same expeditiously so that, should Mr. Arif Mukhtar be appointed as the manager of the Plaintiff’s property, he can then, on the basis of such order, deal directly with the Nazir and take all necessary action, as may be appropriate in this regard.....”

( Underlining is provided for emphasis).

5. In compliance of said order, the Protection Court (IInd Addl. Sessions Judge, Karachi East’ disposed of the Mental Health application No.03 of 2014 vide order dated 05.3.2015. The concluding part thereof is reproduced hereunder:-

“Keeping in view of the report of medical board when Azhar Mukhtar is suffering “from advanced degenerative dementia” when the applicant Arif Mukhtar is the real brother of (Azhar Mukhtar) who is aged about 61 years. When Tariq Mukhtiar and Shariq Mukhtiar, they also real brothers of applicant and Azhar Mukhtiar they both while submitting affidavits, submitted their no-objections over the prayer of applicant, **hence I have left no option except to allow the prayer of the applicant by appointing him as**

**guardian/Manager of Azhar Mukhtar in order to look after the matters of Azhar Mukhtar by acting his guardian."**

6. From above facts, it should not be disputed anymore that all the matters relating to the estate of the present plaintiff (mentally disordered person) are to be governed and controlled under the Sindh Mental Health Act, 2013. The Court, trying and entertaining such judicial proceedings, has been titled as '**a Court of Protection**'. The protection is for the '**mentally disordered person**'; that is so evident from the Section 30(3) of the Act which reads as:-

*'(3) Upon the completion of the inquiry, the Court shall determine whether the alleged mentally disordered person is suffering from mental disorder and is incapable of managing himself and his affairs, or may come to a special finding that such person lacks the capacity to manage his affairs, but is capable of managing himself and is not dangerous to himself or to others, or may make any such order it deems fit, in the circumstances of the case, **in the best interests of such person.**'*

7. The purpose and object of appointment of '**guardian**' and '**Manager**' under this Act are not synonym to each other as is evident from Section 32 and 33(1) of the Act. The '**guardian**' shall be appointed where person (mentally disordered) is incapable of taking care of himself while '**manager**' shall be appointed where person (mentally disordered) is incapable of managing his property. The language of the Section 35 of the Act gives an impression that '**guardian**' and '**manager**' should be two different '*suitable persons*', however, the Act, *nowhere*, specifically restricts appointment of a single person or a relative as '**guardian**' and '**manager**' i.e to look after the person (mentally disordered) so also to manage the property of such a person (mentally disordered) but subject to only one condition that '*it should be for the benefit of the mentally disordered person*' (Section 31(2) of the Act). The Section 34 of the Act, however, is very much clear that it is the '**manager**' and not the '**guardian**'

who is responsible for the care, cost of treatment and maintenance of mentally disordered person and of such members of his family as are dependent on him. At this juncture, the reproduction of Section 36 of the Act, being relevant and material, is referred hereunder:-

*'36.(1) Every manager appointed under this Act shall, subject to the provisions of this Act, exercise the same powers in regard to the management of the property of the mentally disordered person in respect of which he is appointed as manager, as the mentally disordered person.....*

*Provided that no manager so appointed shall without the permission of the Court –*

- (a) mortgage, create any charge on, or transfer by sale, gift, exchange or otherwise, any movable or immovable property of the mentally disordered person; or*
- (b) lease out or give on bailment any such property.*

*(2) The permission under proviso to sub-section (1) may be granted subject to such conditions or restrictions as the Court may think fit to impose.*

8. From the subsection (1) of Section 36 of the Act, it is quite clear that appointment of the Manager should specify as to for which (the property) he is appointed as Manager. This seems to be for no other purpose but to entitle the 'manager', on his/her appointment, to take the control and management thereof from quarter concern, as is evident from the Section 37(1) of the Act which reads as:-

*'Every manager appointed under this Act shall, within a period of three months from the date of his appointment, deliver to the Court an inventory of the immovable property belonging to the mentally disordered person and of all assets and other movable property received on behalf of the mentally disordered person, together with a statement of all claims due on and all debts and liabilities due by such a person.*

However, it is also clear that even an appointment of one as 'manager' shall not authorize him any other power except that of 'managing the property'.

9. In the instant matter the '**Court of Protection**' has passed the order, referred above, whereby:

*"I have left no option except to allow the prayer of the applicant by appointing him as guardian/Manager of Azhar Mukhtar in order to look after the matters of Azhar Mukhtar by acting his guardian"*

10. There can be no denial to the fact that asset/property of Mr. Azhar Mukhtar (mentally disordered) is the amount, lying with the Nazir of this Court but the order of the '**Court of Protection**', nowhere, specifies the specific appointment of Mr. Arif Mukhtar as '**manager**' for such asset/property of the Azhar Mukhtar (mentally disordered person). An order authorizing one to '**look after the matters of mentally disordered person by acting as his guardian**' shall not dress such person (guardian) with the power and authority, so specifically meant to be exercised by the '**manager**'.

11. Let me make it clear that the said assets of the Azhar Mukhtar (mentally disordered person), lying with Nazir of this Court, shall require an order from the Court of Protection with regard to its '**management**' and in absence thereof the **assets** of mentally disordered person cannot be given to said '**guardian**'. The Court of Protection is required to process with any such application while keeping in view that it (Court of Protection) is the ultimate guardian of the property of the mentally disordered person as the status of a person, not capable to manage his affairs and property, is not more than a '**child**' hence similar caution must be shown by the Court of Protection while dealing with any such application(s).

12. Accordingly, the Arif Mukhtar is required to move the Court of Protection to file proper application for his appointment as '**manager**'

for the assets (amount lying with Nazir, duly invested in Govt. profitable scheme) which the Court of Protection shall decide strictly in accordance with provisions of the Act specifying limitations of the '**manager**', with reference to the relevant provisions, meant and enacted for such purpose. I do not want to make any comments on break-up statement, so supplied by the Advocate for plaintiff showing/claiming expenses on mentally disordered plaintiff from January 2014 to February 2012 (12 months) whereby an amount of Rs. 37,26,282/- is shown to have been spent during such period. This makes monthly expenses as Rs.310523.5/-, towards '*cost of maintenance* (Sec. 2(d) of the Act)' of mentally disordered person alone and seems to be excessive, however,, since issue is also to be addressed and attended by the '*Court of Protection*', therefore, it is left open to such Court as establishing of such Court is nothing but to protect the '**mentally disordered person**'. The present applicant has been seeking release of whole the amount (assets of mentally disordered person) which the Court of Protection can grant under Section 36(1) of the Act but within limitations of subsection (2) thereof which reads as:-

**"(2). The permission under proviso to sub-section (1) may be granted subject to such conditions or restrictions as the Court may think fit to impose."**

13. Accordingly, it needs not be mentioned that the Court of protection shall also have complete regard to provision of Section 36(1), (2) and 40 of the Act while passing any order in this regard. Since the matter pertains to care and maintenance of a mentally disordered person hence the Court of Protection, on approach of said

Arif Mukhtar in said matter, shall decide the same within a short possible time not more than a month.

14. Accordingly, the application (CMA No. 6342/2015) and reference, made by the Nazir, are disposed of in terms, stated above.

15. While parting, it is made clear here that the Nazir shall make compliance of the order of Court of Protection and will deliver the said assets into management of the '**manager**', if appointed or as the Court of Protection orders, in the best interest of the mentally disordered.

JUDGE