

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
M.A. No.73 of 2022

Date: Order with signature of Judge

1. For orders on MA No.5056/2022
2. For hearing of main case

29.5.2023

Mr. Umer Farooq Khan, Advocate for the appellant

M/s. Asim Iqbal and Sofia Saeed Shah, Advocates for
the respondent No.1

Ms. Lubna Pervaiz, Advocate for the respondent No.2
.X.X.X.X.

1. The appellant has presented this appeal under section 46 of the Mental Health Ordinance, 2001 against the order dated 27th May 2022 passed in Mental Health Petition No. 03 of 2017 by the Xth Additional District & Sessions Judge, Karachi (East).

2. Mental Health Petition No. 03 of 2017 was preferred by the respondent No.1 and the respondent No.2 under section 29 read with Sections 30, 32 and 34 of the Mental Health Ordinance, 2001 seeking the guardianship of their brother one Khalid Bin Azad and which Mental Health Petition which was granted vide order 20.11.2018. It seems that thereafter the appellants and the proposed guardian in this matter have choose to file an application under sections 37, 41 and 43(2) of the Mental Health Ordinance, 2001 seeking appointment of one Tariq Bin Azad as additional proposed guardian.

3. By an order dated 27.05.2022 the appellants' application was dismissed by the Xth Additional District & Sessions Judge, Karachi(East) on the grounds that the provision of Sections 37,41 & 43(2) of the Mental Health Ordinance, 2001 only permit the removal of an additional guardian

and the appointment of a new guardian in his place and does not permit the court to appoint an additional guardian.

4. The Appellant impugns the order dated 27 May 2022 on the grounds that sufficient information was available on the record to decide the application and the learned Xth Additional District & Sessions Judge, Karachi (East) has incorrectly refused to exercise her jurisdiction to appoint the proposed guardian as an “additional guardian”.

5. Conversely the counsel for the respondents have argued that the Xth Additional District & Sessions Judge, Karachi(East) has correctly passed the impugned order as sub-section (3) of Section 41 does not permit the Court to appoint an additional guardian and at best the jurisdiction to be exercised by the Court was to remove the existing guardians and appoint a new guardian in his stead.

6. In response the Advocate for the appellant at a belated stage informed the Court that the Mental Health Ordinance, 2001 under which the respondent No.1 and the respondent No.2 had preferred the Mental Health Application and under which the Appellant has preferred an appeal has been repealed by the Sindh Mental Health Act, 2013 and as such the proceedings should all fail. Neither the counsel for the appellant nor the Counsel for the respondents No.1 and 2 advanced any citations to support their contentions.

7. I have heard the learned Counsel for the appellant and the respondents and have perused the record.

Section 41 of the Mental Health Ordinance 2001 states that:

“41. Appointment of a new manager or guardian:-

- (1) The manager of the property of a mentally disordered person may resign with the permission of the Court, or for sufficient cause and for reasons to be recorded in writing, be removed by the Court and such Court may appoint a new manager in his place.
- (2) Any manager removed under sub-section (1) shall be bound to deliver the charge of all property of such a person to the new

manager, and to account for all monies received or disbursed by him.

- (3) The guardian of the person of a mentally disordered person may resign with the permission of the Court, or for sufficient cause and for reasons to be recorded in writing, be removed by the Court and such Court may appoint a new guardian in his place.”

8. A plain reading of this section indicates that the powers conferred on the Court after the appointment of a guardian are to remove the guardian so appointed and appoint another to replace the one removed. Admittedly the appellant did not move such an application and hence the learned Xth Additional District & Sessions Judge, Karachi(East) correctly held that she did not have the power to appoint an additional guardian and has correctly dismissed the application as not maintainable. Needless to say, such finding cannot preclude the appellants from applying to the Court for the removal of the respondent No.1 and the respondent No.2 as guardians and to have another person appointed in his stead if they consider it appropriate to do so.

9. Regarding the final contention as argued by the Counsel for the appellants that the Mental Health Ordinance, 2001 was repealed by Mental Health Act, 2013 and in fact the proceedings as well as the application has been moved under the old law which has now been repealed. This fact is correct. I have examined subsection (1) of Section 61 of the Sindh Mental Health Act, 2013 and the provisions of the Mental Health Ordinance, 2001. Subsection (1) of Section 61 of the Mental Health Act, 2013 contains a cause which is reproduced hereunder:

61. (1) The provisions of the Mental Health Ordinance, 2001 applicable to the Province of Sindh are hereby repealed.

10. While I have already held that the appeal on merits was not maintainable, it is apparent that the appeal, and for that matter the Mental Health Petition No.3 of 2017 was filed, presented and heard under the wrong provisions of law by the appellants by filing this appeal and also by the respondent No.1 and the respondent No.2 in filing Mental Health

Petition No. 03 of 2017. As this issue of the legality of the maintainability of Mental Health Petition No.3 of 2017 was not raised in the appeal and much to the contrary the appeal was itself filed under the Mental Health Ordinance, 2001 which had been repealed. I will refrain from passing any decision on this issue and the parties are at liberty to raise such objections at a proper forum in accordance with law.

11. In the circumstances, this appeal not being maintainable is dismissed and the order dated 27 May 2022 passed in Mental Health Petition No. 03 of 2017 by the Xth Additional District & Sessions Judge, Karachi (East) dismissing the application of the appellants that had been maintained by them under the provision of Sections 37, 41 and 43(2) of the Mental Health Ordinance, 2001 for the appointment of an additional guardian is upheld with no order as to costs.

12. Needless to say, this decision cannot preclude the appellants from applying to the Court for the removal of the respondent No.1 and the respondent No.2 as guardians and to have another person appointed in his stead if they consider it appropriate to do so.

Judge