

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Bench - III:

Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Jamal Khan Mandokhail
Mr. Justice Athar Minallah

Civil Petition No. 1393-L of 2020

(Against the judgment of Lahore High Court, Lahore,
dated 18.06.2020 passed in F.A.O No. 512/2013)

Malik Arshad Hussain Awan

... Petitioner

Versus

M/s United Bank Limited

... Respondent

For the Petitioner: Ms. Saba Saeed Sheikh, ASC
 Mr. Syed Fayyaz Ahmad Sherazi, AOR

For the Respondent: Mr. Jam Khurshid Ahmed, ASC

Date of hearing: 22 February 2024

JUDGMENT

Syed Mansoor Ali Shah, J. – Brief facts of the case are that the respondent Bank filed a recovery suit under the Financial Institutions (Recovery of Finances) Ordinance, 2001 ("**FIO**") against the brother and father of the petitioner on 03.01.2011. While the father of the petitioner contested the suit by filing his application for leave to defend, the brother of the petitioner was proceeded against ex-parte *vide* order dated 10.02.2011. Subsequently, the petitioner filed an application under Rules 3 and 15 of Order XXXII of the Code of Civil Procedure, 1908 ("**CPC**") before the Banking Court seeking his appointment as *guardian for the suit* of his brother who he asserted was suffering from mental infirmity and was of unsound mind. The said application was dismissed by the Banking Court on merits *vide* order dated 16.09.2013 on the ground that there was no valid document on the record to establish that the brother of the petitioner was of unsound mind or suffering from any mental infirmity. Aggrieved of the said order, the petitioner filed an appeal before the High Court under Section 22 of the FIO, which was dismissed through judgment dated 18.06.2020 ("**impugned judgment**"). The High Court maintained that the petitioner's brother had to be first adjudged as mentally disordered by the Court of Protection under the

provisions of the (*Punjab*) Mental Health Ordinance, 2001¹ ("MHO") before the petitioner could be entitled to file an application under Order XXXII, CPC, before the Banking Court. Hence, the instant petition for leave to appeal.

2. We have heard the learned counsel for the parties and have examined the laws and the record of the case.

3. The question involved in the instant petition is whether a Banking Court can appoint a *guardian for the suit*, under Rules 3 and 15 of Order XXXII of the CPC, for a defendant who by reason of "unsoundness of mind" or "mental infirmity" is incapable of protecting his interests, or whether the defendant has to be first adjudged to be a person of unsound mind and get a *guardian* appointed under Sections 29 and 32 of the MHO by the Court of Protection and only then can an application for the appointment of his *guardian for the suit* under Order XXXII of the CPC be entertained by a Banking Court?

4. The instant petition emanates from a suit for recovery filed under the FIO which prescribes a special mechanism for dealing with recovery of finance by the financial institutions from the customers and also establishes special courts, i.e., the Banking Courts for this purpose. Section 4 of the FIO gives its provisions overriding effect over any other law for the time being in force. Section 7 stipulates the powers of Banking Courts and grants them all powers vested in a Civil Court under the CPC in the exercise of its civil jurisdiction. Furthermore, Section 7(2) of the FIO prescribes the Banking Court to follow the procedure laid out in the CPC in all matters with respect to which the procedure has not been provided for in the FIO. Therefore, for the procedure as to how a person of unsound mind or mental infirmity can file or defend a suit filed under the FIO, recourse has to be made to Rule 15 of Order XXXII of the CPC, which is reproduced hereunder for ready reference:

Order XXXII

Rule 15. Application of rules to persons of unsound mind. The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

(*Underlining is ours*)

¹ Ordinance No. VIII of 2001 - as amended for the Province of Punjab on 20.02.2001

The above cited Rule 15 of Order XXXII extends the applicability of the procedure given in Rules 1 to 14 to suits by or against persons of unsound mind. Rule 1 of Order XXXII provides that every suit by a minor shall be filed through a *next friend* and where a minor is the defendant in a suit, Rule 3 mandates the court to appoint his *guardian for the suit*. Rule 4(2) states that where a minor has a *guardian* appointed by a competent authority, such a *guardian* shall act as his *next friend* or be appointed his *guardian for the suit*, unless the court for the reasons to be recorded decides otherwise.

5. Rule 15 provides that Rules 1 to 14 of Order XXXII shall apply to (i) persons adjudged to be of unsound mind and (ii) persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued. The said Rule, therefore, acknowledges two categories of persons of unsound mind: one who is already adjudged by a court of competent authority as a person of unsound mind; and the other, who is not so adjudged but the court itself on inquiry finds that the person is of unsound mind. In both cases, the court is to appoint a *guardian for the suit* for such a person. In the first category, in view of the provisions of Rule 4(2) the court is to ordinarily appoint the same person as *guardian for the suit* who has been appointed the guardian under the MHO; while in the second, the court may appoint any suitable person who has no interest against the person of unsound mind. In the second category, the court cannot decline to appoint the *guardian for the suit* merely for the reason that the defendant has not been so adjudged under the MHO by the competent authority.

6. The mandate and wisdom of Order XXXII of the CPC is to ensure smooth continuation of proceedings and expeditious trial of suits wherein a minor or a person of unsound mind sues or is sued. The concept of *next friend* or *guardian for the suit* is to provide proper representation to a minor or a person with unsound mind during litigation, in order to protect his interests; therefore, their role is limited to the particular litigation or legal action for which they are appointed. *Guardian for the suit* is also called as "*Guardian ad Litem*"; the Latin term "*ad litem*" means "for the lawsuit". Thus, *guardian for the suit* is appointed by a court specifically for the duration of legal proceedings and

his role is temporary and limited to the particular lawsuit or legal matter. This might involve making decisions about litigation, settlement or other legal strategies. A guardian of the person or property of a minor or a person of unsound mind, on the other hand, is a person legally appointed to manage all the affairs of another person. Such a *guardian* has the authority to make decisions on behalf of the said person in various aspects of life, including financial, medical, and personal matters.

7. Now let us examine the scope and extent of MHO. This law deals with the care and treatment of mentally disordered persons, management of their property and other related matters. Under Section 29 of the MHO, whenever a person is possessed of property and is alleged to be mentally disordered, the Court of Protection may, upon an application by any of his relatives filed after having obtained consent in writing of the Advocate-General, direct an inquiry for the purposes of ascertaining whether such person is mentally disordered and incapable of managing himself, his property and his affairs. In case any person is found to be mentally disordered and incapable of taking care of himself, the Court of Protection appoints a *guardian* under Section 32 of the MHO. A *guardian* so appointed under MHO is someone who is legally appointed to take care of and manage the personal and property interests of a mentally disordered person.

8. The scope of the MHO is thus different and broader when compared to that of Order XXXII of the CPC. It provides for care and treatment of mentally disordered persons, for the management of their properties and their affairs and to encourage community care of such persons. It is not limited only to representation before court in a suit. While the MHO does not specifically provide for representation before court while suing or being sued but it goes without saying that once a *guardian* is appointed by the Court of Protection he is to ordinarily act as the *next friend* and the *guardian for the suit* for the purposes of Order XXXII of the CPC (see Rule 4(2) of the said Order). The important thing is that where no such *guardian* has been appointed under the MHO, it does not preclude the Civil Court, or the Banking Court in the present case, to proceed and appoint a *guardian for the suit* under Order XXXII, so that

the interest of a mentally disordered person is protected before the court of law and also ensures the continuation and efficient conclusion of the trial. The Banking Court, therefore, has the power to determine the unsoundness of mind or mental infirmity of a person on an inquiry under Order XXXII of the CPC based on the evidence and appoint a *guardian for the suit* for the limited purpose of representation before the court of law, without first seeking an appointment of a *guardian* under the MHO. The High Court has, therefore, committed a legal error by dismissing the appeal filed by the petitioner holding that the petitioner's brother had to first be adjudged as a person of unsound mind under the MHO before an application could be moved under Order XXXII before the Banking Court.

9. For the above reasons, the instant petition is converted into appeal and allowed by setting aside the impugned judgment. The matter is remanded to the High Court to decide the appeal of the petitioner on merits and in accordance with the provisions of Rule 15 of Order XXXII of the CPC, as expounded above. We are sanguine that the said appeal will be decided expeditiously.

Judge

Judge

Judge

Islamabad
22nd February, 2024
Approved for Reporting.
Sadaqat