District: Chattogram

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Present

Mr. Justice Sardar Md. Rashed Jahangir

Civil Revision No. 2354 of 2020

In the matter of :
Harun Ur Rahim and another
… Petitioners
-Versus-
Gulzar Begum and others
…Opposite parties
Mr. Mohammad Mijanur Rahman, Advocate with
Ms. Jobaida Gulshan Ara, Advocate
…For the petitioners
Mr. Sankar Prasad Dey, Advocate
…For the opposite parties.

Heard on: 23.01.2025, 29.01.2025, 05.02.2025 and 19.02.2025.
Judgment on: 17.03.2025.

At the very outset, learned Advocate Mr. Mohammad Mijanur Rahman by filing an application for conversion of the instant civil revision into a miscellaneous appeal submits that at the time of preparation of the case inadvertently it was missed from the notice of learned Advocate for the petitioner that there is

a specific provision under section 20(5) of the মানসিক স্বাস্থ্য আইন, ২০১৮ as well as under section 83 of the Lunacy Act, 1912 providing an appellate forum. He further submits that if the petitioners could prove that otherwise they have a good arguable case, then they should not be refused the remedy on the technical ground that a revisional application having been filed instead of miscellaneous appeal. He further submits that all the criterion and precondition of filing an appeal is available in the record of the present case and as such, for ends of justice, the instant proceeding should be allowed to convert into a miscellaneous appeal.

On the other hand, Mr. Sankar Prasad Dey, learned Advocate for the opposite party submits that since it is a special law, thus, the remedy by way of conversion is not available to the petitioner and as such, he opposes the prayer for the conversion.

Heard both the parties, perused the application and other materials. The application is allowed upon consideration that in

the facts and circumstances, it appears that the present proceeding could be a competent miscellaneous appeal.

This instant miscellaneous appeal (converted) is directed against the judgment and order dated 01.11.2020 passed by the District Judge, Chattogram in Lunatic Miscellaneous Case No. 204 of 2010, allowing the miscellaneous case thereby appointing the petitioner of the miscellaneous case as guardian of the person and his property upon declaring Mahmud Ahmed as lunatic.

The case of the present opposite party No. 1 in short are that the scheduled property was belonged to Al-haj Abdur Rahim and while he was in enjoyment dedicated the property through a deed of waqf on 18.01.1993, which has been registered as Waqf-Al-Awlad being EC No. 17994. Mahmud Ahmed along with others are the beneficiaries of the waqf. It is further case of the petitioner that she is the mother of lunatic, Mahmud Ahmed, who became sick in the year, 1990. Thereafter, several doctors have been consulted and after getting 7 to 8 years treatment it was detected

that he has been suffered from mental illness. In the year, 1999, it was caused to get treatment from mental health specialist, Dr. Safiul Hasan. Thereafter from 2006, he was under the treatment of Dr. A.H.M. Mohammad Firoz, Director of National Mental Health Institute and thereafter from the month of May, 2009, he was under treatment of Dr. Mohammed Mostafa, Psychiatrist Consultant. It is further alleged that he has been suffering from 'Bipolar Disorder' since 1990 and he has no ability to look after himself or his property and as such, has been getting treatment under the supervision of petitioner, thus, a guardian should be appointed to look after the lunatic, Mahmud Ahmed and his property.

The opposite party Nos. 1 and 4 appeared into the proceeding and contested by filing written objection denying all the averments of the petitioner of lunatic miscellaneous case, alleging interalia that the case is a false one and having been filed with vested interest.

In the proceeding petitioner, Gulzar Begum was examined as P.W.1 in witness box and her examination was started on 17.01.2012 before the Court. Thereafter, due to prayer for adjournment, examination of Gulzar Begum cannot be completed in the witness box of the Court. On 27.02.2018, an application was filed before the District Judge to examine the P.W. 1, Gulzar Begum through commission. Accordingly, an Advocate Commissioner was appointed to complete the examination of P.W. 1 and thereafter, she was examined, but no one take the opportunity to cross-examine her.

Learned District Judge upon receiving the report of the Advocate Commissioner together with the evidence and exhibits as has been exhibited in front of the Advocate Commissioner and thereafter, upon considering the materials before him by his order dated 01.11.2020 allowed the miscellaneous case declaring that Mahmud Ahmed is a lunatic and the petitioner, Gulzar Begum was appointed as guardian to look after the person and property of her lunatic son, Mahmud Ahmed.

Mr. Mohammad Mijanur Rahman, learned Advocate appearing for the appellant submits that there is no authenticated medical certificate in the record to prove that Mahmud Ahmed is lunatic. He next submits that Mahmud Ahmed used to take part in the activities of waqf, thus, he cannot be termed as lunatic holding that he is incapable to manage himself or his property. Learned District Judge without considering the above aspect by a non-speaking order declared that Mahmud Ahmed is a lunatic and Gulzar Begum is appointed as guardian of the person and properties concerned.

On the other hand, Mr. Sankar Prasad Dey, learned Advocate for the opposite party submits that under section 20(4), of the মানসিক স্বাস্থ্য আইন-২০১৮ Civil Surgeon of the concerned jurisdiction submitted a report before the District Judge stating that the person concerned is suffering from 'Bipolar Disorder'. Apart from that considering the Exhibit-'Gha', Autistic Registration Certificate issued by the Social Welfare Directorate, the prescription of the Dr. A.H.M Feroz, Exhibit-'Uma series' and

prescription of Dr. Mostafa, Exhibit-‘Cha’, learned District Judge arrived at the conclusion that Mahmud Ahmed is a lunatic and is incapable of manage himself and his property in person. He further submits that all the documents having been exhibited as evidences without any objection and now the appellants have no scope to raise objection against those exhibits.

Heard learned Advocates of both the parties, perused the converted miscellaneous appeal together with the lower Courts’ record.

It appears that learned District Judge in his order dated 01.11.2020 decided the case by a non-speaking order, for ready reference the order is reproduced herein below:

> আদেশ নং-৮২, তাং-১/১১/২০২০
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> অদ্য অধিঃ শুনানী ও দরখাস্তকারীর গত ২৯/০১/২০২০ ইং তারিখের সহ-প্রার্থীক হওয়ার দরখাস্ত শুনানীর জন্য।
>
> প্রার্থীক হাজিরা সহ দরখাস্তের বিরুদ্ধে লিখিত আপত্তি দাখিল করিয়াছে।
>
> ৪নং প্রতিপক্ষ দরখাস্ত দ্বারা (P.W.-1) কে জেরা করার প্রার্থনা করিয়াছে।
>
> শুনানীর জন্য লওয়া হইলে।

৪নং প্রতিপক্ষ P.W.১ কে জেরা করার দরখাস্ত নামঞ্জুর করা হইল।

“দরখাস্তকারীর গত ২৯/১০/২০২০ ইং তারিখের সহ-প্রার্থীক হওয়ার দরখাস্ত ও দাখিলীয় আপত্তি এবং নথি পর্যালোচনা করিলাম। অত্র মামলাটি দীর্ঘ পুরাতন হওয়ায় সহ-প্রার্থীক হওয়ার দরখাস্ত নামঞ্জুর করা হইল। নথি আদেশের জন্য পেশ করা হইল।

Perused the record, deposition of petitioner P.W.1 Gulzar Begum on commission, report of the Advocate Commissioner and other documents filed by the petitioner.

P.W.1 Gulzar Begum stated in her deposition that her son Mahmud Ahmed is lunatic. As mother she looks after her said lunatic son and his properties mentioned in the schedule of the Misc. petition. As such the case is proved.

Hence, it is,

ORDERED

that this Misc. Case be allowed on contest. -

The petitioner Gulzar Begum is appointed as guardian to look after of the person and properties of the lunatic son Mahmud Ahmed.”

A non-speaking order itself is an illegality, without assigning any reason to arrive at the decision.

Now let us examine the materials or evidences on record led the District Judge in arriving at his decision. On 30.08.2010 Gulzar Begum being petitioner filed Lunatic Miscellaneous Case No. 204 of 2010 before the District Judge, Chattogram and accordingly, it was registered on the same date. Thereafter, on 20.09.2010 learned District Judge on perusal of the record held that it transpired that there is no medical certificate to be regarded the son of the petitioner, Mahmud Ahmed as lunatic. So without going through the medical examination it cannot be ascertained that the person in question is a lunatic and thereby a medical examination report from the Civil Surgeon, Cattogram was called for upon examination of the person in question by constituting a Medical Board and in the said order petitioner, Gulzar Begum was directed to produce her son before the Medical Board.

Upon receiving the order of learned District Judge, Civil Surgeon, Chattogram on 14.10.2010 constituted a Medical Board consisting of 3(three) members. On 20.10.2010, Mahmud Ahmed (in the certificate it was written as Mohammed Ahmed) was examined and the Medical Board in it's report dated 20.10.2010 employing the language as mentioned herein in below certified that:

"Mr. Mohammed Ahmed, 37 years, a nice gentleman is examined by the board. From the Medical records (produced before the Board), it is evident that he has been suffering from Bipolar affective disorder for last twelve years and at present he is admitted in psychiatry word of CMCH. He is under treatment and at present his mood is stable and he is well oriented of time, place and person and he has reasonable judgment and intellect at present".

Meaning thereby, according to the Medical Board, he was capable of managing himself and his property effectively.

On 17.01.2012, petitioner, Gulzar Begum was examined in the witness box, wherein she stated simply that Mahmud Ahmed is sick since 1990 and from 1999, he has been suffering from mental disease and received treatment from Dr. A.H.M Firoz and Dr. Mostafa, mental health specialist. In his said deposition, there was nothing specific that Mahamad Ahmed was incapable of managing himself and or his property.

Thereafter, 6-7 years has been elapsed, but Gulzar Begum was never went before the Court to examine herself in the witness box, rather on 27.02.2018 an application has been filed before the District Judge, through learned Advocate, sought for examining the petitioner through commission. The said application was allowed. Thereafter, Gulzar Begum was examined through commission (upon appointing an Advocate Commissioner) on 07.11.2018 and thereafter on 14.03.2019. In course of her examination, she exhibited Exhibit-'Gha' a certificate issued by the Social Welfare Directorate, a series of prescriptions issued by Dr. A.H.M Feroz which were exhibited as Exhibit-'Uma series'

and Exhibit-‘Cha’ the prescription of Dr. Md. Mostafa. No other witness except the P.W. 1 was examined.

On examination of the entire record it appears to this Court that the aforementioned are the materials on record upon which the District Judge possibly led himself to be arrived at the conclusion. It is already mentioned here that the order of the District Judge is a non-speaking one. Thus, there is hardly any scope to specify that relying upon which documents and evidences, the District Judge decided the case. However, all the materials before the Court having been mentioned in the judgment herein before.

Under section 60 of the Evidences Act, 1872, it is provided that-

“Oral evidence must be direct- Oral evidence must, in all cases whatever, be direct; that is to say-

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection."

From the aforesaid provision, it appears that the oral evidence within the meaning of section 60 of the Evidence Act, 1872 must be in all cases, whatever it may, be direct i.e. if it refers to an opinion or the grounds on which the opinion is held, must be the evidence of the person who holds that opinion or those grounds of opinion. Meaning thereby, if any opinion is expressed by any Specialist or Doctor through any certificate or prescription, it must be proved by the evidence of that person, who holds the opinion on those grounds.

In the case of Kutubuddin Ahmed Siddiky Vs. East Pakistan Industrial Development Corporation, reported in 27 DLR 433, a Division Bench of the High Court Division held as under:

> *" 9. It should, however, be pointed out that the question of admissibility of the Medical Certificate without calling the doctor who gave that certificate to bear witness in this case does not merely relate to the mode of proof but to the question of intrinsic admissibility of the certificate itself. It is no doubt true that under section 45 of the Evidence Act, when*

the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting, the opinions upon that point of persons specially skilled in such foreign law, science or art, are relevant facts. But section 60 makes it very clear that the evidence of such an opinion must be the evidence of the person who holds that opinion and he should be examined as a witness in the case.

10. The provision of section 60 is founded upon a cardinal principle of law of evidence, namely, that the evidence must always be direct and hear say evidence must be excluded. The provision of section 60 may be quoted as follows:

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11. This section makes it abundantly clear that even if the opinion of an expert on a point of science in which he is well versed is relevant, this opinion must be brought on record through his own testimony in Court. Such opinion can be proved by the production of the treatise which may contain such an

opinion in a case where the holder of the opinion is dead or cannot be found or has become incapable of giving evidence or whose presence cannot be enforced without unreasonable delay or expenses. Generally, in a proceeding like the instant case, a Medical Certificate is sought to be proved on behalf of such a person as was incapable of attending the Court during a certain period when the said person has been attacked with certain illness and been under the treatment of a Medical Practitioner during the said period. The nature of the illness and its seriousness are certainly relevant facts in such a case, and the opinion of a Medical Practitioner about the said facts is also relevant under section 45 of the Evidence Act. But the other facts which are sought to be proved by the said certificate can hardly be taken to be points of science on which the Court has to form an opinion within the meaning of section 45 of the Evidence Act. They really refer to facts "which could be seen" or "heard" or perceived by any other sense" within the meaning of section 60 of the Evidence Act and must be of the evidence of the

witness who says he saw, heard or perceived it. As we have already noticed, the opinion of the Medical Practitioner as to the nature of the illness and its seriousness shall, according to the provision of the said section 60, be the evidence of the person who holds that opinion. If such a fact or opinion is sought to be proved by a certificate given by a Medical Practitioner it really offends the rule against hearsay evidence.

12. Chief Justice Harries of Calcutta High Court in delivering the judgment of a Division Bench of the said Court in the case of Sris Chandra Nandy Vs. Sm. Annapurna Roy, A.I.R. 1950 Calcutta page 173 expresses himself in this regard in the following words :

"The Medical man who gave the certificate did not swear an affidavit and a medical certificate tendered in this manner is the worst form of hearsay evidence. By tendering the certificate the plaintiff informs the Court what the doctor says in the matter about her husband. She certainly could not give evidence that a doctor had told her verbally what was

in the certificate. Neither can she produce the certificate and make it evidence because it is merely what the doctor had told her in writing. The certificate is wholly inadmissible in evidence. That being so, the very basis of the Judge's order disappears and the order must consequently be set aside."

Similar view was taken by the Madras High Court in the case of R.M.Y.R.M. Palaniappa Chettiar and others Vs. Bombay Life Assurance Co. Ltd. A.I.R. 1948 Madras page 298 and was also followed in the case of T. N. Govindarajulu Vs. Narasimhan, in A.I.R. 1961 Madras page 158.

13. The question of admissibility of a Medical Certificate without the examination of the doctor giving that certificate was examined thoroughly by the High Court of Gujarat of the Indian jurisdiction in the case of Municipal Corporation of City of Ahmedabad Vs. Gandhi Shantilal Girdharilal and another A.I.R. 1961 Gujarat page 196. After referring to a number of decisions of various High

Courts, Shelat J. (as he then was) observed as follows:

"It is clear from the opinions expressed in these decisions that the principle is that under section 45 of the Evidence Act it is the opinion of the expert that the fact is made relevant and not the document in which it is expressed or communicated. Mr. Vakil, however, contended that an opinion can be expressed both orally as well as in writing. When an expert is called as a witness he expresses his opinion while in the witness box. If such expression of opinion is admissible by reason of section 45 of the Evidence Act there should be no reason why an expression of opinion in writing in a certificate cannot be relevant and admissible. There is, however, a misapprehension in the argument, for it is the opinion and not the document in which such an opinion is recorded that is admissible. When a Medical Expert gives his evidence from the witness evidence and it is that opinion which is made relevant under section 45 of the Evidence Act. The Certificate, therefore, does not prove itself. The learned Judge, therefore was in

error in admitting the certificate and also in relying thereupon."

We are in respectful agreement with the view expressed in the above case."

Their Lordships of the High Court Division upon examination of the provision of section 60 read with section 45 of the Evidence Act, 1872 held that mere production of certificate does not prove any opinion, unless the person who holds the opinion is examined as a witness in the witness box. Meaning thereby, the fact of the medical certification which were sought to be proved to the effect that the person concerned was going through under the treatment for certain disease; so far it relates to Exhibit- 'Gha' 'Uma-series' and 'Cha' are concerned, nothing but opinions of some persons or specialists and those opinions must be proved or can be admissible in evidence by examining the concerned person holding the opinion upon examining or observing the person personally.

In view of the provision of section 60 of the Evidence Act, the Exhibit-‘Gha’, ‘Uma’ and ‘Cha’ are clearly inadmissible in evidence for the purpose of proving doctors’ opinion regarding the fact that the person concerned is suffering from mental disease or lunacy, as has been decided by the District Judge, Chattogram.

Apart from that through the report of the Medical Board constituted under the Courts direction dated 20.10.2010, it was certified that Mahmud Ahmed was well oriented of time, place and person and he possessed reasonable judgment and intellect at the time of examination.

Moreover, the petitioner, Gulzar Begum aged about 85 years while was examined through commission on 07.11.2018 was incapable of moving independently. Thereafter 7(seven) years has been elapsed after her deposition, she is arrived at the age of 92 and probably it is not possible for herself to look after or take care of her son or his property.

In the premise above, this Court is of the opinion that the judgment and order dated 01.11.2020 is not sustainable in law.

Accordingly, the said judgment is set aside and the case is sent back to the District Judge, Chattogram to hold inquiry or investigation in view of the provision of the মানসিক স্বাস্থ্য আইন, ২০১৮ and if after investigation it is found that the person concerned is genuinely incapable of managing himself or his property, and if her mother is found to be incapable, then there are other provisions in the Act which can be resorted, suitable for the welfare of the person.

In the facts and circumstances, the converted miscellaneous appeal is hereby allowed and the case is sent back to the District Judge, Chattogram to decide afresh after notifying all the concerned persons and taking all the measures provided under the law.

Send down the Lower Courts' record.

Communicate the judgment and order at once.

Obaidul Hasan/B.O.