

*Judgment Sheet*

IN THE HIGH COURT OF SINDH AT KARACHI

**II<sup>nd</sup> Appeal No. 29 of 2022**

**II<sup>nd</sup> Appeal No. 30 of 2022**

Date	Order with signature of Judge
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For orders as to maintainability :

Mr. Qamar Iqbal, advocate for the appellant in both appeals.

Mr. Muhammad Azhar Faridi, advocate for respondent No.2 in II<sup>nd</sup> Appeal No.29/2022 and respondent in II<sup>nd</sup> Appeal No.30/2022.

Syed Mohsin Hussain Shah, A.A.G. Sindh.  
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Date of hearing : 13.09.2022.

**J U D G M E N T**

**NADEEM AKHTAR, J.** – The subject matter, parties and their learned counsel and the facts in both these appeals are common, therefore, the same were heard together and are being disposed of through this common judgment. The subject matter of these appeals is Flat No.102, First Floor, Uzma Apartments situated on Sub-Plot No.S-2, Plot No.6, Sheet No.8, Civil Lines Quarters, Karachi (**'suit property'**). II<sup>nd</sup> Appeal No.29/2022 has arisen out of Suit No.698/2004 filed by the appellant Mst. Khalida against respondents Mst. Shakira Khatoon and Mst. Raj Kumari for specific performance and injunction that was dismissed by the trial Court, and Civil Appeal No.206/2014 filed by her against such dismissal was dismissed by the appellate Court. Whereas, II<sup>nd</sup> Appeal No.30/2022 arises out of Suit No.1266/2014 filed by the respondent Mst. Raj Kumari against the appellant Mst. Khalida for declaration, possession, mesne profits and permanent injunction that was decreed by the trial Court, and the appeal filed by the appellant against the said decree was dismissed by the appellate Court. Through the instant second appeals, the appellant has impugned the concurrent findings of the learned Courts below in the above Suits.

2. The case of the appellant before the trial Court in her Suit No.698/2004 was that she entered into an agreement dated 14.02.2001 (**'the agreement'**) with the respondent Mst. Shakira Khatoon whereby the latter agreed to sell the suit property to her in consideration of Rs.2,000,000.00 ; an advance part payment of Rs.650,000.00 was made

by her to the respondent at the time of execution of the agreement when possession of the suit property was handed over to her ; since the original title documents were lying at the relevant time with the respondent Mst. Raj Kumari, an amount of Rs.1,250,000.00 was to be paid by the appellant to Mst. Raj Kumari and the balance amount of Rs.100,000.00 was to be paid by her to Mst. Shakira Khatoon at the time of execution of the sale deed ; the appellant offered the above mentioned amounts to the respondents on several occasions, but they avoided to receive the same on the pretext that a settlement was being negotiated by them with the bank with whom the suit property was lying mortgaged ; and, despite repeated requests by the appellant, the sale in respect of the suit property was not completed in her favour by Mst. Shakira Khatoon. In this back ground the above Suit was filed by her seeking a direction against the respondents to execute the sale deed in respect of the suit property in her favour. Subsequently, an amended plaint was filed by the appellant wherein, in addition to the relief sought by her, she also sought a declaration that the sale agreement, sale deed and power of attorney executed in respect of the suit property in favour of Mst. Raj Kumari be declared as null and void and be cancelled.

3. The above mentioned Suit was originally filed by the appellant against Mst. Shakira Khatoon and the President and Manager of the mortgagee-bank viz. Allied Bank of Pakistan Limited (**‘the bank’**). However, with the consent of the parties, Mst. Raj Kumari was impleaded in the Suit and the plaint was amended accordingly. Mst. Shakira Khatoon did not file her written statement and the Suit proceeded ex-parte against her. Whereas, Mst. Raj Kumari filed her written statement claiming that she was the owner of the suit property by virtue of a registered sale deed dated 23.06.2006 executed in her favour after the release of the suit property by the mortgagee-bank ; the agreement between the appellant and Mst. Shakira Khatoon was void as a mortgage decree in respect of the suit property was in the field when the agreement was allegedly executed ; the suit property was purchased by her in pursuance of the mortgage decree passed on 20.04.2000 by Banking Court No.I at Karachi in Suit No.549/1998 filed by the bank against the principal borrower and Mst. Shakira Khatoon ; Mst. Shakira Khatoon had no right or authority at the relevant time to execute the

agreement in favour of the appellant ; and, the agreement was void and collusive and was executed only to frustrate the said mortgage decree.

4. In view of the divergent pleadings of the appellant and Mst. Raj Kumari, seven issues were settled by the trial Court whereafter the parties examined their respective witnesses and produced relevant documents in support of their respective claims. After examining the evidence of the parties and hearing the arguments advanced on their behalf, the Suit was dismissed by the trial Court by holding that it was barred under Section 23(2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001, and the dismissal was maintained by the appellate Court as noted above. It was noticed by the appellate Court that in the execution proceedings before the Banking Court, the applications filed by the appellant under Order XXI Rule 58 CPC and under Section 151 CPC seeking release of the suit property from attachment and for depositing the decretal amount in Court were dismissed by the Banking Court on 31.01.2006 and 15.05.2009 on the ground that the agreement in respect of the suit property could not be executed in favour of the appellant in view of the prior mortgage decree. It was also noticed by the appellate Court that the aforesaid orders of dismissal of her applications were not challenged by the appellant any further.

5. After dismissal of the appellant's Suit No.698/2004, Mst. Raj Kumari filed Suit No.1266/2014 against the appellant wherein she pleaded the above facts that were pleaded by her in her written statement in the appellant's Suit No.698/2004 that she had purchased the suit property through a registered sale deed and the possession of the appellant in respect thereof was illegal. It was prayed by her in this Suit that she may be declared as the lawful owner of the suit property ; the possession of the appellant in respect thereof be declared as illegal ; and, the appellant be directed to hand over the vacant and peaceful possession of the suit property to her and also to pay mesne profits to her. The appellant filed her written statement in this Suit whereafter nine issues were settled by the trial Court. The Suit was decreed by the trial Court as prayed for by Mst. Raj Kumari, and the appeal filed by the appellant against the decree was dismissed by the appellate Court.

6. A joint statement dated 31.05.2022 was filed by the appellant and Mst. Raj Kumari before the executing Court in Execution Application

No.02/2017 filed by Mst. Raj Kumari for execution of the decree passed in her favour in her Suit No.1266/2014. A certified copy of the aforesaid joint statement has been placed on record by learned counsel for Mst. Raj Kumari along with his statement dated 29.08.2022. The said joint statement states that the appellant / judgment debtor had agreed to vacate the suit property by handing over the peaceful and physical possession thereof to Mst. Raj Kumari / decree holder within forty five (45) days and to withdraw the instant appeals filed by her. On 06.09.2022, another statement was filed by learned counsel for Mst. Raj Kumari along with certified copies of the order / diary sheet dated 31.05.2022 in the above mentioned Execution Application, the bailiff's report dated 27.05.2022 filed therein, and the writ of possession issued therein by the executing Court with permission to break open the locks with police aid.

7. It is contended by learned counsel for Mst. Raj Kumari that in pursuance of the aforesaid joint statement filed by the parties and the order passed thereon by the Executing Court, the possession of the suit property has already been handed over by the appellant to Mst. Raj Kumari and due to this reason, the present appeals have become infructuous. He further contends that the appellant had undertaken before the Executing Court to withdraw the present appeals that are now liable to be dismissed as she has not withdrawn the same despite her said undertaking. On the other hand, it is contended by learned counsel for appellant that the aforesaid joint statement was filed by the appellant under some misconception and she has now filed an application before the Executing Court under Section 12(2) CPC for setting aside the order passed on the said joint statement. He, however, concedes that the order passed by the Executing Court on the said joint statement is still in the field and has not been set aside or even stayed up till now. He further concedes that possession of the suit property has been taken over from the appellant in the execution proceedings. In any event, the signing and filing of the said joint statement by the appellant is not denied by her. The question whether or not the order passed on the said joint statement is liable to be set aside under Section 12(2) CPC will be decided by the Executing Court. Needless to say the application filed in this behalf by the appellant shall be decided by the Executing Court strictly in accordance with law and without being prejudiced with any of the observations made and or the findings contained in this judgment.

8. It is an admitted position that the above written undertaking to handover the possession of the suit property to Mst. Raj Kumari and to withdraw these appeals was given by the appellant before the Executing Court on which an order was passed by the said Court ; and, the said undertaking and the Court's said order have been acted upon to the extent that the possession of the suit property has been taken over from the appellant. In view of the said written undertaking admittedly given by the appellant before the Executing Court and the order passed thereon, she was bound to withdraw the present appeals. However, as she is not willing to withdraw the appeals, I have heard learned counsel for the parties on the merits of these cases and have examined the material available on record, particularly the impugned judgments and decrees passed by the learned courts below.

9. Suit No.549/1998 filed by the mortgagee-bank against Mst. Shakira Khatoon in respect of the suit property was decreed by the Banking Court on 20.04.2000 and the mortgage decree was drawn on 27.04.2000 ; whereas the agreement in respect of the suit property was executed by Mst. Shakira Khatoon and the appellant on 14.02.2001 during the pendency of Execution Application No.149/2000 filed by the mortgagee-bank for execution of the said mortgage decree. The above dates are not disputed by the appellant. Sub-Section (2) of Section 23 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, provides that after pronouncement of the judgment and decree by the Banking Court, no judgment debtor shall, without the written permission of the Banking Court, transfer, alienate, encumber or part with possession of any asset or property, and any such transfer, alienation, encumbrance or other disposition by the judgment debtor in violation of this Sub-Section, shall be void and of no legal effect. It is an admitted position that the agreement was executed by the judgment debtor (Mst. Shakira Khatoon) after passing of the mortgage decree. Thus, the agreement was void abinitio and the Suit filed by the appellant on the basis thereof was clearly barred under Section 23(2) *ibid*, as rightly held by the learned Courts below. In such circumstances, there was no question of granting the discretionary relief of specific performance to Mst. Shakira Khatoon and as such her Suit was rightly dismissed.

10. On the other hand, the respondent Mst. Raj Kumari purchased the suit property from Mst. Shakira Khatoon through a sale deed executed and registered in her favour on 23.06.2006 after issuance of the 'Clearance Certificate' on 22.06.2006 by the mortgagee-bank / decree holder. She had successfully discharged the burden in proving her claim in her Suit before the trial Court which burden could not be dislodged by the appellant. Therefore, her Suit was rightly decreed.

11. In view of the above discussion, the concurrent findings of the learned Courts below do not suffer from any illegality or infirmity, and as such do not require any interference by this Court.

12. Foregoing are the reasons of the short order announced by me on 13.09.2022 whereby both these appeals and the applications pending therein were dismissed with costs throughout.

Office is directed to return the R & P of these cases forthwith to the learned trial / executing Court.

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J U D G E