

IN THE HIGH COURT OF SINDH, KARACHI
First Appeal No.57 of 2005
[Mst. Jabeen Shafiq v. M/s. Muslim Commercial Bank & others]

Present:
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Mohammad Abdur Rahman

Date of hearing:- 27.08.2025.

M/s. Muhammad Haseeb Jamali, Muzamil Hussain Jalbani, Muhammad Shahrukh Siddiqui and Kashan Khan, advocates for appellant.

M/s. Rizwan Ahmed Siddiqui and Barrister Sultan, advocates for respondent No. 1.

Mr. Fazle Rabbi Sheikh, advocate for respondent No. 6.

M/s. Khaleeq Ahmed, Muhammad Usman and Muhayamin Aizaz, advocates for respondent No. 7.

J U D G M E N T

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MUHAMMAD IQBAL KALHORO J: This appeal calls into question an order dated 19.09.2005 dismissing an application, filed by appellant under Section 12(2) read with Section 151 CPC and Section 19(7) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 in Suit No.713/1998 and Execution No.100/1999. Appellant had filed such application seeking setting aside of a judgment and decree dated 06.01.1999 in the aforesaid suit and the order dated 09.01.2001 passed in the aforesaid execution in favour of auction purchasers on the ground that the same were obtained through fraud and concealment of real facts. The learned Banking Court, however, did not agree with what was pleaded in the application and dismissed it by the impugned order.

2. As per brief facts, Muslim Commercial Bank/respondent No. 1, filed a suit for recovery of Rs.10,64,107/- against respondents/judgment debtors, mainly respondent No. 5 Mst. Ahmadi Khatoon, who had obtained loan, did not pay the same and defaulted. The respondents were duly

served with the notices but they did not contest the suit. Resultantly, vide judgment dated 06.01.1999, the suit was decreed. Then, an execution application to implement the decree was filed but the respondents did not contest the same either. Hence, the mortgaged property i.e. Plot No.C-83, Block J, admeasuring 600 sq. yards, KDA Scheme No.2, North Nazimabad, Karachi was attached and was put to auction. Respondents No.6 and 7 gave the highest bid which was accepted and the sale was confirmed in their favour. Accordingly, the sale certificate was issued.

3. Then the auction purchasers/respondents No. 6 and 7 approached the KDA for mutation of record in respect of the property in their favour but KDA refused to do so on the ground that the property was in the name of appellant. Hence, they filed an application under section 151 CPC in the executing court seeking directions to the KDA to make necessary mutation in the record. In response to the notice, the relevant officials of KDA appeared and apprised the Court that the property was in the name of appellant Mst. Jabeen Shafiq. It appears that the Court then examined Assistant Director Land namely Bashir Ahmed and Assistant Registrar Dilshad Hussain from KDA to decide the application. After examining them and perusing the record, the Court formed an opinion that KDA had forged the documents in the name of appellant Mst. Jabeen Shafiq, who was but a fake person.

4. In view thereof, the Court directed the KDA to transfer/mutate the mortgaged plot in favour of auction purchasers/respondents No. 6 and 7. The order was complied with and the auction purchasers came into possession of the property. The application under section 12(2) CPC was filed by the appellant after almost two years thereafter for the relief as stated above on the ground of fraud and concealment of facts. The appellant failed to satisfy the Court about the truthfulness of her claim and hence her application was dismissed through the impugned order.

5. Learned counsel for appellant has argued that the Banking Court has failed to appreciate that appellant is a lawful owner of the property by virtue of sale deed registered on 09.02.1995, while the property was mortgaged by the previous owner/respondent No. 5 Mst. Ahmadi Khatoon with the bank in May 1996 after she had already sold out the property in favour of appellant; that the appellant is in possession of original documents; that the property was mortgaged on the basis of photo state copies and a so-called FIR that the original documents had been stolen, the bank did not make an inquiry into the title of the property and its recorded owner with the KDA and mortgaged the property without original papers which shows connivance of the bank officials with the previous owner that is further established from the fact that although the previous owner was served with the notice of the suit but she did not appear and contest the matter. Even in auction of the property and confirmation of sale by the Banking Court, she did not come forward to have any word against such proceedings. The appellant was not made party in the suit and was shown as guarantor without any document showing her status; that the Banking Court has dismissed the application mostly by observing that the application was filed after a much delay.

6. On the other hand, learned counsel for respondents No. 6 and 7, the auction purchasers, and the learned counsel for the Bank have supported the impugned order.

7. We have perused the record and considered the arguments put up before us. The impugned order shows that the learned Banking Court has observed on the one hand that in order to decide the application under section 12(2) CPC, an investigation was required but, on the other, has dispensed with the investigation on the ground that earlier an application u/s 151 CPC was filed by the auction purchasers seeking direction to the KDA officials to record mutation of the property in their favour, in which, the relevant KDA officials were called and were examined, hence, it was

not needed. The learned Court has then proceeded to examine evidence of said witnesses earlier recorded and formed its view on the basis whereof without realizing that the application filed by the auction purchasers was for a different purpose and object i.e. implementation of judgment and decree, whereas, the application under section 12(2) CPC was filed for the purpose of setting aside the judgment and decree on the ground that it was obtained through fraud and misrepresentation of facts. By confusing the purpose and object of the two applications together and basing its finding on the evidence recorded earlier, the Banking Court misdirected itself, at the least, in determining merits of application u/s 12(2) CPC.

8. The evidence recorded in the application u/s 151 CPC had a different context and background i.e. to determine reasons for non-compliance of Court's direction and it was in such context the evidence was recorded. Therefore, the same evidence could not have been taken into account and relied in the subsequent application under section 12(2) CPC challenging the judgment and decree to have been obtained by playing fraud with the Court. Recording its findings on the evidence led in some other application in fact led the Banking Court to consider application u/s 12(2) CPC through a different prism, swaying its view closer to the view already held by it in the application u/s 151 CPC that appellant was a fake person.

9. The Banking Court failed to appreciate that entire episode from the beginning was tainted with a suspicion. It was claimed during the arguments that Mst. Ahamdi Khatoon, respondent No. 4 (in the suit), who had mortgaged the property with the bank had filed only the (certified) copies of the title documents along with the FIR alleging stealing of the original documents. But when we inquired from learned counsel of the Bank to show us the FIR, he referred to a daily diary instead without disclosing what followed then i.e. whether any investigation in terms of

Section 155 Cr.PC was taken up or not to trace out the original documents. The Bank simply while relying upon a daily diary, which itself was not beyond a doubt as nothing followed in terms of scheme of law, and the copies of the original documents accepted the application of respondent No. 4 for extending her loan and mortgaged the property without ascertaining or making an inquiry into the ownership of the property. It did not occur to the Bank that absence of original documents was not normal, nor supported by any cogent evidence. As on the one hand the procedure to be followed after daily diary was not pursued by the police and no explanation about absence of original documents was on the record, and on the other, there was no confirmation of title of the ownership from the KDA. The loan was approved in May 1996, whereas, the property had already been conveyed to appellant through a conveyance deed on 09.02.1995, much prior to the mortgaging of the property by the bank.

10. It was also strange and should have set off alarm to the Banking Court that although respondent No. 4 Mst. Ahmadi Begum in the suit was served with the notices but she did not appear and contest the matter. In execution application as well, she chose to remain absent despite notice having been served which conduct from a genuine owner could not have been anticipated. The Banking Court decreed the suit *ex parte*, allowed the execution, without even contemplating that non-appearance of respondent No.4 was strange, if seen through the above facts -- absence of title documents and no inquiry to determine the original owner, and therefore could have been on purpose to enable the Court to fast track the proceedings and conclude the same in favour of the Bank.

11. Submission of only copies of the documents in the bank for loan, then defaulting, and then failing to appear in the Court to contest the matter by respondent No. 4 despite being served in our view were sufficient circumstances setting off suspicion in the mind of the Banking

Court to understand that the transaction between the bank and respondent No. 4 was a result of some chicanery.

12. After the application by the auction purchasers under section 151 CPC was filed for implementation of the judgment and decree, the KDA officials had come forward and had apprised the Court that the property stood in the name of appellant. Instead of making efforts to find the appellant, the Court simply concluded, when the Bailiff reported that no such woman in the name of appellant was residing in the said address since long, that she was a fake person and KDA officials were in collusion with respondent No. 4 Mst. Ahmadi Begum and had forged the documents by recording mutation in favour of appellant. The Court did not change such view even after appellant filed application u/s 12 (2) CPC with her signature supported by her own affidavit. The Court did not realize either that conveyance deed in favour of the appellant was prior to mortgage of the property and therefore when at the time the property was mortgaged by respondent No. 4, the same had already changed ownership in favour of the appellant.

13. The apparent negligence of the bank officials in either accepting the loan application without original title documents of the property and without an inquiry from KDA to determine its ownership also leads to a palpable inference of collusion between the bank officials and respondent No. 4. Since there is nothing on record that any inquiry was conducted by the bank into original title of the property being mortgaged and to find out its owner from the KDA, it is clear that the bank either acted in haste to benefit respondent No.4 or their officials were in active connivance with respondent No. 4 to grant her loan without a valid security. Although, appellant was the recorded owner of the property at the time of its mortgage but in the suit she was not made even a party nor any effort was made to procure her attendance. It was only for application under section 151 CPC, filed by auction purchasers that an effort was made to procure

her attendance and on a vague report of the Bailiff, she was declared a fake person. No effort was made either to resort to substitute service by way of publication in newspaper for procuring her attendance. The Court simply got influenced by her previous view taken in application u/s 151 CPC that she was a fake person, although she had herself appeared and filed application u/s 12 (2) CPC which necessitated a decision on merits rather than on technicalities.

14. We, are of a view that non-making the appellant as a party in the suit, acceptance of the loan by the bank without original documents of the property, no valid explanation for their absence, non-appearance of beneficiary/respondent No. 4 before the Banking Court during the suit and execution proceedings despite service, auction of the property and confirmation of the sale in favour of auction purchasers without any objection by respondent No. 4 were sufficient facts and circumstances for allowing the application under section 12(2) CPC filed by the appellant.

15. We, therefore, while setting aside the impugned order, allowed the appeal in terms of a short order dated 27.08.2025. However, we make it clear that the Banking Court while deciding application for leave to defend the suit by appellant shall also attend to the issue whether appellant (not a customer) can be made a party in the suit in view of her status as owner of the mortgage property.

Above are the detailed reasons of our short order announced on 27.08.2025.

JUDGE

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