

(1951) 01 AHC CK 0006**Allahabad High Court****Case No:** Ex.Second Appeal No.2008 of 1947 and Ex.Second Appeal No.387 of 1948

Ram Swarup, Decree-holder

APPELLANT

Vs

Mst. Kalawati, Judgment-debtor

RESPONDENT

Date of Decision: Jan. 4, 1951**Hon'ble Judges:** AGARWALA, J**Final Decision:** Dismissed**Judgement**

1. These are two connected decreeholders appeals. The decreeholders are different though the judgmentdebtor is the same. A simple money decree was obtained by two decreeholders in the two appeals against one Dayanand. Dayanand died leaving Shrimati Kalawati, his widow, as his legal representative. She was impleaded in execution proceedings. The decreeholders prayed that certain houses be put up for sale in execution proceedings. In proceedings under Order 21, Rule 66, C.P.C.

for the settlement of the terms of the sale proclamation, the decreeholders filed an affidavit stating that there appeared to be a charge on the houses in favour of Shrimati Kalawati and Shrimati Manbhari, mother of the deceased judgment debtor, created by means of a deed dated 25th June 1931.

2. At a later stage Shrimati Kalawati herself came forward with an objection praying that the charge in her favour already stated may be proclaimed at the time of the sale. The decreeholders reply to this prayer was that the document creating the charge was a fictitious document and created no rights in Shrimati Kalawati. The trial Court went into the question and held that the document was a fictitious document and dismissed Kalawatis objection. In appeal by Kalawati to the lower appellate court, it was held that it was not necessary for the court to go into the question as to whether the document creating the charge was fictitious or not. All that was necessary was that it may be shown in the sale proclamation that Kalawati claimed a charge on the property. The view it took was that the matter would have to be gone into in a proper proceeding.

3. The decreeholders have come up in second appeals to this Court and it has been strenuously urged on their behalf that as the charge was in favour of the legal representative of the judgmentdebtor, this was a matter which fell within the purview of S.47, C.P.C., and should have been investigated and decided by the executing Court. In support of this plea several cases have been cited before me Seth Chand Mal v. Durga Dei, 12 All 313 (FB)(A); Lachhoo v. Firm Munni Lal Babu Lal, AIR 1935 All 183(B) and Badri Prasad v. Mt. Janki, AIR 1937 All 97(C). In all these cases, however, it was held that the dispute as to the ownership of the property sought to be sold by the decreeholder, between the legal representative of the judgmentdebtor and the decreeholder, is a matter which fell to be decided under S.47, and was not a matter which fell under O.21, R.58, C.P.C. There can be no dispute about the proposition of law stated in all these cases. This, however, does not solve the difficulty. Even if the matter did not fall under O.21, R.58 but fell under S.47, C.P.C. the court has still a discretion in fit cases whether it will decide the precise question raised between the parties or leave it to future proceedings. When it is admitted by the legal representative that the property does indeed belong to the deceased judgment debtor, and the only claim made by the legal representative in her personal capacity is that he or she holds a charge on the property created by the deceased judgment debtor, it is discretionary with the Court to decide or not to decide the question whether the charge is fictitious or genuine.

4. In Mahmud Hasan v. Mohammad Abdul Hamid Khan, AIR 1933 All 287(D), it was held that the proper course in such cases is that the matter be left to be determined in a regular proceeding for the enforcement of the charge. This is a Bench decision and is binding on me.

5. In the case of a charge it will be the look out of the auction purchaser to contest the charge if he so desires. So far as the sale of the property is concerned, it can always take place because it is admittedly the case of the parties that the property belongs to the

deceased judgmentdebtor. Charges or encumbrances on the property sought to be sold are always shown in the sale proclamation under O.21, R.66, C.P.C. and there is nothing to prevent the charge in favour of the legal representative of the deceased judgmentdebtor from being shown in the sale proclamation. If this can be done, there is no necessity of entering into an enquiry as to the validity of the charge.

6. I think that the decision of the court below was perfectly correct. I dismiss these appeals with costs.

Appeals dismissed.