

(1909) 08 CAL CK 0003**Calcutta High Court****Case No:** None

Sreematy Asaban Banu

APPELLANT

Vs

Ananda Chandra Dutt Auction
Purchaser and Others

RESPONDENT

Date of Decision: Aug. 2, 1909**Acts Referred:**

- Evidence Act, 1872 - Section 44

Citation: 3 Ind. Cas. 116**Hon'ble Judges:** Chitty, J; Carnduff, J**Bench:** Division Bench**Judgement**

1. This appeal arises out, of an application by one Asaban Banu u/s 244 of the Code of Civil Procedure, 1882, to set aside a sale on the ground of fraud. It appears that the applicant with her four brothers were the judgment-debtors under a decree. The property was sold and an application was made u/s 244 to have the sale set aside on, the ground of fraud. That application purported to have been signed not only by the four male judgment-debtors but also by the present appellant.. That matter was compromised between the judgment-debtors other than the present petitioner and the decree-holder,, but the compromise petition purported to have been signed by the present appellant. Under that arrangement, the appellant's brothers, entered on the property on fresh term. The appellant subsequently, presented this application u/s 244, C. P. C., for setting aside the sale. It was pleaded in bar of her application that she had already presented an application under the same section which had resulted into the compromise decree to which we have just referred. The Munsif held that she was no party to the first application and that she was entitled in this proceeding to show that the compromise decree was obtained behind her back and in fraud of her rights and that it, was not binding upon her. The learned District Judge has taken a different view. He says: The question before me is not really whether or not the petitioner is entitled to show in. the present application,

that the compromise decree of 1904 was a fraudulent one but can a plaintiff (for the petitioner's position in her application is that of a plaintiff) having once brought a suit (her signature appearing on the plaint) which resulted in a compromise decree on a solenama purporting to be signed by her bring a fresh suit on the same cause of action without having that compromise decree set aside either on review or in a regular suit for the purpose." We think that the learned District Judge did not appreciate the true question before him which was that which he stated first. The other question which he propounded in the second place begs the whole question which, is whether the appellant was, in fact, a party to the first application u/s 244 or a party to the solenama and the compromise decree which ended that proceeding. She maintains now that she was not a party to it and that she had no knowledge whatever of that first proceeding: and that everything that was done in it "was done behind her back. We think that she is entitled in this application to show that the former proceeding was one instituted and carried on by her brothers, that she had no part; or share, whatever in that proceeding and that, so far as she is concerned, it must be treated as a nullity. If this were a suit, there could be no question that she would be entitled to show this. The case of Rajib "Panda v. Lakan Sendh Mahapatra 27 C. 11 : 3 C.W.N. 660 is a distinct authority to that effect. Section 44 of the Evidence Act includes not only a suit but other proceedings and there is nothing, so far as we can see, to exclude from the operation of that section a proceeding like the present one u/s 244 of the Code of Civil Procedure, 1882. It was argued that the appellant was really a party to the previous application. That, of course, is the question which has to be determined. But we think that she is clearly at liberty in this proceeding to show that she was not a party to the first proceeding and it has no effect as against her. We, accordingly, set aside the order of the learned District Judge and remand the case to him for a re-hearing of the appeal in the light of the observations made above. Costs of this appeal will abide the result. We assess the hearing fee at three gold mohurs, Appeal allowed and Case remanded.