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32 C. 1107=2  
G. L. J. 107.

A question has been raised as to limitation under Article 14 of the second schedule of the Limitation Act. This, however, is not the case of a plaintiff suing to get rid of the settlement by the Collector. Assuming also that Article 14 applies, *Bejoy Chand Mahatab Bahadur v. Kristo Mohini Dasi* (1) is a direct authority against the plaintiff's contention.

As I agree with Mr. Justice Woodroffe, who has exhaustively dealt with the points raised, I need not lengthen my judgment. I hold that the decision appealed from is correct and that this appeal should be dismissed with the costs of both the hearings in this Court.

*Appeal dismissed.*

32 C. 1130 (=1 C. L. J. 542.)

[1130] APPELLATE CIVIL.

*Before Mr. Justice Harington and Mr. Justice Mookerjee.*

RAGHUBANS SAHAI v. PHOOL KUMARI AND SECRETARY OF STATE  
FOR INDIA IN COUNCIL.\*  
[22nd May, 1905.]

*Public Demands Recovery Act (Bengal Act I of 1895 as amended by Bengal Act I of 1897) ss. 319, cl. (2) and 20—Suit to set aside a sale on the ground of fraud, whether maintainable—Civil Procedure Code (Act XIV of 1882) ss. 244, 312 and 424—Secretary of State, notice upon.*

A suit to set aside a sale under the Public Demands Recovery Act, on the ground of fraud on the part of the auction-purchaser, is maintainable; and neither s. 244 nor s. 312 of the Civil Procedure Code is a bar to such a suit.

*Umed Ali v. Rajlaksmi Debya* (2) and *Barhamdeo Narayan Singh v. Bibi Rasul Bandi* (3), distinguished.

In such a suit, where no relief is claimed by the plaintiff on the ground of fraud against the Secretary of State for India, it is not necessary to serve a notice under s. 424 of the Civil Procedure Code upon him, as it would be impossible to serve a notice fulfilling the requirements of that section.

*Shahebzadee Shahmshah Begum v. Fergusson* (4); *Muhammad Saddiq Ahmed v. Panna Lal* (5) referred to.

[Ref. 2 C. L. J. 504; 23 Cal. 451=10 C. W. N. 347=3 C. L. J. 235; 5 C. L. J. 240 (F.B.)=2 M. L. T. 153; 34 Cal. 787=11 C. W. N. 745; 34 Cal. 811 (F.B.)=5 C. L. J. 696=11 C. W. N. 756; 14 C. L. J. 83; Fol. 13 I. C. 721=16 C. W. N. 145.]

SECOND APPEAL, by the defendant No. 2, Raghubans Sahai.

This appeal arose out of an action brought by the plaintiff to set aside a sale held under the Public Demands Recovery Act. The allegation of the plaintiff was that no dak cess was really payable for the property sold; that the defendant No. 2 fraudulently brought about the sale by suppressing the notice and the sale [1131] proclamation in collusion with the Collectorate peons, and purchased the property worth Rs. 4,000 for Rs. 15 only; and that the notice and the certificate were not in due form. The Secretary of State for India in Council, who was joined as a party defendant in the suit, resisted the claim on the merits and further contended that the suit as against him was bad in law, inasmuch as no notice was served in time under

\* Appeal from Appellate Decree No. 442 of 1903, against the decrees of F. S. Hamilton, District Judge of Purnea, dated the 22nd of December 1902, affirming the decrees of Srigopal Chatterjee, Subordinate Judge of that district, dated the 31st of July 1902.

(1) (1894) I. L. R. 21 Cal. 626.

1 C. L. J. 360.

(2) (1905) 1 C. L. J. 588.

(4) (1881) I. L. R. 7 Cal. 499.

(3) (1905) I. L. R. 32 Cal. 691;

(5) (1903) I. L. R. 26 All. 220.

s. 424 of the Civil Procedure Code. The auction purchaser defendant *inter alia* pleaded that the suit was barred under the provisions of ss. 244 and 312 of the Civil Procedure Code.

The Court of First Instance decreed the plaintiff's suit and set aside the sale on the ground that it was vitiated by the fraud of the auction purchaser, who in collusion with the Collectorate peons managed to suppress the sale proclamation and thus purchased the property at an inadequate price.

On appeal to the District Judge the decision of the first Court was affirmed.

Against this decision the auction-purchaser defendant appealed to the High Court.

Babu *Pramatha Nath Sen*, for the appellant. The Secretary of State was a necessary party to the suit: see *Gobinda Chandra Shaha v. Hemanta Kumari Debi* (1). He being a necessary party, and no notice having been served upon him under s. 424 of the Civil Procedure Code, the suit ought to fail. Fraud was charged against the servants of the Secretary of State, and therefore there was a cause of action against him. This was a suit to set aside a sale under the Public Demands Recovery Act, and an application was made previously under s. 311 of the Civil Procedure Code to set aside that sale, and that application was rejected. Therefore under s. 19 of the Public Demands Recovery Act no suit would lie on the ground of irregularity. Suit to set aside a certificate is to be instituted within six months under s. 15 of the said Act and that was not done in this case. Section 244 of the Code of Civil Procedure, which has been made applicable by s. 19, is a bar to a suit of this nature. The whole question depends upon the construction of s. 19 of the Public Demands [1132] Recovery Act. [MOOKERJEE J. What is the meaning of the words "in so far as they are applicable" in that section? They mean "in so far as they are applicable," having regard to the other provisions of the Public Demands Recovery Act. The whole of Chapter XIX of the Code of Civil Procedure has been made applicable except provisions, such as those relating to attachment, &c., which are not applicable, having regard to the provisions of the Public Demands Recovery Act. The cases *Barhamdeo Narayan Singh v. Bibi Rasul Bandi* (2) and *Umel Ali v. Rajlaxmi Debya* (3) support my contention.

Babu *Joygopal Ghosh*, for the respondent. The suit is maintainable. It is not a suit to set aside a certificate, but to set aside a sale on the ground of fraud. No notice under s. 424 of the Code of Civil Procedure need be served upon the Secretary of State for India in Council, as he was not charged with any fraud: see *Muhammad Saddiq Ahmad v. Panna Lal* (4). The case of *Gobinda Chandra Shaha v. Hemanta Kumari Debi* (1) is distinguishable as in that case there was an allegation that nothing was due to the Secretary of State.

Babu *Pramatha Nath Sen* in reply.

*Cur. adv. vult.*

MOOKERJEE J. This is an appeal on behalf of the second defendant in an action commenced against him and the Secretary of State for India in Council, by the plaintiff respondent for setting aside a sale of Mehal Killa Chandni Chauk, held on the 5th December 1899, under Bengal

(1) (1908) I. L. R. 31 Cal. 159.

(3) (1905) 1 C. L. J. 538.

(2) (1905) I. L. R. 32 Cal. 691; 1 C. L.

(4) (1908) I. L. R. 26 All: 220.

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Act I of 1895 as amended by Bengal Act I of 1897. The plaintiff alleged that under section 7 of Act I of 1895, a certificate was made against her for an alleged arrear of dak cess and costs amounting to Rs. 3-9; that proceedings were taken for enforcement of this certificate, but the sale proclamation was fraudulently suppressed at the instance of the second defendant, who thus managed to purchase the property worth Rs. 4,000 for Rs. 15. [1133] The plaintiff challenged the validity of the certificate on the ground that it was defective in form as well as substance, and prayed that the sale might be set aside either because the certificate was bad in law and did not afford any basis for a valid sale, or because the sale was vitiated by the fraud of the auction-purchaser. The Secretary of State, who was made the first defendant, resisted the claim on the merits and further contended that the suit as against him was bad, inasmuch as the notice required by section 424 of the Civil Procedure Code, had not been served on him two months before its institution. The auction-purchaser defendant resisted the claim on the additional ground that the suit was barred under the provisions of sections 244 and 312 of the Civil Procedure Code. The Courts below have concurrently set aside the sale on the ground that it is vitiated by the fraud of the auction-purchaser, who managed, in collusion with the Collectorate peons, to suppress the sale proclamation, and thus purchase for Rs. 15 the property in suit, of which the actual value is at least Rs. 2,250. The actual-purchaser defendant has appealed to this Court, and on his behalf the decree of the learned District Judge has been questioned on three grounds, namely, *first*, that the Secretary of State is a necessary party to the suit and as the notice, mentioned in section 424 of the Civil Procedure Code, was not served upon him in time, the suit as against him has been improperly instituted, and ought to be dismissed; *secondly*, that the suit is barred by section 244 of the Civil Procedure Code; and, *thirdly*, that the suit is barred by section 312 of the Civil Procedure Code.

As regard the *first* contention advanced on behalf of the appellant, reliance is placed upon the decision of this Court in the case of *Govinda Chandra Shaha v. Hemanta Kumari Debi* (1), which appears to me to be clearly distinguishable. That case is an authority for the proposition that in a suit to set aside a sale effected under the provisions of the Public Demands Recovery Act, 1895, the Secretary of State for India in Council is a necessary party. In the case before me, the Secretary of State was joined as a party; the only objection is that the notice required by section 424 of the Civil Procedure Code, was not served upon him two months before the institution of the suit. This objection in [1134] my opinion ought not to prevail for two reasons. In the first place, this objection can be taken only by the Secretary of State for whose benefit the notice is intended; but although the objection was taken on his behalf in the Court of first instance and was overruled, the objection has not been pressed by him in this Court; indeed, although the point was decided against the Secretary of State by the first Court, no appeal was preferred by him, and though he was a party respondent to this appeal, he has not chosen to enter appearance. In the second place, there is no substance in this objection. Section 424 of the Civil Procedure Code requires that the notice must state the cause of action and the relief claimed by the plaintiff. In the present case, however, no relief is claimed by the plaintiff on the ground of fraud against the Secretary of State; no fraud is charged against

(1). (1908) I. L. R. 31 Cal. 159.

him, and consequently there can be no cause of action against him based on the ground of fraud. Under these circumstances it would be impossible to serve a notice fulfilling the requirements of section 424. This view receives some support from the case of *Shahebzadee Shahunshah Begum v. Ferguson* (1) where Cunningham J. held that the intention of section 424 is to give to Government as represented by the Secretary of State and to the servants of Government in the discharge of their public duties, the same protection as English Statutes confer on many public officers and bodies, namely, that when it is alleged that they have committed an illegality in the discharge of their duties, they shall have time and an opportunity of making amends before the matter is brought into Court. This is also in accordance with the decision of the Allahabad High Court in the case of *Muhammad Saddiq Ahmad v. Panna Lal* (2). The first objection therefore taken by the appellant on the ground that the notice under section 424 of the Civil Procedure Code, was not served in time on the Secretary of State must be overruled.

The second ground upon which the decision of the learned District Judge is challenged is that the suit, in so far as it seeks to impugn the validity of the auction sale by reason of an alleged fraud on the part of the purchaser is barred under the provisions of section 244 of the Civil Procedure Code. In support [1135] of this position, reliance is placed upon section 19, clause (2) of Act I of 1895, which lays down that every certificate made under sections 5, 7 or 9 may be enforced and executed in the manner provided by Chapter XIX of the Code of Civil Procedure for the enforcement of decrees for money, and all the provisions of that Chapter, except section 310A thereof, and of Chapter XX of the said Code, shall apply, so far as they are applicable. Reference is also made to the decision of this Court in the cases of *Umed Ali v. Raj Lakshmi Debya* (3) and *Barhamdeo Narayan Singh v. Bibi Basul Bandi* (4). The question raised is one of great importance, and not altogether free from difficulty; but upon a careful examination of the argument addressed to us, I must hold that the contention of the applicant is not well founded. The learned vakil for the appellant in referring to section 19, clause (2), laid great emphasis upon the words "all the provisions of that chapter," and argued that, inasmuch as section 244 finds a place in Chapter XIX of the Civil Procedure Code, it is applicable to an application to set aside a certificate sale on the ground of fraud. This contention obviously overlooks the effect of the equally important qualifying words, "so far as they are applicable;" before, therefore, it can be affirmed that a particular provision of the Civil Procedure Code applies, it has to be seen not merely whether it is in Chapter XIX, but also how far it is applicable. In order to answer this second question, one or more of *three tests* may have to be applied; namely, *first*, a particular provision may not be applicable because it does not relate to the enforcement and execution of a decree for money; *secondly*, a particular provision may not be applicable by reason of some restriction contained in the provision itself; and, *thirdly*, a particular provision may not be applicable by reason of its inconsistency with some provision of the Public Demands Recovery Act. As regards the *first test*, I have no hesitation in holding that when section 19, clause 2, limits the application

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(1) (1881) I. L. R. 7 Cal. 499.

(2) (1908) I. L. R. 26 All. 220.

(3) (1905) 1. C. L. J. 538.

(4) (1905) I. L. R. 32 Cal. 691; 1 C.

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of all the provisions of Chapter XIX of the Civil Procedure Code by the words "so far as they are applicable," only such provisions are applicable as apply to the enforcement and execution [1136] of the certificate regarded as a decree for money. Now when a person seeks to set aside a sale held under the Public Demands Recovery Act, can it be legitimately said that the proceeding on the application is either for the enforcement or for the execution of the certificate? To my mind, this question must, for obvious reasons, be answered in the negative. I am fortified in this view by the provisions of section 20, which lays down that any sale of immovable property made in the course of enforcing a certificate may be set aside in accordance with the provisions of sections 311 and 313 of the Code of Civil Procedure. Such a provision as this would be absolutely superfluous, if an application to set aside a sale were either the enforcement or the execution of the certificate, and if sections 311 and 313 of the Civil Procedure Code had been applicable to a proceeding for this purpose by reason of the general words contained in section 19, clause (2). To put the matter in another way, section 20 justifies the inference that under section 19, clause (2) an application would not be maintainable under section 311 or section 313 of the Civil Procedure Code, and, therefore the Legislature thought it necessary to enact the special provision contained in section 20; and the only intelligible ground, which explains the position, is that sections 311 and 313 of the Civil Procedure Code, do not relate to the enforcement and execution of a certificate. The conclusion seems to me to be irresistible that section 19, clause (2), makes only those portions of Chapter XIX of the Civil Procedure Code applicable as relate to the enforcement and execution of decrees for money, that a Court when it deals with an application to set aside a sale on the ground of irregularity under section 311 of the Civil Procedure Code, or on the ground of the judgment-debtor having no saleable interest under section 313 of the Civil Procedure Code, or on the ground of fraud under section 244 of the Civil Procedure Code, does not enforce and execute the certificate, that the Legislature has expressly provided in section 20, for the setting aside of a sale under two of these sections, but not the third, and that, consequently, an application to set aside, on the ground of fraud an auction sale held under the Public Demands Recovery Act, 1895, is not maintainable under section 244 of the Civil Procedure Code. An application of the *first test*, therefore, shows that the [1137] present suit is not barred under section 244 of the Civil Procedure Code. A recourse to the *second test*, however, makes manifest even more clearly that section 244 of the Civil Procedure Code cannot possibly bar this suit. That section, in so far as it is contended to be applicable to the matter now before us, runs as follows:—"The following question shall be determined by order of the Court executing a decree and not by separate suit, namely, (c) any other question arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, or to the stay of execution thereof." This clearly contemplates a suit in which the decree, which is being executed, was passed. It follows, therefore, that before the aid of section 244 can be successfully invoked as a bar to the present suit, it must be shown that the certificate in execution of which the sale now impeached took place, was a decree passed in a suit. When I asked the learned vakil for the appellant to point out to me the suit in which the certificate (having the force of a decree) was made, he made no attempt to answer the question. It is perfectly true that under section 8 of the

Public Demands Recovery Act, every certificate made under the last preceding section shall, as regards the remedies for enforcing the same, and so far only, have the force and effect of a decree of a Civil Court. But although a certificate duly made under section 7 is thus invested with the character of a decree for a specified and restricted purpose, I am unable to hold that there is any suit in which this so-called decree was passed. To make this assumption with a view to the possible application of section 244 would, in my opinion, by the unwarrantable introduction of a fiction, for which there is not the remotest foundation in fact. Indeed, if we assume the existence of an imaginary suit, it is a novel kind of suit, in which there is no plaint, no written statement, no opportunity allowed to the defendant to contest the claim and which possesses the remarkable character of lacking every incident of a suit under the Civil Procedure Code. Such an hypothesis, moreover, would be absolutely inconsistent with the provisions of the Public Demands Recovery Act, which contemplate proceedings for challenging the validity of the certificate and for its modification or cancellation. I must hold accordingly [1138] that the second test proves clearly that section 244 of the Civil Procedure Code by its very language does not bar a suit of this description. I may add that the results of the application of the first and second tests are slightly different. The first test shows that assuming section 244 to be applicable to proceedings in execution and enforcement of a certificate, it does not authorize an application to set aside a sale, which is not a proceeding of this description; the second test, on the other hand, shows that section 244 by its very language cannot fittingly apply even to proceedings in execution and enforcement of the certificate. But whether we adopt the restricted result which follows from the first test or the wider result, which follows from the second test, the present suit is obviously not barred. As regards the *third test*, no inference is deducible from its application in the present instance, but that it may occasionally be of use is illustrated by section 274 of the Civil Procedure Code, which provides for the attachment of immoveable property; that section, in spite of the words "all the provisions" in section 19, clause (2) of the Public Demands Recovery Act, has obviously no application to proceedings for the enforcement and execution of a certificate, because the service of the notice mentioned in section 10 forthwith operates as an attachment of all immoveable property of the judgment-debtor.

As regards the two cases upon which the learned vakil for the appellant relies, they appear to me to be distinguishable, because in neither case was the sale impeached on the ground of fraud. In the first of these cases, *Umed Ali v. Rajlakshmi Debja* (1) the learned Judges, after pointing out that a sale may be set aside for fraud or irregularity in the execution proceedings themselves, observed that fraud had been negatived; they held no doubt that when a sale is impeached on grounds of irregularity, the judgment-debtor must proceed under section 20 of the Act, and that in such a case section 244 of the Civil Procedure Code would bar a separate suit; but I cannot find from the judgment that any effect is given to the qualifying words, "so far as they are applicable." In the second case, *Barhamdeo Narayan Singh v. Bibi Rasool Bhandi* (2), the learned Judges [1139] found that there was no substantial defect in the certificate, nor any material irregularity in the service of the certificate, or of the sale

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(1), (1905) 1 C. L. J. 538.

(2) (1905) 1. L. R. 33 Cal. 691;  
1 C. L. J. 360.

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proclamation, and that consequently there was no ground upon which the validity of the sale could be successfully attacked; but the learned Judges added, what was accordingly not necessary for the purposes of the appeal before them, that the suit to set aside the sale on the ground of irregularity in the execution proceedings, was not maintainable under section 244 of the Civil Procedure Code. Stress was laid upon the words "all the provisions of that Chapter," but no effect appears to have been given to the qualifying words "so far as they are applicable." With all respect for the learned Judges I regret I find myself unable to adopt this view; nor am I able to assent to the broad proposition that section 244 of the Code of Civil Procedure prohibits the bringing of a separate suit to set aside any order passed in the execution of a decree, and a duly made certificate is a decree. As I have already pointed out, the order must be one determining a question arising between the parties to the suit in which the decree was passed; and a duly made certificate has the force and effect of a decree for one purpose and one purpose only, namely, for the application of the remedies for enforcing the certificate. I must hold accordingly that the suit now before us, to set aside the sale on the ground of fraud, is not barred by the provisions of section 244 of the Civil Procedure Code. I may add that I do not rest my decision upon any of the earlier cases, which arose upon the construction of statutes now repealed or modified; for example, the case of *Ram Taruck Hazra v. Dilwar Ali* (1) arose upon the construction of Bengal Act VII of 1880 and the case of *Janki Das v. Ram Gopal Sahu* (2) turned upon the effect of Bengal Act I of 1895 before it was amended by Bengal Act I of 1897. As regards the case of *Ranrup Sahay v. Khushal Misser* (3) it does not appear from the report whether the provisions of the Act of 1895 before or after its amendment in 1897 were applicable; but in the event of the latter contingency, it clearly supports my view. The second contention of the appellant cannot be supported and must be overruled.

[1140] The third ground upon which the decision of the learned District Judge is challenged is that the suit is barred under section 312 of the Civil Procedure Code. This argument is obviously untenable; for the only suit which is barred by section 312 is one to set aside a sale on the ground of the irregularity mentioned in section 311, and the present suit is clearly not of that description, as it seeks to impugn the sale on the ground of fraud. It is therefore unnecessary to consider, whether, if the object of the suit had been to set aside the sale on the ground of material irregularity, it would have been barred under the last paragraph of section 312. I reserve my opinion upon this question, but I note that Mr. Justice Banerjee in the case of *Ram Taruck Hazra v. Dilwar Ali* (1) answered it in the negative. The third ground taken by the appellant must also fail.

The result, therefore, is that the appeal fails and must be dismissed with costs.

HARRINGTON, J. I have read and agree with the judgment of my learned brother.

*Appeal dismissed.*

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(1) (1901) I. L. R. 29 Cal. 78, 91; (2) (1901) 6 C. W. N. 331.  
(1901) 6 C. W. N. 246, 250. (3) (1901) 6 C. W. N. 630.