FULL BENCH.

Before Mr. Justice West, Mr. Justice Nánábhái Haridás, and Mr. Justice Birdwood.

ALA' CHELA', (ORIGINAL DEFENDANT), APPELLANT, *v.* OGHADBHA'I THA'KERSI, (ORIGINAL PLAINTIFF), RESPONDENT.*

1887. *March 22.*

Stamp—Court Fees' Act (VII of 1870), Sec. 7, Art. v, proviso—Construction and applicability of the proviso—Valuation of suits for land in a tálukdári village—Tálukdár's jamá—Remission.

Per WEST and NÁNÁBHÁI, JJ. :—The proviso to article v of section 7 of the Court Fees' Act (VII of 1870) was clearly intended to provide a standard of valuation in the Bombay Presidency, not only for the comparatively rare case of land forming part, but not a definite share, of an estate paying revenue to Government, but for all cases of suits for land.

The theory being that all land is primarily liable to be rated or taxed for the public revenue, any sum not levied according to the appraisement made in order to show the proper amount of the land-tax may be regarded as a remission.

In the case of a *tálukdári* village, the proprietor of which had, under a settlement with Government for a period of twenty-two years, agreed to pay a fixed annual *jamá*, or lump assessment, instead of the full survey assessment for the whole village :—

Held, by a majority of the Full Bench, that the difference in amount between the *jamá* and the full survey assessment was a remission, and, therefore, a suit for possession of lands in this village was to be valued according to clause 3 of the proviso to article v of section 7 of the Court Fees' Act (VII of 1870).

Per BIRDWOOD, J.:—The remission contemplated by clause (3) of the proviso "is an *express* remission, and not a mere difference in amount between the actual assessment payable by a *tálukdár* and the survey assessment."

The three clauses of the proviso seem to apply only to lands which have been subjected to a survey settlement as ordinarily understood and legally provided for in the Bombay Presidency ; the first clause being applicable to lands settled for a period not exceeding thirty years, the second to lands settled for a longer period or permanently, and the third to *inám* lands on which the whole or a part of the survey assessment has been expressly remitted.

The *tálukdárs* are not *inámdárs*. They are land-holders liable to pay a land-tax, but not under a survey settlement such as is applicable to lands for which provision seems to have been specially made in the proviso to clause v of section 7 of the Court Fees' Act. No part of the proviso, therefore, applies to a suit for the possession of lands in a *tálukdári* village. Such a suit should be valued according to sub-clause (*d*) of clause v of section 7 of the Court Fees' Act.

* Appeal No. 39 of 1887.

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THIS was a reference to the Full Bench on a question submitted by the Taxing Officer under section 5 of the Court Fees' Act (VII of 1870) regarding the construction and applicability of article v of section 7 of the Act to a suit for lands in a *tálukdári* village.

The plaintiff sued for possession of 423 acres and 15 *gunthás* of land situated in the *tálukdári* village of Náná Mátra, in the District of Ahmedabad, and to recover Rs. 4,200 as mesne profits. He obtained a decree awarding possession of 353 acres and 2 *gunthás* of land and Rs. 2,100 as mesne profits.

Against this decree the defendant preferred an appeal to the High Court, valuing his claim at Rs. 151-0-9 for the land awarded.

The question submitted by the Taxing Officer was how the memorandum of appeal was to be stamped—whether under section 7, clause v, sub-clause (*b*), or under section 7, clause v, proviso 1, sub-clause 3 of Act VII of 1870.

It appeared, from the report of the District Judge of Ahmedabad, that the whole village of Náná Mátra consisted of 2,485 acres and 34 *gunthás* of land. It was held by the *tálukdár* under a settlement for twenty-two years expiring on the 31st July, 1887. Under the terms of this settlement he agreed to pay to Government for the first seven years a *jamá*, or lump assessment, of Rs. 201 a year, for the next seven years Rs. 243 a year, and for the next seven years Rs. 285 a year, and for the last year Rs. 327. The full survey assessment of the whole village would have been Rs. 514-14-0. There was no levy of assessment by Government in respect of each separate field. But the fields in dispute, if subject to the survey settlement, would have been assessed as follows:—The full assessment on Survey No. 4 being Rs. 30-12-1; on Survey No. 6, Rs. 10-15-0; on Survey No. 8, Rs. 15-6-0; and on Survey No. 17, Rs. 120-14-0.

Upon these facts Birdwood, J., made the following reference to the Full Bench:—

"The plaintiff in this suit sought to recover 423 acres and 15 *gunthás* of land in the *tálukdári* village of Mátra Náná, in the Dhandhuka Táluka of the Ahmedabad District, and also Rs. 4,200 as mesne profits for the three years preceding the suit. The

District Judge found that the plaintiff was entitled to recover out of the land in dispute, 'Survey Nos. 4 and 6; 23 acres on the east of Survey No. 8, and 150 acres on the north of Survey No. 17; together with Rs. 2,100, as mesne profits;' and he made a decree accordingly, and rejected the rest of the plaintiff's claim. From this decree the defendant has appealed; and the question before the Court relates to the valuation, under clause v of section 7 of the Court Fees' Act, 1870, of the land, amounting to 353 acres 2 *gunthás*, which is the subject-matter of the appeal. The appellant contends that the land should be valued under sub-clause (*b*) of clause v at 'five times the revenue' payable on it; and he relies on the decision in *Baváji Mohanji* v. *Punjábhai Hanubhái*(1). That was a suit for the partition of a *tálukdári* estate, *viz.*, the village of Piparla in the Gogha Táluka of the Ahmedabad District. The Subordinate Judge awarded a moiety of the village to the plaintiffs; and the defendants appealed to this Court. The late Chief Justice, Sir M. Westropp, and Kemball, J., held that sub-clauses (1) and (2) of the proviso as to the Bombay Presidency, contained in clause v, were not applicable to the case, inasmuch as the 'full assessment' was not payable to Government on the village, a lump assessment of Rs. 150 being payable annually, whereas the full survey assessment would have been Rs. 621-6-7; and also that sub-clause (3) of the proviso was not applicable, as there was no express remission of the difference in amount between the actual assessment payable by the *tálukdár* and the survey assessment. The proviso was evidently treated as a proviso only to sub-clause (*d*) of clause v, for sub-clause (*b*) of that clause was held to be the portion of the Court Fees' Act which seemed to be 'most nearly adapted to such a suit;' and it was decided that the value of the subject-matter must, for the purposes of the Act, be estimated at five times the revenue payable to Government. The reason given for the decision is that the village of Piparla 'forms' either an entire estate paying an annual revenue to Government, but not a revenue settled permanently, or part of such an estate, and is 'recorded' as such. If Piparla was only a part of an estate, it

(1) Printed Judgments for 1881, p. 177.

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was apparently 'recorded in the Collector's register as separately assessed with' the revenue, as contemplated in sub-clause (*a*) of clause v, the portion of which relating to parts of estates is incorporated in sub-clause (*b*) by the words 'recorded as aforesaid.' Whether it was a part of an estate, or an entire estate, the claim for partition, (which was a claim for a 'definite share,' —that is, a moiety of it), was dealt with under sub-clause (*b*). That decision would not, however, govern the present case; for here the plaintiff *does not ask for a* 'definite share' of the village of Mátra Náná. He asks for a specific part of it; and a specific part, though not all that was asked for, was awarded, and is the subject-matter of the appeal. The village of Mátra Náná is held on the same tenure as Piparla. It is referred to at pp. 78, 79 of Mr. Peile's 'Account of the Tálukdárs in the Ahmedabad Zillah"—(Selections from the Records of the Bombay Government, No. CVI, New Series). The revenue payable on it to Government was settled in 1863. The assessment payable on the village was Rs. 201 *in the first* year, and is Rs. 327 in the current year, 1886-87, which is the last year of the settlement. This assessment is a lump assessment on the whole village, and no part of it is settled on any particular lands; and it is, as in the case of Piparla, less than a full survey assessment would have been. The District Judge reports that 'there is no *levy* of assessment by Government in respect of each separate field, but the fields have been assessed under the survey settlement as follows:—The full assessment on field No. 4 is Rs. 30-12-1; on *No. 6 is* Rs. *10-15-0; on the* whole of No. 8 is Rs. 15-6-0; and on the whole of No. 17 is Rs. 120-14-11.' The full assessment on the whole village is Rs. 514-14-0 a year, whereas the revenue actually payable, as already stated, is Rs. 327. It is quite clear, however, that though there is an official record of a full assessment on each field,—that is, on every specific part of the estate described as a field, no part of the estate is really recorded in the Collector's register as 'separately assessed,' within the meaning of clause v of section 7 of the Court Fees' Act, either with the full assessment on it or with any portion of the lump assessment actually due in respect of it. No portion of the revenue payable on the whole estate is allotted to specific parts of the estate; and

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the entries in the Collector's register, showing the full assessments on fields, were made, not for the purpose of showing the revenue leviable under any possible circumstances on the fields, but for an entirely different purpose, which is explained at p. 29 of Mr. Peile's 'Account of the Tálukdárs.' He there says: 'The alienations were thus disposed of, and it remained to shape a plan for assessing the *tálukdár's* own property. The object was to get rid of the inequality natural to settlements made on imperfect *data*, and to establish some kind of ratio of assessment to value for general adoption. The value of the estate has always been an important element in calculating a *tálukdár's jamá*, and it appeared that some point in the scale of the usual *khálsa* survey assessment below the full rate might be found to form a fair standard. This point might be determined by finding what amount of the survey assessment was equal to a *jamá* fixed at a fair increase on the previous *jamá* of the greatest number of estates, and it seemed that if the *jamá* was fixed between 50 and 70 *per cent.* of the survey rates (as the assessed estate is more or less prosperous) it would give scope for a fair increase on the old *jamá*, such as the improved prospects of agriculture warranted. It was settled, therefore, that the *jamá* of *tálukdárs* is to be not more than 70, nor less than 50, *per cent.* of the survey rates. Some estates already assessed above the maximum were reduced to it, and others were so far below it that they cannot judiciously be raised at once to the minimum, but the bulk of the villages have for the first time the advantage of a land-tax fixed on a clear and equable principle. It should, of course, be here kept carefully in mind that neither 70 *per cent.* nor any other proportion of the survey rates has any intrinsic propriety, but that the survey assessment has merely been called in to guage the value of the estates, so as to bring the *jamá* of each to one and the same proportion of the value." It is clear, therefore, that a record was made of the full survey assessment on all parts of an estate merely as a method of arriving at a fair settlement of the revenue payable on the whole estate. The full assessment being once known in every village, the *jamá* could be calculated at a certain percentage of it in all villages. The ascertainment of the full survey assessment was simply a

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means to an end, not the end itself. There is no ground, therefore, for holding that the land in suit is recorded as separately assessed with a revenue, not permanently settled, which is annually payable on it. The *jamá*, amounting at present to Rs. 327, is payable on the whole village, and there is nothing to show what portion of this sum is payable in respect of any specific part of the estate such as that in suit. It follows that sub-clause (*b*) of clause v of section 7 of the Court Fees' Act cannot be applied to the present suit. Sub-clause (*a*) is clearly inapplicable, as the revenue payable by the estate has not been permanently settled; nor can sub-clause (*c*) be applied, for it cannot be said that the land in suit pays no revenue or 'has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue.' The lump assessment settled on it is not fixed in lieu of revenue. It is itself the whole revenue at present payable by the *tálukdár*. Sub-clause (*d*) of clause v would indeed be strictly applicable to the suit, but for the proviso, which provides special rules for the Bombay Presidency, and so excludes the application of the sub-clause itself to lands in this Presidency. The land in suit 'forms part of an estate paying revenue to Government, but is not a definite share of such estate and is not separately assessed, as above mentioned,' and there would be no difficulty in valuing the suit, therefore, under sub-clause (*d*) at the 'market value of the land,' but for the proviso. That proviso, again, is as inapplicable to the case as it was held to be to the suit for the partition of Piparla, for the reasons given in the judgment in that suit. It would appear, therefore, that there is no provision of the Court Fees' Act applicable to such a suit as the present, instituted in the Bombay Presidency. If that be so, no court fee at all can be levied on the memorandum of appeal. But I hesitate to arrive at such a decision on my own authority only. The question is of sufficient importance to be referred to a Full Bench.

"There is the more reason for such a reference, because, in a similar case, *Jesalsing* v. *Dipsang*[1], Pinhey, J., applied sub-clause (3) of the proviso to clause (*d*) to a suit for a part of a *tálukdári*

[1] Printed Judgments for 1883, p. 164.

estate. That decision cannot be reconciled with the decision in the Piparla case; for Pinhey, J., held that the three sub-clauses of the proviso were the only portions of section 7, clause v of the Act, which applied to suits for the possession of land in the Bombay Presidency. That is, he treated the proviso as a proviso to the whole of clause v, not as a proviso only to sub-clause (*d*) of clause v, as had been done by Westropp, C. J., and Kemball, J. Moreover, he was evidently of opinion that a part of the 'annual survey assessment' on the *tálukdári* village of Puna was 'remitted;' for, except on such a supposition, he could not have applied sub-clause (3) of the proviso to the case. Such, however, was not the opinion of the Judges who decided the Piparla case, and such a supposition is opposed to the actual facts connected with the settlement of the *jamá* on *tálukdári* villages, as set forth by Mr. Peile.

"There is thus not only a conflict of authority as to the true relation of the proviso in clause v of section 7 of the Act to other parts of the clause, but a conflict also of opinion as to the applicability of sub-clause (3) of the proviso to such a suit as the present. But whether the proviso is one to the whole of clause v, or only to sub-clause (*d*), my own opinion is that, as the case cannot fall under sub-clauses (*a*), (*b*) and (*c*), or under sub-clauses (1), (2) and (3) of the proviso, but falls only under sub-clause (*d*), which, in either view as to the relation of the proviso to the rest of the clause, would not apply to this Presidency, there is really no part of clause v which can be applied to this case; and that the omission from the Act of any provision applicable to such a case, in this Presidency, ought to be brought to the notice of the Legislature. Whether this opinion is correct or not, is a question which ought, I think, to be decided by a Full Bench."

The question referred to the Full Bench was argued before West, Nánábhái, and Birdwood, JJ.

Ráv Sáheb *Vásudev J. Kirtikar* for the appellant.

The judgment of the Full Bench (Birdwood, J., dissenting) was as follows:—

WEST, J.:—It seems clear, on a comparison of the so-called, but improperly called, proviso to article v of section 7 of the Court

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Fees' Act (VII of 1870) with the preceding substantive clauses of the same article, that it was intended to provide a standard of valuation in the Bombay Presidency, not only for the comparatively rare case of land forming part, but not a definite share, of an estate paying revenue to Government, but for all cases of suits for land. The proviso extends far more widely than clause (*d*). It provides rules for all the cases embraced in the preceding clauses (*a*), (*b*), (*c*), and is manifestly intended to furnish rules for all these cases based on the particular circumstances of the Bombay Presidency. It has been overlooked, however, that there may be in the Bombay Presidency lands that have not been submitted in any way to the "survey assessment." Because the survey extended over almost all the area, it has been assumed to extend over the whole of it. This must create a difficulty wherever there has, in fact, been no survey and no assessment, but it needs not create a difficulty where there has been a survey and assessment, even though the amount computed under this process as the rate or amount theoretically leviable as land revenue be not, in fact, exacted by the Government. The primary sense of assessment is the imposition on the land of such and such a tax: *its second intention is the tax itself, and there is in* the section a transition from the one sense to the other. The theory being that all land is primarily liable to be rated or taxed for the public revenue, any sum not levied according to the appraisement made in order to show the proper amount of the land-tax may be regarded as a remission. If this view be correct, the case before us falls properly under clause (3) of the proviso, and the valuation for court fees should, we think, be made according to the rule given in that clause.

BIRDWOOD, J. :—After considering the argument addressed to the Court on behalf of the appellant, I am led so far to modify the opinion I expressed when making the reference to the Full Bench as to hold that clause v of section 7 of the Court Fees' Act is *not altogether* inapplicable to the present case; but I am unable to hold, with the majority of the Bench, that clause (3) of the proviso to that clause is applicable to it. I concur rather in the opinion expressed by Westropp, C.J., and

Kemball, J., in *Baváji Mohanji* v. *Punjábhái Hanubhái*[1], that the remission contemplated by clause (3) of the proviso "is an express remission, and not a mere difference in amount between the actual assessment payable by the *tálukdár* and the survey assessment." There is, indeed, under the existing revenue system of *tálukdári* villages, as described by Mr. Peile in the passage quoted in the reference to the Full Bench, no "survey assessment" to which the lands of those villages are in any sense liable. The three clauses of the proviso seem to apply only to lands which have been subjected to a survey settlement as ordinarily understood and legally provided for in the Bombay Presidency; the first clause being applicable to lands settled for a period not exceeding thirty years, the second to lands settled for a longer period or permanently, and the third to *inám* lands on which the whole or a part of the survey assessment has been expressly remitted. The circumstance that, in *tálukdári* villages, the "*jamá*," or land-tax payable by *tálukdárs*, is not more than 70 or less than 50 *per cent.* of what a full survey assessment would amount to if the lands were subjected to a survey settlement, does not, in my opinion, bring the lands within the purview of clause (3) of the proviso. In assessing such villages to the land revenue, regard is had to survey rates as pointed out by Mr. Peile, only in order that an equable settlement of the full land-tax may be arrived at. That tax may vary from time to time and be always less than a survey assessment; but there is no remission of any assessment legally leviable under the system actually in force. The *tálukdárs* do not claim to be *inámdárs*,* and are not regarded as *inámdárs* by the Government. They are land-holders, liable to pay a land-tax, but not under a survey settlement such as is applicable to lands for which provision seems to be specially made in the proviso to clause v of section 7 of the Court Fees' Act.

(1) Printed Judgments for 1881, p. 177.

* There may, of course, be *inám* or "alienated" lands in *tálukdári* villages, as elsewhere. The form of "*jamá* agreement" given at page 37 of Mr. Peile's "Account of the Tálukdárs in the Ahmedabad Zillah." shows that the "full sum" payable by a *tálukdár* may include (1) the *jamá* on *darbári* lands, (2) the *sanadi salámi* on alienated lands, (3) an improvement fund levied at the rate of one anna per every rupee of *jamá*.

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If the proviso applies, then, only to land subjected to the Bombay Survey Settlement, it may, I think, be taken to have been the intention of the Legislature that, in valuing suits for the possession of land not so subjected, the Courts should be guided, even in the Bombay Presidency, by the enacting part of clause v of section 7, and not by the proviso. The clause, as I read it, is applicable generally throughout British India; but the proviso prevents the application of the enacting part of it to suits for the possession of such land as has been subjected to the Bombay Survey Settlement, whether a full survey assessment be payable in respect of such land or not. And that seems to have been the view practically taken by the learned Judges who decided *Baváji Mohanji* v. *Punjábhái Hanubhái*[1].

As no part of the proviso of clause v of section 7 is, in my opinion, applicable to the present case; but as the terms of sub-clause (*d*) of the clause can be applied to it, I should now be prepared to hold that the value of the subject-matter of this appeal should "be deemed to be * * * the market value of the land" now in dispute, as provided by sub-clause (*d*). The decision of the majority of the Bench must, however, prevail.

(1) Printed Judgments for 1881, p. 177.

NOTE.—The following is the judgment of Westropp, C. J., and Kemball, J., in the case of *Baváji Mohanji* v. *Punjábhái Hanubhái* (*a*) referred to in the above decision of Mr. Justice Birdwood :—

WESTROPP, C. J.—This is a suit for partition of a *tálukdári* estate, *viz.*, the village of Piparla in the táluká of Gogha and District of Ahmedabad. The Subordinate Judge has, by his decree, awarded a moiety of the village to the plaintiffs, and the defendants have appealed to this Court. The question submitted by the Taxing Officer for decision is, how the memorandum of appeal should, under the Court Fees' Act VII of 1870, be stamped. The village is held by the *tálukdárs* under a settlement for twenty-three years, expiring in A. D. 1886-87, at a lump assessment of Rs. 150 payable annually to Government, (*vide* No. CVI of Selections from the Records of the Bombay Government, New Series, pages 96 and 97, and the form of the *kabuláyat*, Id., page 37). The survey assessment of the village is Rs. 621-6-7. The case does not appear to fall within section 7, clause v, sub-clause (*d*), proviso (1) of Act VII of 1870. Although the land is held in settlement for a period not exceeding thirty years, it does not pay "the full assessment" to Government, if, as would seem to be the true construction of that proviso and proviso (2), the expression "full assessment" be equivalent to "survey assessment." If this be so, it is difficult to account for the use,

(*a*) Printed Judgments for 1881, p. 177.

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in those provisos, of the term "full assessment." The phrase "survey assessment" would have been sufficient and more definite. The introduction of both expressions in those provisos *primâ facie* may suggest that they were not intended to be interchangeable. But if the full assessment be not the survey assessment, there is not any guide in the Court Fees' Act as to what the full assessment is; and Civil Courts would be left to conjecture in each case what should be fairly deemed a full assessment. For instance, if something less than Rs. 621-6-7 (the survey settlement) might be deemed a full assessment for the village of Piparla, there do not seem to be any legal *data* whereby the *minimum* that might be so regarded is to be fixed. The case would be one of *quot homines tot sententiæ.* The same difficulties of construction as to the expression "full assessment" existed in Act X of 1862, Schedule B, and Act XXVI of 1867, Schedule B, in the Special Rules for the Bombay Presidency. The term "remitted," used in proviso (3) of Act VII of 1870, section 7, clause v, sub-clause (*d*), appears to exclude this suit from that section, as we think that the remission thereby contemplated is an express remission, and not a mere difference in amount between the actual assessment payable by the *tálukdár* and the survey assessment. The portion of the Court Fees' Act which seems most nearly adapted to such a suit as this is sub-clause (*b*) of clause v of section 7, inasmuch as the village of Piparla "forms" an entire estate paying annual revenue to Government, or forms part of such estate, and is "recorded" as such; "and such revenue is settled, but not permanently." That being so, the value must, for the purposes of the Court Fees' Act, be estimated at "five times the revenue so payable."

PRIVY COUNCIL.*

WA'GHELA' RA'JSANJI, DEFENDANT, *v.* SHEKH MASLUDIN AND OTHERS, PLAINTIFFS.

1887. *March 2 and 3*

On appeal from the High Court at Bombay.

Guardian and ward—Inability of guardian to contract on behalf of infant ward so as to bind him personally—Effect of Act VI of 1862 (Bombay), Sec. 12, in regard to a charge upon a tálukdári estate in the Ahmedabad District during the period of management.

A guardian cannot contract in the name of a ward, so as to impose on him a personal liability.

Act VI of 1862 (Bombay), "for the amelioration of the condition of tálukdárs in the Ahmedabad Collectorate and for their relief from debt," was intended to deal with all debts and liabilities which could possibly impose a charge upon the *tálukdári* estate at the end of the period of management; when the estate was to be restored to the *tálukdár* free of incumbrance, excepting the Government revenue. If debts amounted to more than the surplus of rents during the

* *Present:*—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, and SIR B. PEACOCK.