Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Vasudeva Padhi Khadanga Garu v. *Maguni* (*Magata*) *Devan Bakshi Mahapatrulu Garu, from the High Court of Judicature at Madras; delivered the 23rd March* 1901.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.
SIR FORD NORTH.

[*Delivered by Lord Davey.*]

THIS is an Appeal against a Judgment of the High Court of Madras, dated the 25th of March 1896, reversing a Decree of the District Judge of Ganjam of the 17th of October 1894.

The Appellant, who is Defendant in the action, is the only son of Bayana Padhi, who died shortly before the year 1858. The Appellant was then 7 or 8 years of age. The Respondent, the Plaintiff in the action, is the first cousin of the Appellant, and is the son of Gurunatha Padhi, who died in the year 1858. The Respondent was about two years older than the Appellant. The two brothers Bayana Padhi and Gurunatha Padhi were members of a Hindu family joint in property.

The question in the case is whether the two villages in suit are joint or separate property. It is admitted that these villages were granted to Bayana Padhi by the Zemindar of the Chikati Taluk. The Deed is not forthcoming, and the only information their Lordships have as to the

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grant is contained in two Orders from the Collector of Ganjam to the Zemindar. The 1st Order is dated the 10th August 1847, and is in these words :—"I have approved of the "permanent cowle you have granted to one "Bayana Padhi Khadanga of Jayantipuram "under Section 15 of Regulation XXX. of 1802 "in respect of the Forest land called Rajen- "drapuram attached to your Taluk, fixing a "Kattubadi of Rs. 45 a year, and defining the "boundaries (Chekubandi). But you are in- "formed that there should be no disputes by "the Jalanthra people regarding the boundaries "thereof." The other Order of the Collector was dated 22nd July 1848. It states that the Collector has "under Section 15 of Regulation "30 of 1802 approved of the gift of 840 "Bharanams of Forest land which was granted to "Bayana Padhi Khadanga by the late Zemindar "of the Taluk, Sri Brundavana Chandra Ra- "jendra Dev Garu after fixing the Kattubadi, "and the boundaries thereof. You shall inform "the said Khadanga that he might improve the "said land, and make it fruitful, and collect from "him every year, commencing from the current "year, the Kattubadi fixed at Rs. 50 a "year." There is no evidence of the circumstances under which this grant was made, or of the manner in which the property was enjoyed or whether it was treated as joint or separate property from the date of the grant until the death of the survivor of the two brothers in the year 1858. On that event the widows of the two brothers concurred in appointing a manager of the property, and it is not disputed that during the Appellant's minority it was treated or enjoyed as joint family property; and after he attained his majority in or about the year 1870 it continued to be so treated by the Appellant and the Respondent for several years. The Subordinate Judge fixed the date up to which that state of things lasted as the year 1880; and

their Lordships assume that date for the purpose of their Judgment. A quarrel took place between the two cousins, and the Appellant thereupon asserted his right to the villages as the separate property of his father to which he was entitled as his heir, and ousted the Respondent. Hence this suit, which was instituted by the Respondent on 11th November 1891. The Subordinate Judge held it to be the separate property of the Appellant; but his decree was reversed by the High Court, who held it to be joint family property, and decreed a partition. Their Lordships find the question whether the property was the separate property of Bayana, or had been acquired and held by him in his own name for the benefit of the joint family, to be one of some difficulty, owing to the absence of any direct evidence as to the circumstances under which the grant was made, or the manner in which the property was treated during Bayana's lifetime; and they accordingly desired that the case should be argued a second time. On the second argument Counsel for the Respondent raised the question of limitation, and their Lordships have come to the conclusion that the Respondent ought to succeed on that ground. The 7th Section of the Act of Limitation is in these terms: "If a person entitled "to institute a suit, or make an application, "be at the time from which the period of "limitation is to be reckoned a minor, or insane, "or an idiot, he may institute the suit, or "make the application within the same period, "after the disability has ceased, as would "otherwise have been allowed from the time "prescribed therefor in the third column of "the Second Schedule hereto annexed." Then there is provision as to double and successive disabilities, and a provision for the case of the continuing of the disability up to the death of the person under disability; and the

end of the section is in these terms :—" Nothing " in this section applies to suits to enforce rights " of pre-emption, or shall be deemed to extend " for more than three years from the cessation " of the disability, or the death of the person " affected thereby, the period within which any " suit must be instituted, or application made." The effect of that section, therefore, is this,— that a person under disability may institute a suit within the same period after the disability has ceased as he would otherwise have been allowed under the Schedule, but subject to a proviso that the time shall not in any case be extended for more than three years from the cessation of the disability. Illustration (*b*) exactly illustrates the present case. Their Lordships, for the purpose of their Judgment, will make the assumption which is most favourable to the Appellant, and they will assume in his favour that up to the year 1858, the date of the death of the surviving brother, it was treated as, and was, separate property of Bayana, to which the Appellant was entitled to succeed as his heir. But on that assumption the Appellant was dispossessed, or discontinued his possession of his separate property, in favour of the joint estate at least on the death of his uncle in the year 1858; and the case comes within No. 142 in the 2nd Schedule; but if that be not so the possession of the Joint family was at any rate adverse to his separate estate from the same date; and it thus comes within No. 144. It is immaterial for the present purpose which article it comes under. That being so, the Appellant could not have brought an action after the expiration of three years after he attained his majority (say) 1873. Then comes in Section 28, by which his right to the property is extinguished at the determination of the period limited for bringing a suit for possession of it. The point does not require to be expressly

pleaded, as it is only evidence of the Respondent's title; but that question does not arise in this case, as it undoubtedly was a matter of controversy in the Court below, and in fact forms the subject of the third issue: Whether the Plaintiff has acquired any title by possession. The Subordinate Judge finds against the Plaintiff on that issue, but it does not appear on what grounds.

The same point is also raised in the Sixth Reason for Appeal to the High Court, though it was unnecessary for that Court, in the view they took of the case, to express any opinion upon it. The only answer which could be made to the argument would be one founded on section 18, namely, that the existence of the original grant was fraudulently concealed from the Appellant. This answer is, perhaps, sufficiently pleaded by paragraph 3 of the defence, although there is no mention in that paragraph of fraud; but their Lordships do not think that any such case is proved with such precision as is necessary in a charge of fraud. There is, undoubtedly, some evidence that the original grant found its way into the Respondent's possession; and it is not produced by him. On the other hand, the Defendant gave evidence on his own behalf, but merely put in a copy of another document, and did not even say that he was ignorant of the original grant, or when he first discovered it, or say anything about it.

Their Lordships do not think that this is sufficient to support a charge of fraud. They are, therefore, of opinion that the appeal ought to be dismissed, on the ground that the Defendant's right of possession (if it ever existed) has been extinguished by limitation; and they will humbly advise His Majesty accordingly.

The Appellant must pay the costs of the appeal.