Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Babu Mungniram Marwari and Another v. *Mohunt Gursahai Nund, and Syed Liakut Hossein* v. *Mohunt Gursahai Nund, two appeals from the High Court of Judicature at Fort William in Bengal; delivered July 20th,* 1889.

Present:

LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

IN this case the Plaintiff, the present Mohunt of a Muth called Bela Sheottur, seeks to obtain possession of certain properties, and for a declaration that the decree and auction sale under which the Defendants in the two suits became the purchasers of the properties are not binding upon him, as he was a minor, and was not properly represented in the suit in which the decree was obtained. He is the successor in the Mohuntship of one Hurri Pershad Nund, who in the years 1873 and 1875 borrowed money of the Defendant in one of the suits, Mungniram Marwari, and executed mortgages of the properties which are now claimed by the Plaintiff. Hurri Pershad on the 28th September 1875 appointed the Plaintiff to be his successor (the terms of the appointment will be referred to), and died on the following day. On the 24th of November 1875 Jitlal Nund, the brother of Hurri Pershad, applied to the District Judge of Bhagulpore for a certificate of guardianship of the person and property of

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the Plaintiff under Act 40 of 1858, and on the 19th of February 1876 the application was allowed, after opposition on the part of one Somar Nund. The terms of the application and of the allowance are these: The application stated that Hurri Pershad had in his lifetime given the guddi of Mohuntship to Mohunt Gursahai Nund, the present Plaintiff, his youngest disciple, of about 13 years of age; and after stating the vesting in possession of the Muth and other properties it said that it was necessary, in order to take care of the person of the minor and to look after all the cases and manage the properties, that the Petitioner, that is Jitlal Nund, should obtain a certificate under Act 40 of 1858; and it prayed for a certificate. The order of the District Judge, after stating the application, and that it had been objected to by a disciple, a Chela, who claimed to have succeeded Hurri Pershad, and that the certificate of guardianship would be only as regards the personal property of the minor, "whatever that property may be at present," said "Order; application allowed."

On the 7th November 1876 Mungniram, the Defendant in one of the suits, instituted a suit on his mortgage bonds against the Plaintiff, and in the plaint he described the present Plaintiff as "Minor, disciple and heir of Mohunt Hurri "Pershad Nund, deceased, under the guardian- "ship of his uncle Jitlal Nund." In this suit a summons was served on Jitlal Nund personally, but he did not appear, and made no defence to the suit; and on the 16th January 1877 Mungniram obtained an *ex parte* decree declaring his lien upon the mortgage property and directing it to be sold. In execution of that decree Mungniram caused the property to be attached, and it was put up for sale by auction; and Mungniram became the purchaser of Bela Sheottur, part of the property taken in execution,

and the Defendant in the other suit, Liakut Hossein, purchased Mouzah Bichwa, the other part.

On the 18th August 1882 the Plaintiff instituted the present suits, alleging that he attained his majority in January 1880. The first question to be considered is whether he was properly represented in the suit by Mungniram by his guardian Jitlal; and that depends on the construction of Act 40 of 1858. That Act in the third section says :—" Every " person who shall claim a right to have charge " of property in trust for a minor under a will " or deed, or by reason of nearness of kin, or " otherwise, may apply to the Civil Court for a " certificate of administration; and no person " shall be entitled to institute or defend any " suit connected with the estate of which he " claims the charge until he shall have obtained " such certificate." The question is, what is the meaning of the words " until he shall have obtained such certificate ? " Although the order was made allowing the application for the certificate, no formal certificate appears to have ever been prepared by the officer of the Court, and issued to Jitlal Nund. The Subordinate Judge found that although Jitlal Nund did not take out the certificate, he was the constituted guardian of the Plaintiff, but that he did not properly look after the interests of the Plaintiff, and did not defend the suit. On that account he held that the decree in the suit was not binding upon the Plaintiff, but he thought that the suit was barred by the law of limitation, and decided the case upon that ground.

Then it came by appeal to the High Court. That Court, after noticing some cases which had been quoted, said: " There is not, so far as " we are aware, any authority for holding that " a person who has applied for a certificate of " guardianship under Act 40 of 1858, and who

" has been appointed guardian by the Court, " can, as of right, sue or defend on behalf of " the minor without taking out a certificate;" and they went on to state what is material as showing the nature of the case, that Jitlal Nund had acted for the Plaintiff, not only in this suit by Mungniram, but that he acted in suits by other creditors, and in proceedings taken by certain of the Chelas to establish title to the office of the Mohunt; and further, that after the Plaintiff attained his majority, he presented a petition to the Court of the Subordinate Judge, in which he stated that Jitlal had obtained a certificate of guardianship under the Act "and had been managing his estate; " and on the 6th of July 1881 he (the Plaintiff) " was examined as a witness, and stated that " Jitlal had been his guardian, and used to do " all his business." So that it appears that Jitlal had, at all events, although the certificate had not been issued, acted as the guardian of the Plaintiff. The High Court then decided against the Plaintiff, dismissing the appeal with costs. However, they entertained a petition for review, and upon that petition came to the conclusion that they had not put the right construction upon the Act. The ground of this conclusion appears to be that the Court Fees Act, which was passed in 1870, contains this provision: " Except in the " Courts herein-before mentioned no document " of any of the kinds specified as chargeable " in the first or second schedule to this Act " annexed shall be filed, exhibited, or recorded " in any Court of Justice, or shall be received " or furnished by any public officer, unless in " respect of such document there be paid a fee " of an amount not less than that indicated by " either of the said schedules;" and they considered, as they say, that the certificate could not actually come into existence " until the

" person who has the permission of the Court to " obtain it, deposits the requisite amount of stamp " duty." They reversed their previous judgment, and held that the Plaintiff ought to have a decree for possession, and for mesne profits, on the ground that he had not been properly represented by Jitlal in the suit.

Now the words are " until he shall have obtained such certificate." The section provides that the person who claims a right to have charge of the property may apply to the Civil Court for a certificate. The Court is to exercise a discretion, or at least is to inquire whether the person making the application is entitled to have the certificate. Their Lordships are of opinion that when the Court makes that inquiry, and comes to a decision that the application should be allowed, that is doing all that is substantially necessary in the matter; and when the order is made that the applicant shall have his certificate, the applicant really then obtains his certificate. All is done at that time which is necessary to show that he is the person who should have the certificate. He then, by getting that order, substantially obtains the certificate, although the officer of the Court, whose duty it would be to draw up the certificate, and prepare it for the signature of the Judge, or the seal of the Court to be attached to it, may not do that for some time afterwards, on account of the course of business, or the party not applying to him for it. When a man obtains an order for a certificate he does in substance comply with the terms of this Act, in the same way as when a person has the judgment of the Court that he shall have a decree in his suit it may be said that he then obtains his decree. The decree, when it is drawn up afterwards, relates back to that time; and so would the certificate in

this case relate back; and the terms of the Act that he shall have obtained such certificate are complied with.

The High Court give as a reason, as has been stated, that the Court Fees Act, which was passed 12 years after the Act of 1858, shows that the obtaining the certificate is not complete until the fee is paid, and the certificate is actually issued. The answer to this is that it must be seen what was the intention of the Legislature when the Act of 1858 was passed, and when there was apparently no such provision as this in existence requiring the Court fee to be paid before the certificate was issued. If the meaning of the Act in 1858 was that the obtaining the certificate was complied with by obtaining the order, any subsequent provision in the Court Fees Act could not make any difference in the intention of the Legislature. Their Lordships have to see what the intention was, and what was meant by these words when the Act was passed in 1858. Therefore they have come to the conclusion that the Act was sufficiently complied with by Jitlal obtaining the order from the Judge, although the certificate was never actually afterwards drawn up. What means there might be under the Court Fees Act to oblige the person who had obtained such an order to take out the certificate it is not necessary now to consider. Probably, if there is not power now to oblige the fee to be paid, it would be for the Legislature to make a provision for it.

The Plaintiff being thus properly represented in the suit, the other question which arises, and which has to be determined before considering any other matters or questions which arise in the case, is when did the Plaintiff attain his majority? It is not disputed by his learned Counsel that the present suits are suits in the nature of one to set aside a decree, and that such a suit must be brought, according

to the law of limitation, within one year from the making of the decree, if the party at that time is of full age, but if he is a minor, then within one year of his attaining majority. The plaint in this suit was filed on the 18th of August 1882, and the question is whether the Plaintiff had attained his majority more than one year before that time. That depends upon the date of his birth; and the Subordinate Judge who had that question to try upon the second issue, finds this. He says:—"With "regard to the second issue the Plaintiff states in "the plaint that he was born in December 1861, "and that he attained majority in January 1880, "that is, when he completed his age of 18 years. "On the other hand the Defendants contend "that he was 25 when he brought the suits. "The Plaintiff was examined as a witness in "another case on the 6th July 1881, when he "had no idea of bringing these suits, and he "then stated his age to be 24 years, and "distinctly said that he was a minor up to "1879, that is until he completed the age of 21. "In the present case he has not ventured to "come into the box and explain away his "previous statement. He has sedulously kept "himself out of Court, and though in the course "of the trial the Court remarked that it would "be satisfactory if the Plaintiff himself was "examined, his legal advisers have not thought "proper to examine him." The statement which is referred to is a deposition which he made on the 6th of July 1881 in some suit, the nature of which does not appear, and in that deposition there is this statement:— "My name is Gursahai Nund, father's name Mohunt Hurri Pershad, age 24 years." Mr. Mayne has urged upon their Lordships that the heading of a deposition of this kind is not of much importance; that the statement of the age

by a witness is taken down in such a way that little weight ought to be attached to it. The answer to that seems to be that if the Plaintiff made this statement without considering what his age was, or made it in a loose and informal manner, he might have come forward as a witness, or been produced as a witness by his legal advisers and explained it. He might have shown how it was that he came to allow his age to be put down at 24 years when according to his present case he was some three or four years younger at that time, and would be 19 or 20. The Subordinate Judge has properly attached considerable importance to that. He then goes on to say that he does not attach weight to the evidence which was given on the part of the Plaintiff. Some of it, he says, and justly, is hearsay evidence, and he thinks that the evidence of the mother, and of the other persons who give any evidence on the subject, is not to be given credit to. The conclusion he came to was that the Plaintiff was born in 1265 Fusli, and that he attained his majority when he completed 21 years of age, and more than a year before the suit was commenced. The difference between the 18 years and the 21 years has been adverted to in the course of the argument, and it has been said, and it may be with some justice, that the Plaintiff may have supposed when he talked of majority that it was 18. This difference is explained by the operation of the Act of 1858; because when a minor is brought under the operation of that Act, which the Plaintiff was by the certificate, the age of majority is altered from 18 to 21, and therefore it became necessary to show that the age of 21 years was attained.

Besides what the Subordinate Judge has referred to, some observations arise upon the evidence in this case with regard to the law of

limitation. The hibanama throws some light upon the matter. That states :—" I am " Mohunt Gossain Hurri Pershad, inhabitant " and proprietor of Monzoh muth Bela Sheottur, " pergunnah Bisthazari, lying within the juris- " diction of station Sikundara, sub-division " Jamui, Zillah Monghyr. Whereas life is " uncertain, and out of old disciples no one is " intelligent and clever enough to discharge " and manage the zemindari, village, and court " affairs, and the affairs relating to my guddi " of Mohuntship, for this reason I, of my own " free will and accord in health of body, and in " a sound state of mind, have out of my disciples " appointed a new disciple by name Gursahai " Nund, who is competent to manage the zemin- " dari, village, and court affairs, as the holder " of the estate to be left, and the guddi of " Mohuntship, and successor to my dignity and " possession, in order that after my decease " he shall take possession of my guddi of " Mohunship, and succeed to my dignity and " possession, the movable and immovable pro- " perties, and household furniture detailed " below." Therefore according to the Plaintiff's case we have Hurri Pershad saying that no one is intelligent and clever enough out of his old disciples to discharge and manage the zemindari, and appointing a youth at that time only 13 years of age. It seems unlikely that Hurri Pershad, if the Plaintiff was only of that age, would have used such language as this in the hibanama. He might do it if the Plaintiff were just upon the point of attaining his majority of 18. Again it is somewhat strange that Hurri Pershad, considering that he said not one of the old disciples was intelligent and clever enough to manage the zemindari, when he appointed a youth of 13, made no provision for the appointment of a

guardian. There is no suggestion that the Plaintiff was a minor. The terms of this hibanama appear to their Lordships not to be consistent with the case of the Plaintiff, although they may be consistent with the case of the Defendants, that at that time the Plaintiff was very nearly attaining the age of 18, when he would be of full age if no certificate of administration had been obtained, which it would not be necessary then to apply for.

Another fact against the Plaintiff's case is this: that an application was made for the return of documents, which was presented by a pleader; and in that application the Plaintiff is made to state, or states—it is made through his pleader, and we may use the expression "made to state"—"I have attained my majority since "1880, and have been personally transacting my "own affairs." Upon that application, after a report was made to the Judge by the Record Keeper, an order was made that the documents should be returned on the petitioner having attained his majority. The pleader who was employed to present the petition was examined as a witness and he appears to have done what was quite right — to have asked to see the petitioner, and saw him; he says that the Plaintiff on that occasion told him that he had attained majority. It is suggested that the Plaintiff had then in his mind the age of 18, but it is not to be supposed that the pleader, who no doubt was acquainted with the law, did not consider that the proper age to be attained was 21; and certainly a Judge whose duty it was to see that the Plaintiff was entitled to have back the documents would have to consider whether it was true or not that he had attained his majority. That supports the conclusion to which the Subordinate Judge came when he decided the issue against the Plaintiff, and there

is certainly no reason for their Lordships thinking that this conclusion is wrong.

That being so, it is not necessary to consider the other question which was raised by Mr. Mayne, whether as regards Mungniram, he being the Plaintiff in the original suit, and being shown by the evidence to have known the whole state of the property, that it was "debuttur" property, and that Hurri Pershad had no right to mortgage it, and knowing also that the suit which he brought to recover the money was undefended, and that Jitlal was grossly neglecting his duty in not defending it, and raising the question that the estate which had come to the Plaintiff as the Mohunt, was not liable to satisfy Mungniram's debt, the decree obtained by Mungniram against the present Plaintiff represented by Jitlal was not binding upon him by reason of the gross laches of Jitlal.

The result is that their Lordships will humbly advise Her Majesty that the decrees of the High Court made upon the review should be reversed, and both suits be dismissed with costs in the Subordinate Court and in the High Court, including the costs of the review. This conclusion was correctly arrived at by the Subordinate Judge, and by the High Court upon the first hearing of the appeals, although not upon the same grounds as those upon which the judgment is now given. The Appellants must respectively have their costs of these appeals.