creditor holding a decree, which entitles him to enforce his lien; and another decree-holder not secured and holding a simple money-decree. Under these circumstances, we think it impossible to say that the Subordinate Judge was wrong in allowing the mortgaged eight annas to be first sold in execution of the mortgage-decree, and then selling the remaining moiety in execution of the decrees for rent. This appeal, therefore, must also be dismissed with costs.

Appeals dismissed.

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MOHENDRO COOMAR DUTT v. HEERA MOHUN COONDOO.

ISHANESWARY DASEE v. GOPAL DAS DUTT.

Before Mr. Justice Mitter and Mr. Justice Maclean.

WAZEER MAHTON AND ANOTHER (DEFENDANTS) *v.* CHUNI SINGH AND ANOTHER (PLAINTIFFS).*

1881 *June* 11.

Res Judicata—Finality of Arbitrator's Award, when Judgment is passed thereon—Question dealt with by such Award raised in a subsequent Suit.

Where a case was referred to arbitration, and the award was subsequently filed and judgment passed in accordance therewith, and subsequently, in another suit between the same parties, a question dealt with in the award was raised,—

Held, that such question was *res judicata* between the parties, the judgment on the award having the same effect as an ordinary judgment of a Court, and being conclusive on the point.

THIS was a suit for arrears of rent for the years 1284 and 1285 (1876—1878). The rent was payable in kind, and the amount of land in respect of which it was alleged to be due was found by the original Court to be 44 bighas and 12 cottas. The plaintiffs alleged that they were entitled to a nine-annas share, and that the defendants were only entitled to a seven-annas share; but the defendants disputed this, and contended that the plaintiffs were only entitled to an eight-annas share of the produce, and that a tender had been made of that amount and refused previous to the suit being brought.

* Appeal from Appellate Decree, No. 721 of 1880, against the decree of H. Beveridge, Esq., Judge of Patna, dated the 19th January 1880, reversing the decree of Babu Poresh Nath Banerjee, Subordinate Judge of that district, dated the 27th May 1879.

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The original Court found the shares to be in the proportion of nine to seven, on the ground that this question had been decided in a previous suit between the parties, which had been referred to arbitration. It appeared that the award, which was dated the 12th November 1877, had been confirmed by the Munsif, and subsequently upheld on appeal by the District Judge. The remaining facts in the case having been found against the defendants, the Subordinate Judge gave the plaintiffs a decree for the amount they claimed, and this decree was confirmed on appeal by the lower Appellate Court. The defendants accordingly now appealed to the High Court, on the ground, amongst others, that the decision of the arbitrators, acted on by the Courts below, was not a finding of a Court of competent jurisdiction upon the question at issue in the present suit, and that it was, therefore, not admissible, if at all, as conclusive evidence on the question.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Sreesh Chunder Chowdhry* for the appellants.

Baboo *Saligram Singh* for the respondents.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—This was a suit for arrears of rent for the years 1284 and 1285 (1876—1878), the rent being admittedly payable in kind. The plaintiffs claim to recover in the proportion of nine-sixteenths of the produce; the defendants allege that the proportion is half and half.

It appears that there was a previous suit between the parties in respect of the rent of the years 1281 to 1283 (1874—1876). In that suit also, they were at issue upon this point, *viz.*, in what proportion the plaintiffs are entitled to receive the produce. The whole matter in difference in that suit was referred to arbitration, and the arbitrator submitted his award, deciding this question in favour of the plaintiffs. Certain objections were taken against the award, but the Court overruled them and passed judgment in accordance with it. The defendants appealed against

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that judgment, but failed, on the ground that the judgment being in accordance with the award was final under the law.

The Courts below in this case have treated the former judgment as conclusive evidence on this point, and the question raised before us is, whether it has that effect.

We are of opinion, that the lower Courts are right in treating the former judgment as conclusive upon this particular issue. It has been contended before us, that a judgment can be only treated as *res judicata* when it is the decision of a Court of competent jurisdiction; and that an arbitrator is not a Court of competent jurisdiction, his jurisdiction being limited to the decision of the particular matter referred to him.

This argument seems to us not to be sound. It is not simply the award which has been held to be *res judicata* in this case, but the award followed by the judgment of the Court.

Section 325 of Act VIII of 1859 (the reference was under that Act) says, that if the Court shall not see cause to remit the award, &c., &c., the Court shall proceed to pass judgment according to the award; and s. 185 says, that the judgment shall contain the point or points for determination, the decision thereupon, and the reasons for the decision. It is clear, therefore, that a judgment passed in accordance with s. 325 incorporates in itself the decision upon the points at issue as contained in the award. It has the same effect as an ordinary judgment of a Court. This view is supported by an authority cited at p. 17 of "Biglow on the Law of Estoppel." It is to the following effect:—"The *award of arbitration* under a rule of Court, if final and valid, is also conclusive upon the parties. The case first cited—*Lloyd* v. *Barr* (1)—was an action on a note against a prior by a subsequent indorser, who had paid a judgment given by arbitrators in an action by the holder against all the indorsers; and as no technical issue had been framed, it was contended that the judgment was not an estoppel to the present defendants to deny demand and notice. But the Court ruled otherwise."

It has been also urged that the question of proportion was incidentally tried in the former suit. But we are unable to take

(1) 11 Pen. St., 41.

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this view. It appears to us, that the point arose directly in that case as it also arises directly here.

The decision of the lower Courts is, therefore, correct. The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Prinsep and Mr. Justice Field.

1881 *July* 28.

BONOMALI MOZUMDAR (JUDGMENT-DEBTOR) *v.* WOOMESH CHUNDER BUNDOPADHYA (DECREE-HOLDER).*

Sale in Execution of Decree—Irregularity—Material Injury—Presumption—Civil Procedure Code (Act X of 1877), s. 311—Witnesses, Laches in summoning.

On an application under s. 311 of the Civil Procedure Code (Act X of 1877) to set aside a sale, it appeared that there had been a material irregularity in publishing the sale; but no witnesses were called to prove that substantial injury had been caused thereby. It also appeared that seventeen days after the applicant had applied for proclamations to be issued to his witnesses, he deposited the requisite fees; and that, subsequently, there was a delay of seven days in the office in issuing such proclamations, which were ultimately issued only three days prior to the day fixed for the hearing. On the applicant alleging that, in consequence of such delay, he had not been allowed a fair opportunity to produce his witnesses,—

Held, that the Court cannot presume that substantial injury has been caused from the mere fact of there having been a material irregularity in publishing a sale; but when both a material irregularity and substantial injury have been proved, the Court may reasonably presume that the substantial injury is due to such irregularity.

Held also, that the applicant having been guilty of laches himself, could not be allowed to set up the delay in the office, as a ground for the non-production of his witnesses.

Gopee Nath Dobay v. *Roy Luchmeeput Singh* (1) considered.

THIS was an appeal against an order rejecting an application under s. 311 of the Civil Procedure Code (Act X of 1877) to set aside a sale.

* Appeal from Original Order, No. 142 of 1881, against the order of Baboo Jugatdurlubh Mozumdar, Officiating Subordinate Judge of Furreedpore, dated the 5th February 1881.

(1) 1 C. L. R., 349.