Baboo *Debender Chandra Ghose*, in support of the rule, cited *Pareshnath Dey* v. *Nabin Chandra Dutt* (1).

(1) *Before Mr. Justice Glover and Mr. Justice Mitter.*

PARESHNATH DEY AND ANOTHER (DEFENDANTS) *v.* NABIN CHANDRA DUTT (RESPONDENT).*

June 28th, 1869.

MITTER, J.—We are of opinion that the decision of the lower Appellate Court ought to be reversed. The Moonsiff who tried this suit in the first instance, referred it to arbitration, under the provisions of section 315, Act VIII of 1859. The arbitrators came to the conclusion that the transaction relied upon by the plaintiff was altogether fictitious, but they nevertheless held that the plaintiff was entitled to a decree, inasmuch as the defendant had affixed his signature to the *bina-putra* upon which the suit was brought.

The Moonsiff declined to uphold this award, upon the ground that the arbitrators were guilty of misconduct, in deciding contrary to the evidence which they themselves had accepted and believed.

On appeal, the Judge has reversed the Moonsiff's decision, holding that the Moonsiff had no jurisdiction to refer to the evidence taken by the arbitrators for the purpose of determining whether they were guilty of misconduct or not.

It has been contended before us that the Judge having disposed of the case according to the award of the arbitrators, the decision is final, under the provisions of section 325 of the Code. But we are clearly of opinion that this contention is not sound. The provisions of section 325 apply to that Court only, by which the case is referred to arbitration, and to no other Court. In the present case, the Court which made the reference declined to pass judgment according to the award, and the Judge, having on appeal, reversed the decision of that Court, we have every power to see whether the Judge's decision is correct or otherwise. There is nothing in the provision of section 325 which goes to show that those provisions were intended by the Legislature to be applicable to a case like the present, and we are bound to entertain this special appeal; there being no express provision to the contrary.

Upon the merits, we are of opinion that the Judge's decision is wrong. The Moonsiff had every power to refer to the whole of the arbitration record, for the purpose of determining whether the arbitrators were guilty of misconduct or not. Section 320 says:—"When an "award in a suit shall be made either "by the arbitrator or arbitrators, or by "the umpire, it shall be submitted to "the Court under the signature of the "person or persons by whom it is made "together with all the proceedings, de "positions, and exhibits in the suit." If, therefore, the arbitrators are bound to submit to the Court, all the proceedings, depositions, and exhibits in the suit, the Court to which they are submitted has every power to look into them; and if on the perusal of those proceedings, depositions, and exhibits, the Court is satisfied that the award is of such a perverse character as to raise a reasonable presumption of misconduct on the part of the arbitrators, it has every power to set it aside.

Charges like partiality and misconduct, are seldom capable of direct proof; and if the proceedings of the arbitrators which contain the best available evidence of their conduct are not referred to for the purpose of determining whether that conduct was good or bad, gross failure of justice might ensue in many cases. In the present case, there can be no doubt that the award of the arbitrators is highly improper on the very face of it, and the Moonsiff was fully justified in holding them guilty of misconduct, in having decided the case contrary to all the evidence which they had themselves recorded and believed.

We reverse the decision of the Judge, and restore that of the Moonsiff, with the costs of this Court and of the lower Appellate Court.

* Special Appeal, No. 3217 of 1868 from a decision of the Officiating Additional Judge of Jessore, dated the 3rd September 1868.

1870

IN THE MATTER OF THE PETTION OF SHEIKH ILAHI BAX.

The judgment of the Court was delivered by

MARKBY, J.—I think this rule must be made absolute. There was a suit before the Moonsiff. That suit was referred to arbitration. Pending the arbitration, a dispute arose as to whether or not the arbitrators could proceed. An application was made to the Court, and the Moonsiff expressed an opinion that the arbitration could proceed. Thereupon two of the arbitrators proceeded to make the award, and the Moonsiff gave a judgment in accordance with that award.

Against that decision the defendant appealed to the Judge. The Judge was of opinion that the award was invalid; and upon a consideration of the evidence on the record, he found that the plaintiff's claim was not satisfactorily proved, and therefore reversed the judgment of the Moonsiff and dismissed the plaintiff's suit.

We think that the order of the Judge was made without jurisdiction, and ought to be set aside. The function of the Court, in arbitration cases, in dealing with an award, is laid down in sections 324 and 325, Act VIII of 1859. Under section 324, an award can only be set aside on two grounds, *viz.*, on the ground of corruption and on ground of misconduct on the part of the arbitrators. Under section 325, the Court, if no application to set aside the award on the grounds above stated be made, or if any application be made but refused, shall proceed to pass judgment according to the award; and in every case in which judgment shall be given according to the award, the judgment shall be final. No provision is therefore made for a case in which the award is absolutely void, and whether or no it is convenient that that should be the state of the law, it is quite clear that the remedy is not, and cannot be, by an appeal to the Judge (1). Of course, we do not in the least mean to intimate any opinion whether this award was a good or a bad award, or whether it can be enforced; that question is not before us. All that we do mean to say is that, when a judgment was passed by the Moonsiff in accordance with it, that judgment was not subject to any further appeal to the Judge. We think that this opinion of ours is in accordance with the view of law taken in *Sreenath Ghose* v. *Rajchunder Paul* (2); and although it is true that it appears at first sight somewhat in conflict with the view taken in *Paresnath Dey* v. *Nabin Chandra Dutt* (3), I doubt if it is really so.

This last case was one of a very peculiar character. reference to arbitration did not take place until after a remand from this Court; and looking to the order of reference, I doubt very much whether the record ever really left the Court. I am inclined to think that only the question on remand was referred to the arbitrators. At any rate it is obvious that the course taken by the Judge in this case is erroneous. There was no judgment

(1) See Sec. 323, Act VIII of 1859.
(2) 8 W. R., 171.
(3) *Ante*, p. 77.

according to the argument of the very party who appears to show cause, upon which an appeal could lie. The only contention is that the proceeding under the arbitration was void, and there was no judgment by the Moonsiff of his own, but only a decree according to the award. Upon this fact alone, however, it seems clear to us that no appeal could lie, because there was no judgment to appeal against.

We think, therefore, that the Judge acted without jurisdiction in this case, and that his judgment must be set aside, and this rule made absolute with costs.

Before Mr. Justice Markby.

1870
August 9.

DUTT *v.* CORNELIUS.

Subsistence-money—Discharge—Act VIII of 1859, *ss.* 276, 278.

A prisoner was arrested on August 4th, and committed to prison on the evening of the same day. Before his committal, the execution-creditor paid into the hands of the jailor a sum sufficient for his subsistence-money for 27 days, at the established rate of 4 annas per day. On the 5th August, a writ of *habeas corpus* was applied for to bring the prisoner up, and on the 6th, a further sum of 4 annas was paid to the jailor to cover any deficiency in the former payment.

Held, that the requirements of section 276, Act VIII of 1859, had not been fulfilled, and that the prisoner was entitled to his discharge under section 278.

THIS was an application for discharge of the defendant from custody, on the ground that his subsistence-money had not been paid in accordance with section 276 of Act VIII of 1859. The defendant was brought up in obedience to a writ of *habeas corpus* which had been issued to the jailor.

Mr. *Kennedy* for the prisoner.

Mr. *Bonnerjee* for the execution-creditor.

MARKBY, J.—I think the applicant is entitled to his discharge. He was arrested on the 4th August, and committed to prison on the evening of that day. Before the committal, the plaintiff paid into the hands of the proper officer the sum of rupees 6-12, which, at the rate established of 4 annas a day, would be his subsistence-money for 27 days. Now the first question that arises is whether that was a compliance with section 276 of Act VIII of 1859. What strictly remained unexpired was 27 days and 6 or 7 hours, and I do not think that the payment for 27 days only is a compliance with what the section requires. Then, it appears that, on the 5th August, application was made for a *habeas corpus* to bring up the body of the prisoner, and on the following day, the sum of 4 annas was paid to the jailor to supply any deficiency in the previous payment. It has been contended that inasmuch as there always was in the hands of the jailor money sufficient for the maintenance of the prisoner, and the deficiency of payment before the com-