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of the Small Cause Court had determined to grant a new trial subject to the opinion of this Court; and we may therefore take it that they considered the case was a proper one for a new trial. The language of s. 53 of Act IX of 1850 is certainly sufficiently large to allow a new trial being granted after a previous new trial (*reads*).

It is reasonable and is in accordance with the practice of the Court in England to grant a new trial after a previous new trial, if it seems necessary for the ends of justice. There are instances in England in the common Law Courts and in the Courts of Equity where more than one new trial has been granted, it appearing proper that it should be done. We think the same rule may be applied here. We must assume that the Judges of the Small Cause Court will not exercise this power unless it appears to them to be right to do so, and they have power to impose such terms as they may think reasonable. We think the question which has been referred to us must be answered in the affirmative, that it is competent to the Judges of the Small Cause Court to grant a second new trial in the same case.

Each party will pay his own costs of stating the case and taking the opinion of this Court.

Attorney for the plaintiff: Mr. *Carapiet*.

Attorney for the defendants: Mr. *Hart*.

Before Sir Richard Couch, Kt. Chief Justice, and Mr. Justice Pontifex.

NOBOCOOMAR DOSS (DEFENDANT) *v.* KEWATA MUG (PLAINTIFF).

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Feb. 28.

Costs—Action on Contract—Verdict for less than Rs. 1,000*—Certificate under Act XXVI of* 1864, *s.* 9.

Where in an action in the High Court founded on contract, a verdict was found for the plaintiff for a sum less than Rs. 1,000, and the Judge who tried the case awarded costs without certifying under s. 9 of Act XXVI 1864 that the action was fit to be brought in the High Court, *held* that the Court might supply the omission on appeal.

APPEAL from a decree of Macpherson, J., dated the 20th August 1872.

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The plaintiff sought to recover the sum of Rs. 1,811-6-5 for tobacco sold by him to the defendant on 29th August 1871, giving credit to the defendant for Rs. 200, which the plaintiff said was paid to him on that day. The defendant admitted the transaction, but said that he paid the plaintiff Rs. 1,025, and not Rs. 200 as stated by the plaintiff. He also claimed a balance of Rs. 711-15, as still due to him on account of a former transaction between them. He further said that upon an adjustment of account, the plaintiff allowed him Rs. 225, leaving a balance of Rs. 50, which he admitted to be due to the plaintiff. Macpherson, J., found that the defendant had paid the plaintiff Rs. 1.025, and not Rs. 200; but he gave the plaintiff a decree for Rs. 711-15, and for Rs. 225, with costs on scale No. 2. The defendant appealed.

Mr. *Lowe* and Mr. *Bonnerjee*, for the appellant, contended that the amount which was held to be due to the plaintiff being less than a thousand rupees, the plaintiff was not entitled to his costs, as the suit ought to have been brought in the Small Cause Court; and that the lower Court was wrong in awarding costs to the plaintiff without certifying that it was a fit case to be brought in the High Court as required by s. 9 of Act XXVI of 1864.

Mr. *Phillips* and Mr. *Gregory*, for the respondent, contended that the Act did not prescribe any particular form in which a Judge was to certify that a case was a fit case for awarding costs, and that the awarding of costs merely had the same effect as if there was a certificate. They also contended that if it were necessary that there should be a formal certificate or order in accordance with the Act, the Appellate Court could supply the omission by certifying that it was a fit case for awarding costs.

The judgment of the Court was delivered by

COUCH, C.J. (who, after affirming the decree upon the findings of fact, continued)—An objection was taken that the decree being for a sum less than Rs. 1,000, the award of

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costs was erroneous, because there was no certificate under s. 9, Act XXVI of 1864. Now a certificate under that section may, according to the words of it, be given at any time. The words do not require that it should be given immediately. It says that costs shall not be allowed unless the Judge gives a certificate. The case, then, is that the learned Judge has made a decree for costs in express terms; he says "there will be a decree accordingly with costs on scale 2;" but he has omitted to determine the question whether "by reason of the difficulty, novelty or general importance of the case, the action was fit to be brought in the High Court." We think that is an omission which, the case having come before us in appeal, we are at liberty to supply; and if we consider that the action was fit to be brought in this Court, we may, acting as an Appellate Court, supply what has been omitted. We may determine any question which it was essential to determine, and may certify that it was a proper action to be brought in the High Court. We have no hesitation in doing that because we have ascertained from the learned Judge that, if his attention had been called to the necessity of a certificate, he would have granted it.

The appeal must be dismissed with costs on scale No. 2.

Appeal dismissed.

Attorneys for the appellant: Messrs. *Swinhoe, Law* and *Co.*

Attorney for the respondent: Mr. *Carapiet.*