1873

BISTOO CHUNDER BANERJEE v. NITHORE MONEE DABEE.

reason which we consider a reasonable one, namely, that the decree-holder slept over his rights for no less than five years before making his demand for contribution, and we do not see any error in law which would justify our interfering with his order. There was no contract between the parties to pay interest, and there is no rule of law by which, in the absence of such contract, an award of interest is made compulsory. It was within the discretion of the Court below either to give or to whithhold interest, and there is no ground for our interfering with his order.

The special appeal is dismissed with costs.

Appeal dismissed.

ORIGINAL CIVIL.

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

1872 *Dec.* 12.
1873 *Feby.* 28.

PURSON CHUND GOLACHA (PLAINTIFF) *v.* KAJOORAM AND ANOTHER (DEFENDANTS).

Second New Trial—Small Cause Court.

It is competent to the Judge of the Calcutta Small Cause Court to grant a second new trial of the same case.

THE defendant having obtained judgment in his favor in a suit in the Small Cause Court, the plaintiff obtained a new trial. Judgment was again given in favor of the defendant. The plaintiff again obtained a rule absolute for a new trial, but subject to the opinion of the High Court on the question "Whether it is competent to the Judges of this (the Small Cause) Court to grant a second new trial on the same case."

Mr. *Woodroffe* and Mr. *Phillips* for the plaintiff.

Mr. *Jackson* for the defendants.

Mr. *Phillips*.—The plaintiff has obtained a rule absolute for a new trial. Under these circumstances I do not know who ought to begin.

1872.

PURSON CHUND GOLACHA v. KAJOORAM.

COUCH, C.J.—The rule was made absolute subject to the opinion of this Court, the case therefore comes before us, as though you were now moving for a rule, therefore you ought to begin.

Mr. *Phillips*.—By Act IX of 1850, s. 53(1), the Judges of the Small Cause Court, in every case whatever, have the power "if they shall think fit, to order a new trial to be had." Unless "a new trial" is to be taken as equivalent to "one new trial," there is nothing to restrict the power. A new trial is in every respect a distinct proceeding, new evidence is given, new points of law may possibly arise, and there is a new judgment. There appear to be no authorities as to the practice in this respect of the English County Courts, but the superior Courts undoubtedly have the power to grant a third trial—Chitty's Archbold's Practice, 1534.

Mr. *Jackson*.—The Small Cause Court is an inferior Court, and, therefore, cannot grant a new trial, except for irregularity or fraud, unless it have an express statutory power—*The King* v. *The Mayor of Oxford* (2); *per* Maule, J., in *Mossop* v. *The Great Northern Railway* (3); and *The Great Northern Railway* v. *Nossop* (4). S. 53 of Act IX of 1850 is in the same terms as s. 89 of the County Courts' Act 9 & 10 Vict., c. 95. [PONTIFEX, J.—The case of *Mossop* v. *The Great Northern Railway* (3) only shows that the County Court cannot entertain repeated motions for a new trial.] The case shows the general principle that the inferior Courts cannot grant new trials. A new trial in England would be had before different juries, whereas here the case would be tried over and over again by the

(1) *Act IX of* 1850 *s.* 53.—"Every order and judgment of any Court holden under this Act, except as herein provided, shall be final and conclusive between the parties; but the Judges shall have power to non-suit the plaintiff in every case in which satisfactory proof shall not be given to them, entitling either the plaintiff or defendant to the judgment of the Court; and shall also, in every case whatever, have the power, if they shall think fit, to order a new trial to be had, upon such terms, as they shall think reasonable, and in the meantime to stay the proceedings."

(2) 3 N. & M., 877.

(3) 16 C. B., 580, at p. 584.

(4) 17 *Id.*, 130.

1872-73

PURSON CHUND GOLACHA v. KAJOORAM.

same Judges. The words in s. 53 must be taken in their ordinary sense. Had the Legislature intended to give a power of granting successive new trials in the same case, it would have used the words "new trials." Under the Rules of Practice of the Calcutta Small Cause Court, the position of the defendant is different after the first and second trials: the defendonts' deposit must be left in Court for four days—Rule 56 (1); but if on the new trial the verdict be entered for the plaintiff, the judgment may, by Rule 58 (2), be satisfied at once out of the sum deposited, and the defendant, if he desire a second new trial, must make a fresh deposit. [COUCH, C.J.—That only shows that the rules did not contemplate a second new trial, but it will not alter the power if it be given by the Act.] It shows the practice: there is no reported case in which a second new trial has been moved for. If a party may obtain successive new trials in the same case, he can saddle his opponent with enormous costs, for the Judges of the Small Cause Court have repeatedly held that they can only give one set of fees in each case to attorneys and Counsel engaged. [COUCH, C.J.—They can give a new set of fees on each new trial. PONTIFEX, J.—The Judges can put the parties on terms.] If this Court holds that the Small Cause Court can grant a second new trial, it will be conferring a jurisdiction which the Act does not in express words confer.

Mr. *Phillps* in reply.

The opinion of the Court was delivered by

COUCH, C. J.—The quetsion which has been referred to us by the Small CauseCourt is (*reads*). It appears that the Judges

(1) *Rule* 56.—If the Court is of opinion that a new trial should be granted, the plaintiff shall proceed to set his case down for re-hearing within four days, unless some othertime be granted by the Court, and in default, the defendant shall be at liberty to withdraw his deposit.

(2) *Rule* 58.—If, on the hearing of the second trial, the verdict is entered for the plaintiff, the judgment may be satisfied *pro tanto* out of the sum already deposited for debt and costs by defendant, with right of execution against the goods or person of the defendant for the amount payable by the defendant over and above the sum so deposited by him in Court.

1872-73

PURSON CHUND GOLACHA v. KAJOORAM.

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).

1873

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.