

*Mr. K. E. Twidale* for Appellants.

*Baboo Motee Lall Mookerjee* for Respondents.

Where any real grievance or other just cause of complaint arises to a plaintiff from the first Court's refusal to examine his witnesses, his first duty is to bring the matter prominently to the notice of the Lower Appellate Court in his grounds of appeal. Failing to do so, he cannot be allowed to urge it as a plea in special appeal.

*Bayley, J.*—THERE is no ground for this special appeal.

The main objection is that, on various occasions, it was brought to the notice of the first Court that the witnesses for the special appellant were present in Court, and yet they were not examined.

Now, looking to the record, it, no doubt, appears that there were most unreasonable adjournments and delays in the examination of the witnesses, and this Court would have taken further notice of the matter had the jurisdiction of the Deputy Collector over such cases remained; but if there were any real grievance or any just cause of complaint, or any obvious injustice caused to the special appellant by the refusal of the Court to examine his witnesses, his first duty would have been to bring the matter prominently to the notice of the Lower Appellate Court in his grounds of appeal; but he totally neglected to do so, and only after the case was decided against him by the Lower Appellate Court on other grounds did he take the objection by way of review, and now urges it before this Court as a point of special appeal. We quite agree with the learned Counsel, Mr. Twidale, that it is the duty of this Court to redress the grievances arising to parties from the neglect of the Courts below in matters of this kind; but at the same time it cannot be denied that, in this particular case, if any real grievance had been caused to the special appellant by the omission of the first Court to examine his witnesses, he would and should have first urged it as a preliminary and prominent point of appeal before the Judge, and not that point only for a special plea in this Court in the last stage of the special appeal.

In this view, we think this special appeal must be dismissed with costs.

The 30th January 1871.

*Present:*

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

**Witnesses—Notice.**

Case No. 420 of 1870.

*Miscellaneous Appeal from an order passed by the Subordinate Judge of Bhaugulpore, dated the 9th July 1870.*

Mussamut Mussitee Khanum (Claimant),  
*Appellant,*

*versus*

Mussamut Hookoom Bibee and another  
(Opposite Party), *Respondents.*

*Moonshee Mahomed Yusuf* for Appellant.

*Baboos Debendro Narain Bose and Kalee Kishen Sein* for Respondents.

After a list of witnesses has been filed and the *tullubana* paid, the Court's officers, not the applicant, are responsible for the service and return of notice.

*Bayley, J.*—IN this case, we think that justice requires that the order of the Subordinate Judge must be reversed.

On the 15th June 1870, an order was passed that the case be taken up on the 9th July, and that the applicant do, in the meantime, file his *issumnvisee* or list of witnesses.

On the 29th June, the applicant not only put in the list of witnesses, but did also on that day pay in the *tullubana*, and thus completed all that he was required to do under the law. This gave a period of 10 days before the day fixed for hearing. For the proceedings that were taken within this

interval of 10 days, the applicant was not responsible, but the Court-officers. The service of notice and the return thereof were acts in the hands of the Court and its officers.

We think the order of the Subordinate Judge must be reversed, and the case remanded to him to hear the witnesses whom the appellant named in his *issumnivisee*, and for whose appearance he paid *tullubana*, if produced within a reasonable time to be fixed by the Lower Court.

The case is accordingly remanded to be tried on its merits.

The 30th January 1871.

*Present:*

The Hon'ble L. S. Jackson and Dwarkanath Mitter, Judges.

Jurisdiction—Debt—Partnership-accounts.

Case No. 669 of 1870.

*Special Appeal from a decision passed by the Officiating Additional Judge of Backergunge, dated the 19th January 1870, reversing a decision of the Moon-siff of Burrisaul, dated the 13th January 1869.*

Ram Kanaye Shaha and others (Plaintiffs),  
*Appellants,*

*versus*

Bykunt Nath Shaha (Defendant), *Respondent.*

*Baboo Kalee Mohun Doss* for Appellants.

*Baboo Grija Sunkur Mojoomdar* for  
*Respondent.*

Where defendant had been plaintiff's servant in charge of plaintiff's shop, on the understanding that he was to be remunerated by a small share of the profits in lieu

of fixed wages, a suit to recover the balance after deduction of such remuneration was held to be a suit on a demand cognizable by a Small Cause Court, and not for balance of partnership-account.

*Mitter, J.*—I AM of opinion that there is no special appeal in this case.

The suit was brought for the recovery of a sum of money below 500 rupees, alleged to have been misappropriated by the defendant whilst he was employed as a *gomasta* in the plaintiff's shop. Such a suit is clearly cognizable by the Court of Small Causes. Whether the accounts between the parties have been adjusted and the balance struck or not, it is evident that those accounts cannot be treated as partnership-accounts. The defendant was employed as a servant, and the mere fact that he was to receive a certain portion of the profits of the shop cannot convert this suit into a suit for balance of partnership-account. But if this suit was really cognizable by the Court of Small Causes, the Lower Courts had no jurisdiction to try it. There is a Court of Small Causes at Nulchitee, and that Court was fully competent to try it. It is much to be regretted that the Judge of the Small Cause Court of Nulchitee had, on a previous occasion, refused to entertain this claim upon the ground that it was a claim for balance of partnership-account. But as the question is one of jurisdiction, I feel myself bound to set aside the decisions of both the Lower Courts under the powers vested in me by the 15th Section of the Charter Act. I would, therefore, set aside the decisions of both the Lower Courts; but under the circumstances stated above, I would order that each party ought to bear his own costs in all the Courts.

*Jackson, J.*—I agree that this was not a suit on a balance of partnership-account, although the plaintiff, misled by the erroneous dictum of the Small Cause Court, did his best to make it so.

The defendant was plaintiff's servant in charge of his shop, and was to be remunerated by a small share of the profits instead of fixed wages. What the plaintiff sought to recover was the amount which he found ought to have been in defendant's hands after deduction of the amount coming to him for his remuneration.

This was a debt or demand really recoverable in the Small Cause Court, and the jurisdiction of the ordinary Civil Courts was accordingly varied.