

right. A plaintiff is only bound to include the whole of the claim which he is entitled to make in respect of the cause of action (Section 43, Civil Procedure Code).

The old Code was to the same effect. The same view which we are constrained to regard as erroneous pervades the decision in *Denobhundo Chowdry v. Kristomonee Dossee* (I. L. R., 2 Cal., 152), in which we should have followed the opinion of GARTH, C.J. To apply this to the present case, in the former suit the obligation to pay rent and the non-payment of the rent due constituted the cause of action put forward, the title was an incidental question, (see *DeSouza v. Coles* (3 M. H. C. R., 384); *Jackson v. Spittal* [39 L. J. (N.S.), 321]; and *Durham v. Spence* [40 L. J. (N. S), 3]). In the present suit the title is the cause of action. Plaintiff, no doubt, in the former suit prayed for possession of the paramba, and that relief was refused, and it is argued that this brings the case within the terms of Explanation 3 of Section 13 of the Civil Procedure Code, and that, as that relief was not granted in the [311] former suit, it must be regarded as having been refused. That explanation, however, must be read with the section, and clearly applies to relief applied for which the Court is bound to grant with reference to the matters directly and substantially in issue. Now the *causa petendi* in the former suit was the existence of the relation of landlord and tenant and the omission to pay rent which entitled the plaintiff to recover the property. The title, no doubt, was in issue, but not directly and substantially, only incidentally, and that relief is now prayed for on wholly different grounds. We do not think that Explanation (3) of Section 13 bars the plaintiff from putting forward her present claim to relief. We shall therefore send the following issues for trial:—

- (1) Has the plaintiff a title to the property sued for?
- (2) Is first defendant liable for mesne profits, and what is the amount of them?

Upon return of the finding on the issues referred, the Court set aside the decree of the District Judge and restored the Munsif's decree in favour of the plaintiff.

NOTE.—For the meaning of the term Cause of action, See I. L. R., 1 Mad., 375, and the cases there cited.

[4 Mad. 311]

APPELLATE CIVIL.

The 27th September and 31st October, 1881.

PRESENT:

MR. JUSTICE INNES AND MR. JUSTICE MUTTUSAMI AYYAR.

Kupu Rau.....(Second Defendant), Petitioner

and

Venkataramayyar.....(Plaintiff), Respondent.*

Civil Procedure Code, Section 515—Arbitration—Umpire, extension of time for submission of award by—Estoppel.

As in the case of an arbitrator so in the case of an umpire a Court has power to extend the period within which the award is to be submitted.

* C. M. P. No. 15 of 1881 against the order of P. Tirumal Rau, Acting Subordinate Judge of Tinnevely, dated 7th December 1880.

Where the parties prayed the Court to appoint two arbitrators and an umpire and to refer the case to them for decision, and undertook to abide by such decision as might be passed by them unanimously or by the majority of them—

Held that an award by the umpire alone, the arbitrators being unable to decide, was valid.

[312] *Held*, also, that the plaintiff having appeared before the umpire and taken no objection to the procedure of the umpire from March to August, was estopped from raising the objection that an award of the umpire alone was invalid.;

The Court can extend the time allowed to an umpire under Section 509 of the Code. In Suit No. 16 of 1879 in the Subordinate Court of Tinnevely, the parties applied to the Court to appoint two arbitrators, one for each of the parties, and an umpire, and undertook to abide by such decision as might be passed by them unanimously or by the majority of them. The Court accordingly made an order of reference on 3rd October 1879, fixing 3rd November 1879 as the date within which the award should be delivered to the Court. The period was subsequently extended to 5th March 1880, on which date the umpire informed the Court by petition that the arbitrators, not having decided the case, had called upon him under Section 515 of the Code of Civil Procedure for a decision. The Court directed the parties to appear before the umpire on the 17th March, and the umpire to send in his decision before 29th March. The umpire, unable to submit his award within the 29th March, applied for an extension of time on five occasions. The award was eventually submitted on 16th August.

On 24th August the plaintiff objected to the award on the ground—

- (1) that the parties never agreed to abide by the decision of the umpire alone ;
- (2) that the order of reference to arbitration gave the umpire no authority to dispose of the case alone ;

and prayed that the Court would dispose of the case.

This petition was heard by the successor of the Subordinate Judge, who set aside the umpire's award and remitted the case for disposal by the two arbitrators and the umpire, on the ground that the procedure laid down by Section 510 of the Code of Civil Procedure had not been followed ; that the Court had no power to extend the time for the submission of the award by the umpire ; and that the parties did not agree to abide by the award of the umpire.

Against this order the defendant presented this petition to the High Court under Section 622 of the Code of Civil Procedure on the grounds—

[313] (1) that the Subordinate Judge had no jurisdiction to set aside the umpire's award ;

- (2) that the procedure was legal and proper.

Bhashyam Ayyangar for Petitioner.

The Advocate-General (Hon. P. O'Sullivan) for Respondent.

The Court (INNES AND MUTTUSAMI AYYAR, JJ.) delivered the following

Judgment:—The Subordinate Judge certainly had no power to set aside the award, except for some one of the causes set forth in Section 521. His order was without jurisdiction and must be set aside.

Then the question arises whether the decision by the umpire is bad in law, *i.e.*, whether the parties did not agree to the decision of the case by the umpire in certain events.

Looking at the order of reference and at the Muchalka upon which the order of reference is founded, the parties do not seem to have directly contemplated the eventual decision of the case by the umpire alone, but it cannot be said that those documents necessarily require the decision to be that of the umpire and another.

In executing the Muchalka and in invoking the aid of the Court to give it effect, the parties were submitting to the procedure of the Code, which allows of the decision by an umpire in certain events, and cannot now call it in question. Objection was not taken to the procedure till 24th August 1880, though proceedings by the umpire commenced by order of the Court on the 17th March, and the fact that they were to be commenced must have been known several days before that date. This is evidence of acquiescence in the procedure adopted which, of itself and without reference to the operation of the provision of the Procedure Code, should be held to estop the parties from seeking to disturb what was done by the umpire.

It is said, however, that the umpire did not act as provided by the Code of Civil Procedure, and, when he commenced acting, had no authority to act, as the period for delivery of a decision by the arbitrators had not expired. The period had been extended to the 5th March, and the umpire on that date wrote apprising the Subordinate Judge that the arbitrators had failed to pass the award by the proper date, and that he had taken up his duties as [314] umpire, though he could have had no authority to do so until the expiry of the 5th March. It is, however, quite clear that the arbitrators did not deliver an award within the 5th March, and no proceedings were taken by the umpire towards the investigation or decision of the case until, by the expiry of the extended period, the authority of the umpire was called into operation. We think, therefore, that there is nothing in this objection.

We do not doubt that the Court has power to extend the period within which an umpire may give in his decision just as it may in the case of an arbitrator; otherwise the time allowed to an umpire under Section 509 might become exhausted without remedy by extension of time given to the arbitrators. We observe also that the English decisions upon similar sections of the Judicature Act are to the same effect.

On the whole we think that the order of the Subordinate Judge should be set aside and that the award should be allowed to stand, and that the Court should proceed to give judgment according to it.