

(1922) 08 MAD CK 0013
In the Madras High Court

P.S. Narayana Aiyar

APPELLANT

Vs

Biyari Bivi alias Kathun Bivi and Others

RESPONDENT

Date of Decision : 01-08-1922

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 152

Citation : (1922) 16 LW 623 : (1922) 43 MLJ 559

Judgement

1. At the last hearing of this Appeal we held, disagreeing with the lower court, that plaintiff was not entitled to the charge she claimed, because inter

alia it was not conferred on her by her decree. Ex. J3. That decree was passed on an award, Ex. J1 but did not in our opinion reproduce the term

thereof, by which such a charge as plaintiff set up was created. Plaintiff after our decision induced the court, which passed Ex, J3, to amend it u/s

152, C.P.C. by removal of what in the affidavit filed there is described as a clerical error and to insert words making the provision her case here

required. She then moved for a re-hearing of the appeal on review and we allowed it.

2. The Advocate General on behalf of 3rd defendant, the appellant, first asked us to postpone the re-hearing, until he had appealed to the Privy

Council against our order granting a review. But we pointed out that such an order could not be regarded as final for the purpose of Section 109

C.P.C. and that his application for leave in connection with it would be unsustainable. The rehearing accordingly proceeded.

3. It may for the present purpose be at once conceded that, if Ex. J3 had stood on 8-12-17 the date of 3rd defendant's purchase in court sale, as

it does now, plaintiff would be entitled to relief. The question however is whether she is so entitled, when Ex. J3 as it was passed on 5-1-17 and as

it was expressed on the date of the sale, conferred no charge and recognized one only by the amendment, made over four years later, on 25-11-

21, in proceedings, to which 3rd defendant was not a party.

4. The exercise of the power to amend u/s 152 is discretionary and necessarily so, when no period of limitation is provided for application for its

exercise and therefore no investigation of title can insure those, who acquire rights in property dealt with in a previous decree, against the effect of a

subsequent amendment thereof. This and the consequence, that an application for amendment should be rejected as too late, if the rights of third

parties acting in good faith have intervened, is recognized in *Nation v. Harris* (1892) A.C. 547, and *Langat Singh v. Janki Koer* (1911) 1 L.R. 39

Cal 265. It is clear that, if the amending court, the District Court of Madura, had had the full facts before it, its duty would have been to refuse to

use its powers for plaintiff's benefit. In fact, as the copies filed here of the affidavits on which it acted show, it was told nothing of those facts or of

the present proceedings, from which the necessity for plaintiff's obtaining an amendment had arisen, the construction which had actually been

adopted by us being represented in one affidavit merely as "likely". If the District Court had been aware of the real state of the case, it cannot be

doubted that it would have refused to consider the application, until at least 3rd defendant had had notice of it.

5. Plaintiff here has not succeeded in showing that the principle above referred to is for any reason inapplicable to this case and has argued only

that under the C.P.C. she could not have proceeded otherwise than she did and could not have made 3rd defendant a party to the amendment

proceedings. It is not necessary for us to express a final opinion as to the applicability of Order 22 Rule 10 or on the question whether the

reference in that provision to "the pendency of the suit" covers the period between an original and an amended decree. For plaintiff could and

should have made 3rd defendant a party in compliance with the general principle that persons, whom it is desired to bind by proceedings can and

must be impleaded in them. Third defendant having had no previous opportunity to object to the amendment, is entitled to object to it now; and as

it was delayed until long after he acquired his rights at the sale of the imminence of which plaintiff admittedly knew, the objection must prevail.

6. Holding that the amended decree cannot in the circumstances be pleaded against 3rd defendant, we again allow the appeal, dismissing plaintiff's suit with costs (including those of the review petition) throughout.