

## Prema Amritham Aiyer Vs Sudha Vitthal Amarapurkar

**Court:** Bombay High Court

**Date of Decision:** Jan. 20, 2025

**Acts Referred:** Constitution of India, 1950 " Article 227

Code of Civil Procedure, 1908 " Section 2(11), Order 22 Rule 4, Order 22 Rule 5

**Hon'ble Judges:** N. J. Jamadar, J

**Bench:** Single Bench

**Advocate:** Mandar Limaye, Vedant Bende, Vaibhav Patankar & Associte, Jaydeep Deo

**Final Decision:** Allowed

### Judgement

Ã, N. J. Jamadar, J

1. Rule. Rule made returnable forthwith. With the consent of the learned Counsel for the parties heard finally.

2. By this Petition under Article 227 of the Constitution of India, the Petitioner assails the legality, propriety and correctness of common order passed

by learned District Judge, Pune on 4th January 2024, whereby the Application preferred by the Petitioner (Exhibit Ã¢,Ã“49Ã¢,Ã“) and another Application

preferred by Mr. Suresh Pandurang Ghodke (Exhibit Ã¢,Ã“77Ã¢,Ã“) to implead them as the parties to RCA No. 324 of 2012 in the capacity of legal

representatives of Marybai Moses Peter, the deceased Respondent, came to be rejected.

3. Shorn of the unnecessary details, the background facts leading to this Petition can be summarized as under:

4. The Respondents-Plaintiffs had instituted a Suit for specific performance of a contract for sale executed by Marybai Peter, being Special Civil Suit

No. 34 of 1984. The said Suit was partly decreed by Judgment and Order dated 20th September 1990. The Defendant carried the matter in Appeal

before this Court in First Appeal No. 171 of 1992. In the said Appeal, the Respondent filed cross-objection. First Appeal No. 171 of 1992 came to be

dismissed for want of prosecution. The cross-objection preferred by the Respondent-Plaintiff came to be independently numbered as First Appeal No.

131 of 1995. In view of the enhancement of pecuniary jurisdiction, in the year 2012 the said First Appeal No. 131 of 1995 came to be transferred to

the District Court, Pune, and was registered as RCA No. 324 of 2012.

5. During the pendency of the Appeal, the Petitioner preferred Application (Exhibit Ã¢,Ã“49Ã¢,Ã“) asserting inter alia that Marybai Peter, the

Defendant/Respondent therein, passed away on 6th February 1995. The Petitioner/Applicant is the daughter of late Amritham Aiyer, who was the

Vice-President of Spicer College, Aundh, Pune. Deceased Marybai Peter was the cousin of Amritham Aiyer, the father of the Applicant. Marybai

Peter was a spinster. Marybai had not left behind her parents, Sister or Brother. The Petitioner is the sole surviving heir of late Marybai Peter.

Therefore, the Petitioner be permitted to implead herself as the legal representative of late Marybai Peter.

6. Dr. Suresh Pandurang Ghodke also preferred an Application (Exhibit 77) to implead him as the legal representative of Marybai Peter in the

capacity of the legatee under the purported Will dated 12th November 1992 executed by Marybai, whereunder the suit property also came to be

bequeathed to him.

7. The Appellants resisted both the Applications. It was disputed that Marybai Peter passed away on 6th February 1995. A reference was made to an

earlier order passed by the Court on an Application of one Pannalal Shah (Exhibit 32), whereby the said Application came to be rejected

observing inter alia that the said Pannalal Shah has failed to establish that Marybai Peter passed away on 29th March 1993. The claim of both the

Petitioner Prema Aiyer, and Dr. Suresh Ghodke to succeed to the estate of Marybai Peter, on intestacy and testamentary disposition, respectively,

was contested by the Appellants-Respondents herein.

8. Prema Aiyer also controverted the claim of Dr. Suresh Ghodke that late Marybai Peter had executed a Will in his favour.

9. The learned District Judge was of the view that though it was established that Marybai Peter died on 6th February 1995, yet, both the Petitioner and

Dr. Suresh Ghodke failed to substantiate their claim that they are the legal representative of late Marybai Peter. Being aggrieved, the Petitioner has

invoked the writ jurisdiction of this Court.

10. I have heard Mr. Mandar Limaye, the learned Counsel for the Petitioner, and Mr. Jaydeep Deo, the learned Counsel for the Respondent, at some

length. The learned Counsel took the Court through the material and documents on record.

11. Mr. Limaye, learned Counsel for the Petitioner, strenuously submitted that there was a substantial procedural defect in the determination of the

question by the learned District Judge. Inviting the attention of the Court to the provisions contained in Order XXII Rule 5 of the Code, Mr. Limaye

would urge that the question as to whether, the Petitioner is a legal representative of Marybai Peter, the deceased-Respondent, could not have been

determined by the learned District Judge by embarking upon a superficial enquiry. Placing emphasize on the proviso to Rule 5 of Order XXII, Mr.

Limaye urged that in the circumstances of the case where a dispute was raised about the status of the Petitioner as the legal representative of

Marybai Peter, the learned District Judge ought to have directed the trial court to try the said question and return its findings and thereafter determine

the said question. Without following the said procedure, the learned District Judge by ascribing reasons which can be said to be in the nature of

surmises and conjectures, rejected the Application.

12. Mr. Limaye submitted that it is not the case that the Petitioner is a busybody. The Petitioner had filed an Application for grant of heirship

certificate being Civil Miscellaneous Application No. 370 of 2021 under the Bombay Regulation VIII of 1827. The said Application was opposed by

the Respondent. The Petitioner has placed on record the birth certificate and other documents to show that she is the daughter of Amritham Aiyer, the

cousin of late Marybai Peter. Therefore, the learned District Judge could not have non-suited the Petitioner without holding a proper enquiry as

warranted by the provisions contained in Order XXII Rule 5 of the Code.

13. Mr. Jaydeep Deo, the learned Counsel for the Respondent, would support the impugned order. It was submitted that the learned District Judge has

ascribed justifiable reasons to record a finding that there is no material to show that Manuel Amritham, of whose reference finds place in the cross-

examination of late Marybai Peter, was the cousin of late Marybai Peter or that the Petitioner is the daughter of Amritham Aiyer. Mr. Deo further

submitted that the learned District Judge correctly noted that in Civil Application No. 622691 in First Appeal No.12299 of 1991 filed before this Court,

late Marybai Peter had contended that she had no son, daughter, brother or sister; she had lost her parents several years ago and she had no other

relative to help her.

14. Lastly Mr. Deo placed reliance on a decision of the Supreme Court in the case of Mahanth Satyanand Alias Ramjee Singh Vs Shyam Lal

Chauhan And Ors (2018) 18 SCC 485 wherein it was enunciated that the aspect of deciding legal representative cannot be postponed with a view to

decide at the time of the final disposal of the Appeal on merits. Thus, the submission on behalf of the Petitioner that since the Application for grant of

heirship certificate is subjudice before the Civil Court, the issue of the Petitioner not being a legal representative of late Marybai Peter could not have

been adjudicated, does not merit acceptance.

15. The provisions contained in Order XXII Rule 5 read as under:

“5. Determination, of, question, as, to, legal, representative.”

Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question

shall be determined by the Court:

Provided that where such question arises before an Appellate Court, that Court may before determining the question, direct any subordinate Court to

try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons, therefor, and the Appellate

Court may take the same into consideration in determining the question.

16. The text of the abovesaid Rule, makes it abundantly clear that where a question arises as to whether a person is the legal representative of a

deceased party to the proceeding, the Court is enjoined to determine the said question. Determination of the said question, the moment it arises, is

imperative as the proceeding cannot be further proceeded with till a deceased party is represented in the proceeding.

17. The proviso to Rule 5, was inserted by the Code of Civil Procedure (Amendment) Act 1976. Where the question arises in an appeal, the proviso

enables the appellate court to direct the trial court to enquire into and give its findings on dispute as to who is the legal representative of a deceased

party. Nonetheless, it is the appellate court which has to determine the question as to who is the legal representative of the deceased party, albeit,

after taking into consideration the report submitted by the trial court. From the phraseology of Rule 5, it also becomes evident that though the proviso

refers to the evidence (adduced by the parties), yet, the enquiry envisaged by the said Rule is summary in nature.

18. A useful reference, in this context, can be made to a decision of the Supreme Court in the case of *Jaladi Suguna (Deceased) Through LRs Vs*

*Satya Sai Central Trust*, (2008) 8 SCC 521 wherein after advertng to the definition of legal representative under Section 2 (11) of the Code and the

provisions contained in Rules 4 and 5 of Order XXII, the position in law was expounded as under:

“12. 'Legal representative' according to its definition in section 2(11) of CPC, means a person who in law represents the estate of a deceased person, and includes

any person who intermeddles with the estate of the deceased. Thus a legatee under a will, who intends to represent the estate of the deceased testator, being an

intermeddler with the estate of the deceased, will be a legal representative.

..

14. When a respondent in an appeal dies, and the right to sue survives, the legal representatives of the deceased respondent have to be brought on record before the

court can proceed further in the appeal. Where the respondent-plaintiff who has succeeded in a suit, dies during the pendency of the appeal, any judgment rendered

on hearing the appeal filed by the defendant, without bringing the legal representatives of the deceased respondent-plaintiff on record, will be a nullity. In the appeal

before the High Court, the first respondent therein (*Suguna*) was the contesting respondent and the second respondent (the tenant) was only a proforma respondent.

When the first respondent in the appeal died, the right to prosecute the appeal survived against her estate. Therefore, it was necessary to bring the legal

representative(s) of the deceased Suguna on record to proceed with the appeal.

15. Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed,

the court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the

deceased. Until such decision by the court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute

or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal

representative is determined by the court and such legal representative is brought on record, can it be said that the estate of the deceased is represented. The

determination as to who is the legal representative under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for

adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property

which is the subject matter of the suit, vis-a-vis other rival claimants to the estate of the deceased.

16. The provisions of Rules 4 and 5 of Order 22 are mandatory. When a respondent in an appeal dies, the Court cannot simply say that it will hear all rival claimants to

the estate of the deceased respondent and proceed to dispose of the appeal. Nor can it implead all persons claiming to be legal representatives, as parties to the

appeal without deciding who will represent the estate of the deceased, and proceed to hear the appeal on merits. The court cannot also postpone the decision as to

who is the legal, representative of the deceased respondent, for being decided along with the appeal on merits. The Code clearly provides that where a question

arises as to whether any person is or is not the legal representative of a deceased respondent, such question shall be determined by the court. The Code also

provides that where one of the respondents dies and the right to sue does not survive against the surviving respondents, the court shall, on an application made in

that behalf, cause the legal representatives of the deceased respondent to be made parties, and then proceed with the case. Though Rule 5 does not specifically

provide that determination of legal representative should precede the hearing of the appeal on merits, Rule 4 read with Rule 11 makes it clear that the appeal can be

heard only after the legal representatives are brought on record. (emphasis supplied)

19. In the case of Mahanth Satyanand (Supra), on which reliance was placed by Mr. Deo, two persons, like the case at hand, claimed to be the

disciples (chellas) of the deceased Mahanth, and, thus, claimed to be his legal representative. The High Court referred the matter to the trial court for

determination under Order XXII, Rule 5 of the Code. The trial court returned a definitive finding that one of the Applicants was the legal

representative. The other Applicant filed objections to the said finding, before the High Court. Without deciding the question as to who of the two

applicants was legal representative, the High Court passed an order to allow both the Applicants to take part in the proceeding.

20. Placing reliance on the decision in the case of Jaladi Suguna (Supra), the Supreme Court set aside the aforesaid order of the High Court, and

observed, inter alia, as under:

“10. Apparently, the issue of bringing on record the legal representative in a pending appeal has to be dealt with in a manner prescribed under the provisions of

Order 22 Rule 5. From the context of the settled legal position, it is clear that when a question arises before the Court in a pending matter as to who will come on

record as the legal heir of the deceased, the Court shall, before proceeding to decide with the substantive issues involved in the case, first and foremost, shall decide

who is the legal representative of the deceased. It is also well settled that when a party dies at the stage of second appeal and there are rival contenders claiming to

be the legal representatives of the deceased, as in the present case, there is a burden cast upon the Court to first decide as to who is the legal representative of the

deceased. Without doing so, the Court cannot proceed with the disposal of the case on hand. At the same time, the Court cannot make all the contenders as parties.

The aspect of deciding legal representative cannot also be postponed with a view to decide the same at the time of final disposal of the appeal on merits. It is

significant that the statute has clearly mandated that if the question of deciding the legal representative of a legatee arises before an appellate Court, it may direct the

subordinate Court to make enquiries by leading evidence, if any, through the process of trial and record its finding as to who is the legal representative. After

considering the finding recorded by the trial Court, the appellate Court can decide and bring on record the legal representative of the deceased.

11. It is indisputable that the procedural laws are meant to advance justice. A procedure contemplated under the code which is mandatory in nature shall not be

skipped or ignored by the Courts. Whereas, in the instant case, the High Court's approach has diluted the purport of Order 22 Rule 5 of the CPC and is contrary

to the law laid down by this Court in Jaladi Suguna (supra). Such an approach of the High Court cannot be sustained.

(emphasis supplied)

21. Undoubtedly, the proviso to Rule 5 is an enabling provision. It cannot be construed as mandatory. It is in the discretion of the appellate court to

direct the trial court to try the issue as to who is the legal representative of a deceased party to the appeal. Yet, the object of expressly empowering

the appellate court to refer such dispute to the trial court and consider the finding of the trial court while determining the question as to who is the legal

representative, cannot be completely lost sight of. The object of the said proviso is to equip the appellate court with the material and findings along

with the reasons, of the trial court, to determine the question referred to in the main part of the Rule 5.

22. It is in this context, in the case of Mahanth Satyanand (Supra), the Supreme Court observed that the procedural laws are meant to advance justice.

A procedure contemplated under the Code, which is mandatory in nature, shall not be skipped or ignored by the Courts. I am conscious that, the

aforesaid observations were in the context of deferring of the determination as to who is the legal representative of a deceased party, by allowing both

the contenders to participate in the proceeding. Yet, the utility of the proviso to Rule 5 cannot be completely brushed aside.

23. In fact, the utility of the proviso to Rule 5 of Order XXII comes to the fore in those cases where there is a contest about the claim of a person that

he is the legal representative of the deceased party. Ordinarily, where such question cannot be decided unequivocally on the basis of documents and

material of unimpeachable character, the court may not hesitate to make use of the enabling provision, the object of which seems to be to advance the

cause of justice by facilitating the determination based on objective material and enquiry by the trial court. It must be reiterated that the ultimate

determination is by the appellate court only. The findings of the trial court are not to supplant the determination by the appellate court but to equip the

trial court to decide the question in a just manner.

24. It would be contextually relevant to note that the controversy in the case of Mahanth Satyanand (Supra) again reached the Supreme Court as the

High Court after the matter was remitted, permitted the person who was found to be legal representative in the enquiry conducted by the trial court to

represent the deceased Mahant. In the case of Swami Vedvyasanand Ji Maharaj (D) Through LRs Vs Shyam Lal Chauhan & Ors, 2024 INSC 352

by Judgment and Order dated 30th April 2024, the Supreme Court observed that the aforesaid approach of the High Court was not correct. The

Supreme Court emphasized that the final decision as to who is the legal representative of the deceased party to the Appeal has to be made ultimately

by the appellate court. The observations in paragraph 17 of the aforesaid order read as under:

“17 Proviso to Rule 5 does not say that the Appellate Court can direct the subordinate court to decide the question as to who would be the legal representative, it

only provides that the Appellate Court can direct the subordinate court to try the question and return the records to the Appellate Court, along with the evidence and

the subordinate court has then to send a report in the form of a reasoned opinion based on evidence recorded, upon which the final decision has to be made

ultimately by the Appellate Court, after considering all relevant material. While dealing with the report sent by the subordinate court under Order 22 Rule 5 of CPC,

the Appellate Court may consider the findings of the subordinate court and then give its reasons before reaching any conclusion. The words 'the Appellate Court

may take the same into consideration in determining the question' used in the proviso to Rule 5 gives discretion to the Appellate Court to make its own separate

opinion notwithstanding the opinion of the subordinate court. The proviso cannot be construed to be a delegation of the powers of the Appellate Court to substitute

the deceased party, but is merely to assist it in ultimately deciding the issue of substitution. Thus, the Appellate Court 'may' take into consideration the material

referred by the subordinate court under Rule 5 of Order 22, CPC along with the objections, if any, against the report while deciding on the substitution of the

appellant.Ãçâ,~â€œ

(emphasis supplied)

25. In the case at hand, the learned District Judge proceeded to determine the question without taking the benefit of the proviso to Rule 5. After

referring to certain documents and the statements of the deceased Respondent, the learned District Judge concluded that the Petitioner failed to

establish her claim that she is the daughter of the cousin of deceased Respondent.

26. The aforesaid approach of the learned District Judge, in the circumstances of the case, appears to be fraught with the risk of the determination

being based on surmises and conjectures. It is pertinent to note that in the evidence of late Marybai Peter, there was an explicit reference to the fact

that she had a cousin Manuel Amritham. He was the Vice-President of the Spicer College, Pune. Marybai Peter had offered to sell half of her plot to

the said cousin. There is also reference to the fact that late Marybai Peter wished to consult her cousin about the transactions.

27. In the face of the aforesaid material, the question whether the Petitioner is the daughter of the said cousin of late Marybai Peter, in my considered

view, could not have been decided on the basis of the relative weight of documents placed on record. The issue was such that it warranted

adjudication upon evidence. To put in in other words, the Petitioner deserved an opportunity to adduce evidence to substantiate her claim that she was

the legal representative of late Marybai Peter.

28. At this juncture, a profitable reference can be made to a decision of the Supreme Court in the case of Kanhiya Singh Santok Singh And Ors Vs

Kartar Singh (2009) 5 SCC 155 wherein there was a dispute as to who was legal representative of the deceased tenant. The Supreme Court



enunciated that such question of fact cannot be decided without permitting the parties to lead evidence in respect of their respective cases and without

coming to a finding on such question of fact by the Court. After referring to the provisions contained in Order XXII Rule 5, the Supreme Court held

that pending disposal of the second appeal, the High Court ought to have sent the case to the trial court to determine as to who was legal

representative of late Santok Singh after permitting the parties to adduce evidence, under the provisions of Order XXII Rule 5 of the Code, which

deals exclusively with the determination of the question as to the legal representatives of a deceased.

29. For forgoing reasons, I am inclined to hold that learned District Judge ought to have resorted to the enabling provision contained in the proviso of

Rule 5 of Order XXII instead of determining the issue on the basis of the broad appreciation of the documents and material on record.

30. It is also imperative to note that the learned District Judge eventually found constraints in proceeding with the appeal, as there was no

representation for the deceased Respondent and by the impugned order called upon the appellant to advance submission as to the manner in which the

appeal was to be further proceeded with. Therefore, a proper determination of the said question assumed importance from the perspective of a just

decision of the appeal.

31. Resultantly, I am impelled to allow the Petition, set aside the impugned order and remit the application of the Petitioner (Exh. 49) to the District

Court, with a direction to the trial court to try the said question and submit a report to the District Court.

32. Hence, the following order :

: ORDER:

(i) The petition stands allowed.

Ã, (ii) The impugned order passed by the learned District Judge on the application (Exhibit-49) stands quashed and set aside.

(iii) The application (Exh. 49) stands remitted to the District Court for a fresh determination in accordance with law.

(iv) The question as to whether the petitioner is the legal representative of deceased respondent in RCA/224/2012 is directed to be tried by the Court

which passed the decree in Civil Suit No.34/1984 and the record together with evidence, if any, recorded at such trial, its findings and reasons

therefor, be returned to the Appellate Court.

(v) The District Court shall remit the relevant record to the trial court within a period of four weeks from the date of communication of this order.

(vi) The trial court is requested to try the said question and submit the report to the Appellate Court, alongwith the aforesaid record, within a period of

six months from the date of the receipt of the record from the District Court.

(vii) Upon receipt of the report, the District Court may consider the same and decide the question as to whether the Petitioner is the legal

representative of Marybai Peter Açã, -" deceased Respondent, in accordance with law, after providing an opportunity of hearing to the parties.

(viii) Rule made absolute to the aforesaid extent. No costs.