

(2014) 12 SC CK 0050
In the Supreme Court Of India
Case No : Civil Appeal No. 3872 of 2009

Karedla Parthasaradhi

APPELLANT

Vs

Gangula Ramanamma

RESPONDENT

Date of Decision : 04-12-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 22 Rule 4, Order 22 Rule 5, Order 41 Rule 25, 151
Constitution of India, 1950 — Article 136
Evidence Act, 1872 — Section 50
Hindu Succession Act, 1956 — Section 8

Citation : AIR 2015 SC 891 : (2015) 2 ALD 67 : (2015) 3 ALLMR 398 : (2015) 2 ALT 18 : (2015) 2 CDR 402 : (2015) 1 CTC 114 : (2015) 1 RCR(Civil) 223 : (2015) 1 RCR(Criminal) 225 : (2014) 13 SCALE 588 : (2015) 1 SCJ 354 : (2015) 2 WLN 161

Hon'ble Judges : M. Yusuf Eqbal, J;Abhay Manohar Sapre, J

Bench : Division Bench

Advocate : Pramod Swarup, Sr. Advocate, Anjani Aiyagari, Sushma Verma, Ram Lal Roy and U.V. Rama, Advocates for the Appellant; Madhavi Divan, D. Bharat Kumar, T. Baskar Gowtham and Abhijit Sengupta, Advocates for the Respondent

Final Decision : Disposed Of

Judgement

Abhay Manohar Sapre, J.—This appeal is filed by the Plaintiff against the judgment and decree dated 19.12.2008 passed by the High Court of Judicature, Andhra Pradesh at Hyderabad in Appeal Suit No. 1842 of 1996 which in turn arises out of judgment and decree dated 15.03.1996 passed by the IInd Additional Subordinate Judge, Vijayawada, in O.S. No. 15 of 1985.

2. By impugned judgment, the learned Single Judge of the High Court allowed the first appeal filed by Defendant No. 1 (Respondent No. 1 herein), reversed the judgment and decree of the trial court, which had decreed Plaintiffs suit for ejectment against Defendant No. 1 in relation to the suit house and in consequence dismissed the Plaintiff's suit.

3. So the question that arises for consideration in this appeal is whether the High Court was justified in allowing the first appeal filed by Defendant No. 1 thereby justified in dismissing Plaintiff's suit filed for ejectment against Defendant No. 1 in relation to the suit house?

4. In order to appreciate the controversy involved in this appeal, it is necessary to state the relevant facts in brief *infra*.

5. The dispute relates to house bearing No. RS 233/1 situated in an area called "Gunadala" within the Municipal Corporation limits of Vijayawada, bearing door No. 2/172 (Old Assessment No. 225), new No. 37687 (described in detail in the schedule attached to the plaint) (hereinafter referred to as "the suit house").

6. One Karedla Satyanarayana purchased the suit house by registered sale deed dated 15.12.1975 from one Smt. Abdul Amina Bee and her sister. At the time of purchase, there was only a tiled house. Subsequently he reconstructed the suit house. He died intestate on 19.12.1983. On his death, the Plaintiff (Appellant herein), who is real brother of late Karedla Satyanarayana, claimed that the suit house has devolved upon him along with his sister (Defendant No. 2) in equal share being Class II (II) (3) (4) heirs as specified in the Schedule appended to the Hindu Succession Act, 1956 (in short "the Act"). However, the Plaintiff could not get possession of the suit house because he noticed that Defendant No. 1 was claiming herself to be in its possession and declined to vacate the same when demanded by the Plaintiff. The Plaintiff also noticed that Defendant No. 1 had been asserting her ownership rights over the suit house after the death of Satyanarayana as his wife. Therefore, on 20.10.1984, the Plaintiff served a legal notice to Defendant No. 1 calling upon her to vacate the suit house and handover its possession to the Plaintiff.

7. Since Defendant No. 1 did not vacate the suit house despite service of notice to her, the Plaintiff filed a suit for eviction against Defendant No. 1 (Respondent No. 1 herein) in the Court of IInd Additional Subordinate Judge, Vijayawada. The suit was founded on the allegations *inter alia* that on the death of K. Satyanarayana, the suit house devolved upon the Plaintiff being his brother as provided Under Section 8 read with Class II (II) (3) of the Act. It was alleged that Defendant No. 1 was employed by K. Satyanarayana to cook his food. It was alleged that since K. Satyanarayana was a bachelor, he had allowed Defendant No. 1 to stay in the suit house as its caretaker and also because he used to be mostly on tour to various places being an active member of the Viswa Hindu Parishad. It was alleged that Defendant No. 1 had neither any ownership nor any tenancy rights over the suit house. It was further alleged that even as a servant, she had no right to remain in the occupation of the suit house and in any event, after K. Satyanarayana's death, the so-called contract of employment between her and K. Satyanarayana having come to an end, her permissive possession in the suit house had become unauthorized and was that of the trespasser *qua* its real owner-the Plaintiff. The Plaintiff, therefore, claimed a decree for possession of the suit house and damages at the rate of Rs. 1000/- per month for its

wrongful use from Defendant No. 1. The Plaintiff also arrayed his sister as proforma Defendant No. 2 without claiming any relief against her.

8. In answer to the plaint, Defendant No. 1 filed her written statement. While denying the Plaintiff's case, it was alleged that she was legally married wife of K. Satyanarayana and was living with him since decades in the suit house. It was alleged that after Satyanarayana's death, she became the sole owner of the suit house by virtue of law of inheritance being a class-I heir i.e., wife. It was alleged that she invested her own money in renovation of the suit house, got her name mutated in the Municipal records as its owner and paid municipal taxes. It was thus contended that her possession over the suit house is on the strength of the ownership and hence cannot be disturbed.

9. The trial court framed the following issues on the basis of aforesaid pleadings:

1. Whether Defendant No. 1 is legally married wife of Late Satyanarayana?
2. Whether the Plaintiff and 2nd Defendant are entitled for possession of suit schedule property?
3. To what relief?

Additional issue dated 4.2.1992.

1. Whether the Plaintiff has preferred title by adverse possession?

10. The parties adduced evidence. By judgment and decree dated 15.03.1996, the trial court decreed the suit holding that the suit house belonged to K. Satyanarayana as its sole owner; that K. Satyanarayana died intestate; that the Plaintiff was Satyanarayana's brother; that the Plaintiff inherited the suit house as its owner as provided Under Section 8 read with Clause (II) (II) (3) of the Schedule appended to the Act; that Defendant No. 1 was working as cook for K. Satyanarayana during his life time and being his servant, neither acquired nor inherited any right, title and interest and nor did acquire any possessory rights in the suit house after the death of K. Satyanarayana. With these findings, the decree for eviction was passed against Defendant No. 1 in relation to the suit house.

11. Feeling aggrieved by the said judgment, Defendant No. 1 filed first appeal before the High Court. During the pendency of first appeal, on 09.06.2000, Defendant No. 1 Gangula Ramanamma (Appellant in first appeal), died. On 09.09.2000, K. Sanjiva Rao (Respondent No. 1 herein) filed an application being CMP No. 17902 of 2000 Under Order XXII Rule 4 read with Section 151 of the Code of Civil Procedure, 1908, (hereinafter referred to as "the Code of Civil Procedure") and prayed that his name be substituted in place of deceased Appellant. It was alleged that he is the adopted son of the deceased Defendant No. 1 (Appellant) and secondly, Defendant No. 1 has also executed one Will on 02.01.1984 in his favour bequeathing the suit house to him. He, therefore, claimed that he, being the legal representative of Defendant No. 1, either as her

adopted son or/and as her legatee on the strength of the Will dated 02.01.1984, he has a right to prosecute the appeal and continue the lis on merits. The Plaintiff (who was Respondent in the appeal before the High Court) opposed the application. However, the High Court, by order dated 09.10.2000 allowed the application and permitted K. Sanjiva Rao to become the Appellant and prosecute the appeal on merits. The order dated 09.10.2000 reads as under:

Petition Under Order 22 Rule 4 r/w. Section 151 of the Code of Civil Procedure praying that in the circumstances stated in the affidavit filed herewith, the High Court will be pleased to bring the Petitioner/proposed Appellant No. 2 herein as the 2nd Appellant in the above A.S. No. 1842/96 and all connected proceedings to represent the estate left by the deceased Appellant Smt. Ramanamma.

This petition coming on for hearing upon perusing the petition and the affidavit filed in support thereof Sri V.S.R. Anjaneyulu, Advocate for the Petitioner and Sri O. Manohar Reddy for Sri G. Vivekananad, Advocate for the Respondent.

This Court made the following order:

Ordered

12. The appeal was accordingly heard on merits by the High Court.

13. By impugned judgment, the learned Single Judge of the High Court allowed the first appeal filed by Defendant No. 1 which as stated above was being prosecuted by K. Sanjiva Rao and while reversing the judgment and decree of the trial court dismissed the Plaintiffs suit. It was held that the Plaintiff was the brother of late K. Satyanarayana and that K. Satyanarayana died intestate. The High Court, however, disagreed with the finding of the trial court on the issue of Defendant No. 1's (Ms. Gangula Ramanamma) status. The High Court reversed the finding on this issue and held that Defendant No. 1 was legally married wife of late K. Satyanarayana. As a result of reversal of this finding, the High Court further held that Defendant No. 1, inherited the suit house after the death of K. Satyanarayana as class-I heir being his wife to the exclusion of Plaintiff and Defendant No. 2 because both were class II heirs being brother and sister of late K. Satyanarayana and thus had no right to succeed the estate of late K. Satyanarayana. With these findings, the High Court allowed the first appeal and in consequence dismissed the Plaintiffs suit giving rise to filing of this appeal by the Plaintiff.

14. Shri Pramod Swarup, learned senior Counsel appearing for the Appellant (Plaintiff) while assailing the legality and correctness of the impugned judgment mainly raised five contentions. In the first place, he contended that the High Court erred in allowing Defendant No. 1's appeal thereby erred in dismissing Plaintiffs suit. According to him, there was neither any basis and nor reason for such reversal. Secondly, he contended that well reasoned finding recorded by the trial court on the question as to whether Defendant No. 1 was legally married wife of Late K. Satyanarayana or not, should not have been reversed by the High

Court for want of any cogent evidence. According to him, a finding of trial court on this issue holding that she was not his legally married wife, was just, legal and proper and hence it should have been upheld. Thirdly, he contended that when admittedly Plaintiff was the real brother of late K. Satyanarayana then he was entitled to inherit the suit house as per provisions of Section 8 read with class II (II) (3) of the Schedule appended to the Act on the death of late K. Satyanarayana. Fourthly, he contended that in any event, due to subsequent event which came into existence during pendency of the appeal viz. death of Defendant No. 1 on 09.06.2000, the suit house devolved upon the Plaintiff because there was no class-I heir in the family of K. Satyanarayana who could succeed to his estate after him except the Plaintiff being the nearest class II heir as brother and hence he should have been held entitled to succeed the suit house as its owner and lastly, he urged that the High Court erred in allowing the application filed by K. Sanjiva Rao (Respondent No. 1 herein) Under Order XXII Rule 4 of the Code of Civil Procedure. According to him, the order allowing the application was passed without following the procedure prescribed in Order XXII Rule 5 proviso and more importantly without recording any finding as to whether K. Sanjiva Rao was the legal representative of Defendant No. 1 and if so, in what capacity i.e., adopted son of Defendant No. 1 or legatee on the strength of Will dated 02.01.1984 alleged to be executed by Defendant No. 1 in his favour. Learned Counsel pointed out that it was necessary for the High Court to have remanded the case to the trial court as provided in proviso to Rule 5 of Order XXII for holding an inquiry to determine the status of K. Sanjiva Rao qua deceased Defendant No. 1 and then depending upon the finding, he should have been allowed to become the Appellant and prosecute the appeal. Learned Counsel, therefore, urged that in the absence of any finding on this material issue, the impugned judgment is also not legally sustainable and hence liable to be set aside.

15. Learned Counsel for Respondent No. 1 (K. Sanjiva Rao) supported the impugned judgment and contended that no case is made out to interfere in the impugned judgment, which deserves to be upheld by dismissing the appeal.

16. Having heard the learned Counsel for the parties and on perusal of the record of the case, we are inclined to uphold one finding of the High Court on merits and remand the case for holding an inquiry on limited specific questions to enable this Court to finally decide the appeal in the light of findings so recorded on the questions framed infra for inquiry.

17. Coming first to the main question as to whether the High Court was justified in holding that Defendant No. 1 (Gangula Ramanamma) was legally married wife of late K. Satyanarayana, we are of the considered opinion that the High Court was justified in holding so. In other words, the reversal of finding of the trial court by the High Court on this issue is justified.

18. The question as to in which circumstances, the Court can draw presumption as to the legality of marriage was succinctly explained by Mulla in his book-Hindu

Law, 17th Edition in Article 438, page 664 under the heading-"Presumption as to legality of marriage"-in following words:

438. Presumption as to legality of marriage-Where it is proved that a marriage was performed in fact, the court will presume that it is valid in law, and that the necessary ceremonies have been performed. A Hindu marriage is recognized as a valid marriage in English law.

Presumption as to marriage and legitimacy-There is an extremely strong presumption in favour of the validity of a marriage and the legitimacy of its offspring if from the time of the alleged marriage the parties are recognized by all persons concerned as man and wife and are so described in important documents and on important occasions. The like presumption applies to the question whether the formal requisites of a valid marriage ceremony were satisfied. Similarly the fact that a woman was living under the control and protection of a man who generally lived with her and acknowledged her children raises a strong presumption that she is the wife of that man. However, this presumption may be rebutted by proof of facts showing that no marriage could have taken place.

19. The question arose before this Court in *Thakur Gokalchand Vs. Parvin Kumari*, , as to whether on facts/evidence, the Court could record a finding about the existence of lawful marriage between the parties and, if so, what should be the principle to be applied while deciding such question. Learned Judge-Fazal Ali J, speaking for the Bench examined this question in the context of Section 50 of the Indian Evidence Act, 1872 and other relevant provisions of law and laid down the following principle of law for determination of such question:

It seems to us that the question as to how far the evidence of those particular witnesses is relevant Under Section 50 is academic, because it is well-settled that continuous cohabitation for a number of years may raise the presumption of marriage. In the present case, it seems clear that the Plaintiff and Ram Piari lived and were treated as husband and wife for a number of years, and, in the absence of any material pointing to the contrary conclusion, a presumption might have been drawn that they were lawfully married. But the presumption which may be drawn from long cohabitation is rebuttable, and if there are circumstances which weaken or destroy that presumption, the court cannot ignore them

20. In recent time, this Court in *Madan Mohan Singh and Others Vs. Rajni Kant and Another*, , relying upon the aforesaid principle of law, reiterated the same principle in following words:

24. The courts have consistently held that the law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a number of years. However, such presumption can be rebutted by leading unimpeachable evidence. (Vide *Madan Mohan Singh and Others Vs. Rajni Kant and Another*, , *Thakur Gokalchand Vs. Parvin Kumari*, , *Thakur*

Gokalchand Vs. Parvin Kumari, , Ranganath Parmeshwar Panditrao Mali and another Vs. Eknath Gajanan Kulkarni and another, and Sobha Hymavathi Devi Vs. Setti Gangadhara Swamy and Others,

21. Coming now to the facts of this case, we consider it apposite to reproduce the finding of the High Court on this issue in verbatim, which is contained in paras 26 to 30 in the judgment:

26. When the first Defendant asserted that she is the legally wedded wife of late Satyanarayana, we have to examine the material placed by her to establish the said fact. It is an undisputed fact that the first Defendant lived with late Satyanarayana. The first Defendant claims that their marriage took place at Rajahmundry about 30 years ago. They lived at Rajahmundry for about 10 years. During their wedlock, she became pregnant twice and those pregnancies were got abort at the instance of her husband. Ultimately, she got her sister's son adopted during the lifetime of late Satyanarayana. Later, they shifted to Rajahmundry, constructed the house and performed the house warming ceremony. Her name was included in the voters list as the wife of late Satyanarayana. She also stated that the deceased being the Pracharak of Viswa Hindu Parishad, he took all care to see that no photographs are taken either for the marriage or house warming ceremony or any other occasion. In support of her contention, DW-2, the neighbour at Vijayawada, was examined, who stated that the deceased Satyanarayana was the husband of the first Defendant. They resided in the said house to the knowledge of one and all as wife and husband. The deceased used to take the first Defendant to some camps along with him. D-1 also looked after the construction work of the house. D-1 and late Satyanarayana sat as wife and husband for performing pooja at the time of house warming ceremony. The Plaintiff and the second Defendant did not attend the said function. He finally said that D-1 is the wife of late Satyanarayana, but not his maidservant. In the cross-examination also, he stated that he heard that Satyanarayana and D-1 married at the temple near their house even prior to the shifting of their residence to his locality and as they have no issues, they brought up one boy by name Sanjeeva Rao. Though the Plaintiff cross-examined DWs 1 and 2, he could not elicit any favourable information in support of his contention that the first Defendant lived in the house of late Satyanarayana only as a cook, but not in any capacity. Ex. X-1 is a Kalpatharuvu deposit receipt of Andhra Bank, Vijayawada. DW-1, an officer of the Andhra Bank, deposed that the deceased Satyanarayana and the first Defendant kept an amount of Rs. 42,650/- in Kalpatharuvu fixed deposit. Satyanarayana wrote letters to the bank informing that after maturity, the amount may be paid either to him or to the first Defendant. The application was signed by both of them at the time of depositing the amount. But, he does not know their relationship. In the fixed deposit receipt, the first Defendant was described as K. Ramanamma, but not as G. Ramanamma, which is her parents' surname. Had the first Defendant lived in the house of late Satyanarayana as a cook, he would not have allowed her to join him in making the deposit and he would not have written letters to the bank

asking them to pay the amount to her after its maturity. This is also one of the strong circumstances to draw an inference that the first Defendant was the wife of late Satyanarayana. After maturity, D-1 withdrew the amount as per the authorization given by the deceased Satyanarayana. In the voters lists covered by Exs. B-42 and 44, the name of D-1 was shown as the wife of late Satyanarayana. Had she not been the wife of Satyanarayana, he would have definitely raised an objection not to designate her as his wife, therefore, this is also one of the strong circumstances to establish that the first Defendant is the wife of the deceased Satyanarayana. In 1983, the deceased was 53 years old and the first Defendant was 32 years old. Though there is difference of age of 20 years between them, on account of long association and continuous living in the same house, the deceased might have developed affection towards the first Defendant and married her as wife. For sake of society, he might have taken precautions to indicate that he remained as a bachelor. The postman of the locality was examined as DW-5, who stated that he saw the first Defendant in the house of the deceased from 1980, but he does not know the relationship and the first Defendant used to receive letters in her name to the said address. Ex. B-46 is one of such letters addressed by late Satyanarayana, wherein the address of the first Defendant is described as K. Ramanamma indicating his surname. In the said letter, the deceased described the first Defendant as Chiranjeevi Ramanamma and mentioned that she has to take care of the domestic needs and perform karthika Monday festival without caring for the expenditure and also advised to instruct Sanjeeva Rao (their foster son) to study well. The manner in which the letter was written is also reflecting the affection of the deceased towards the first Defendant. Had the first Defendant was not his wife, the deceased would not have mentioned her name as K. Ramanamma instead of her parents' surname as Gangula Ramanamma.

27. In the letter addressed to the bank covered by Ex. X-2, the deceased described the first Defendant as Smt. K. Ramanamma, which is also an indication that he is treating her as his wife for all practical purposes except describing her as his wife. DW-6, an ex-corporator of Vijaywada Municipality deposed that after the construction of house, the first Defendant, her mother and a boy name Sanjeeva Rao resided there along with late Satyanarayana till his death. Late Satyanarayana and the first Defendant lived together. Their names find place in the voters list. Late Satyanarayana and the first Defendant used to take treatment from him, as he was a Doctor and Satyanarayana himself used to bring D-1 for treatment. In the cross-examination, DW-6 stated that the first Defendant was residing in the house of late Satyanarayana in the capacity of his wife. He knows the said fact as both of them performed Satyanarayana Vratam at the time of house warming ceremony. He asserted in the cross-examination that late Satyanarayana and the first Defendant are the husband and wife and they brought up one Sanjeeva Rao, who is no other than the sister's son of the first Defendant. DW-7, the fostered son of the Defendant also, stated that the first Defendant is his fostered mother and late Satyanarayana was his fostered

father. He was brought up by both of them. No relatives of Satyanarayana attended the function when Satyanarayana Vratam was performed by late Satyanarayana and D-1 at the time of house warming ceremony. He also performed the obsequies of late Satyanarayana in the suit schedule premises.

28. The above evidence is also lending support to the contention of the first Defendant that she is the wife of late Satyanarayana. A presumption can be drawn that a woman is the wife of a man with whom she lived for a very long period and on account of their long association and she can be recognised as his wife. Various circumstances placed by the first Defendant by way of oral and documentary evidence also indicate that she was recognised as the wife of late Satyanarayana, therefore, she can be treated as wife of late Satyanarayana.

29. Though the Plaintiff and the second Defendant claimed that they are the brother and sister of the deceased, they severed connections with the deceased about four decades prior to the filing of the suit and his whereabouts were also not known to those persons. There was no exchange of visits and they never helped and financed late Satyanarayana either for the construction of the house or for any other purpose. Since there is house in the name of the deceased, they entertained an idea of claiming the same as legal heirs of the deceased Satyanarayana.

30. On account of long association of the first Defendant with the deceased for more than 33 years and on account of the conduct and affection shown by the deceased towards first Defendant, it can be said that she was married by him surreptitiously pretending to be a bachelor to the outside world and with a view to provide shelter to her, he constructed the house and fostered her sister's son to be the successor to D-1. The totality of the circumstances would indicate that D-1 was the legally wedded wife of late Satyanarayana, therefore, she is entitled to the house property being Class-I heir.

22. Mere perusal of the afore-quoted finding would go to show that it is based on proper appreciation of evidence and being just, legal and proper, it does not call for any interference by this Court Under Article 136 of the Constitution. That apart, the High Court while exercising its first appellate jurisdiction Under Section 96 of the Code of Civil Procedure had ample jurisdiction to appreciate the evidence independent to that of the appreciation done by the trial court and come to its own conclusion. Indeed, this being the well-settled principle of law laid down by this Court in several decisions, no elaborate discussion is necessary on this question.

23. We, therefore, find no good ground to reverse the finding though assailed by the Appellant and uphold the same and accordingly hold that Defendant No. 1 (late Gangula Ramanamma) was legally married wife of late K. Satyanarayana.

24. This takes us to the next question which is equally material in the facts of this case as to whether the High Court was justified in allowing the application filed by K. Sanjiva Rao (Respondent No. 1) Under Order XXII Rule 4 of the Code

of Civil Procedure thereby justified in permitting him to become the Appellant to prosecute the appeal as Defendant No. 1's legal representative?

25. The question as to whether a particular person is a legal representative of a deceased Plaintiff or Defendant is required to be decided by the Court as per procedure prescribed in Order XXII Rule 5 of the Code of Civil Procedure which reads as under:

Order XXII Rule 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.

26. This Court in Jaladi Suguna (deceased) through LRs. Vs. Satya Sai Central Trust and Others, , had the occasion to interpret Order XXII Rules 4 and 5 *ibid*, Justice R.V. Raveendran speaking for the Bench after examining the object underlying in Order XXII Rules 4 and 5, held as under:

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-?-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.

27. Keeping in view the abovesaid principle of law and applying the same to the facts of this case, we are of the considered opinion, the High Court committed an error of law when it proceeded to allow the application filed by K. Sanjiva Rao (Respondent No. 1) Under Order XXII Rule 4 *ibid* by its order dated 19.12.2008, for more than one reason mentioned hereinbelow.

28. In the first place, the High Court should have remanded the case to the trial court by taking recourse to the provision of Order XXII Rule 5 proviso for deciding the question as to whether K. Sanjiva Rao (Respondent No. 1 herein) was the legal representative of deceased Defendant No. 1 (Gangula Ramanamma) and if so, in what capacity-adopted son or legatee on the strength of Will dated 02.01.1984. Secondly, without first deciding this material question, the High Court could not have either allowed the application and nor it could have proceeded to decide the appeal on merits. Thirdly, the High Court simply allowed the application without recording a finding as to whether any right in the suit property was devolved in favour of K. Sanjiva Rao (Respondent No. 1) after the death of Defendant No. 1 and if so, in what capacity. This finding alone would have enabled K. Sanjiva Rao to become the Appellant and prosecute the appeal on merits and lastly, this was a case where inquiry into the question was necessary and it could be done only by the trial court.

29. Indeed, this question, in our opinion, has assumed significance for three reasons. Firstly, because K. Sanjiva Rao is not the natural son born out of wedlock of Defendant No. 1 and late K. Satyanarayana and nor he had any blood relations with late K. Satyanarayana. Secondly, due to death of Defendant No. 1 during pendency of appeal, the question has arisen as to who should succeed to her interest and thirdly, this Court having upheld the finding of the High Court that Defendant No. 1 was the legally married wife of late K. Satyanarayana Rao, it is now necessary to give effect to this finding and the same is possible only when it is decided as to who is her legal representative.

30. In the light of foregoing discussion and as rightly argued by the learned senior Counsel for the Appellant, the order dated 09.10.2000 allowing the application filed by K. Sanjiva Rao Under order XXII Rule 4 of the Code of Civil Procedure is not legally sustainable and hence deserves to be set aside.

31. Now in such situation arising in a case, we have two options. First, to remand the case to the High Court which in turn will remand the case to the trial court to decide the application filed by K. Sanjiva Rao Under Order XXII Rule 4 as provided in proviso to Order XXII Rule 5 of the Code of Civil Procedure and depending upon the inquiry report, will decide the appeal and second, this Court should retain the session of this appeal to itself and remand the case to the trial court as provided Under Order XLI Rule 25 read with Order XXII Rule 5 proviso for holding an inquiry and on receipt of the finding, finally decide the appeal in the light of finding so recorded by the trial court.

32. Having given our anxious consideration to this question, we are of the considered view that second course suggested above seems to be more appropriate. It is for the reason that firstly, retaining the session of the appeal and inviting finding from the trial court would save time, avoid incurring cost and curtail stages of litigation and secondly, the litigation which is pending since 1985 would come to an end early and lastly by taking such recourse, no prejudice of any nature would cause to any parties because so far as other issues on merits are concerned, we have already decided and lastly, the expression "Appellate Court" occurring in Order XLI Rule 25 read with Order XXII Rule 5 proviso would not only include the first Appellate Court, but also include second Appellate Court and this Court once this Court grant the leave to file appeal to the Appellant. In such event, this Court being the last Appellate Court, can always exercise the powers available Under Order XLI Rule 25 read with Order XXII Rule 5 proviso and specially when the High Court as first Appellate Court failed to exercise such powers for proper determination of rights of the parties.

33. In the light of foregoing discussion, though we have decided the appeal on merits on some issues arising in the case but having regard to the nature of controversy involved and now keeping in view the subsequent event which have come into existence pending appeal and having a material bearing over the rights of the parties in relation to the suit house, we retain the session of this appeal and remand the case to the concerned trial court i.e., (Second Additional Subordinate Judge Vijayawada) for holding an inquiry to enable this Court to pass appropriate orders on the application filed by Respondent No. 1, K. Sanjiva Rao Under Order XXII Rule 4 of the Code of Civil Procedure (CMP No. 17902 of 2000 in A.S. No. 1842 of 1996).

34. The trial court will decide the question keeping in view the provisions of Order XXII Rule 4 and 5 *ibid* and record a finding on the questions (1) whether K. Sanjiva Rao is the adopted son of Defendant No. 1 and if so, how and on what basis, (2) whether Defendant No. 1 executed Will dated 01.02.1984 in favour of K. Sanjiva Rao and if so, whether it is a genuine Will as per law and (3) if Will dated 01.02.1984 is held as genuine, whether bequeath of the suit property is made by such Will in favour of K. Sanjiva Rao?

35. Let the inquiry be held by the trial court after affording an opportunity to all parties concerned to file reply to application and adduce evidence in addition to

evidence already led in suit and reasoned findings be returned to this Court within three months along with documents and evidence led in the inquiry proceedings.

36. The Registry to remit the record of the trial court and that of the High Court in relation to this case to the concerned trial court forthwith to enable the trial court to hold the inquiry and submit the report as directed within the time fixed.

37. Let the appeal be listed for hearing on receipt of finding from the trial court.