HIGH COURT OF MADHYA PRADESH

HIGH COURT OF MADHYA PRADESH: BENCH: INDORE (SINGLE BENCH: HON.MR. JUSTICE PRAKASH SHRIVASTAVA)

FIRST APPEAL NO.69/1997

Mahendra Kumar ... Appellant

Vs.

Lalchand & another .... Respondents

Shri A.K.Sethi, learned Sr.Counsel with Shri Rishabh Sethi, learned counsel for appellant.

Shri A.S.Garg, learned Sr.Counsel with Shri Yashpal Rathore, learned counsel for respondent Lalchand.

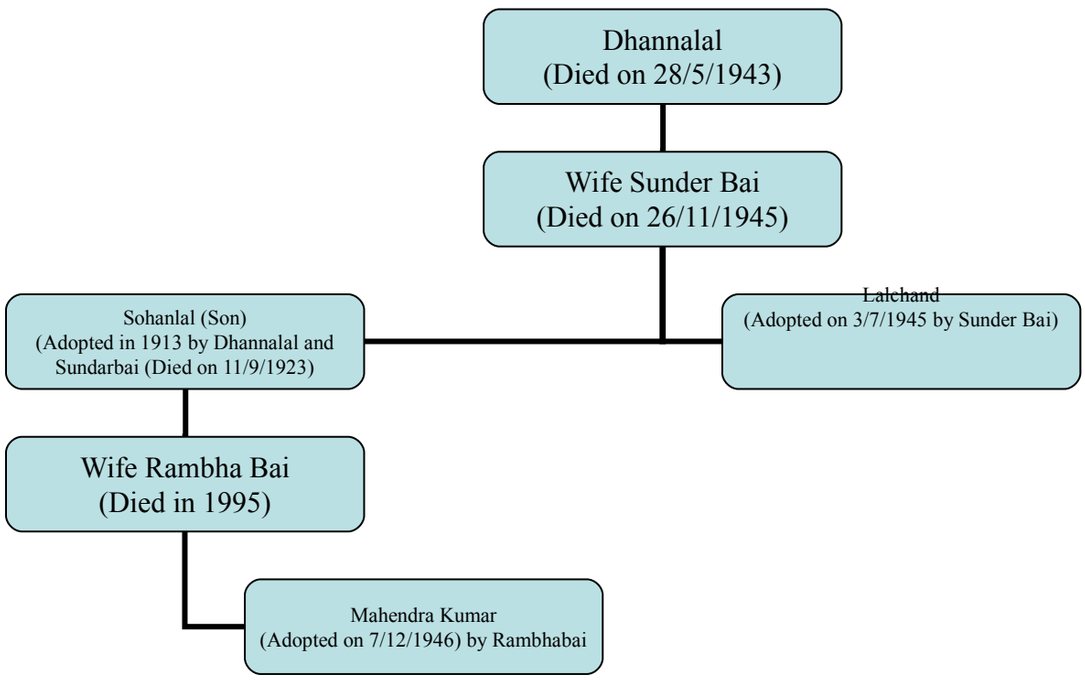
Respondent Shri S.K. Chourishi present in person.

J U D G M E N T
(Delivered on 11th March, 2019)

By this first appeal u/S.96 of the CPC, plaintiff No.2 has challenged the judgment and decree dated 6/6/1987 and 14/7/1987 passed by the learned V Addl. District Judge, Indore in COS No.2/1972-A which is in the nature of final decree in the partition suit holding that Rambhabai plaintiff No.1 and Lalchand has ½ - ½ share in the suit property and accordingly partitioning it.

[2] In this appeal, the *lis* is between Mahendra Kumar and Rambhabai (since deceased through Shrikrishna Chourishi).

[3] The Family Tree for convenience is reproduced as under:-



[4] It would be worthwhile to take note of the chequered history of this case.

[5] On 6/9/1943 Rambhabai had filed the suit for partition as against Sundarbai with the plea that Seth Dhannalal was the owner of the suit property who died intestate on 28/5/1943. Sundarbai was the wife of Dhannalal and mother-in-law of Rambhabai. Sohanlal was adopted by Dhannlal in 1913 (Samvad year 1970) and Rambhabai was married to Sohanlal thereafter, but about four years after the marriage Sohanlal had

died on 11/9/1923, thereafter Rambhabai had continued to live with Dhannalal and Sunderbai as their daughter-in-law. Dhannalal had died on 28/5/1943 and the relationship between Sundarbai and Rambhabai became strained, hence the suit for partition was filed by Rambhabai.

[6] Sundarbai (defendant in the suit) filed the written statement and denied the factum of adoption of Sohanlal and had also denied that Rambhabai was treated by her as daughter-in-law and further denied her any right on the suit property. After the issues were framed on 5/11/1943 pleaders for both the parties made a request to pass the preliminary decree at the first instance.

[7] Trial court had passed the preliminary decree dated 31/7/1944 holding in Para 11 of the judgment that the adoption of Sohanlal was duly proved and accordingly by way of preliminary decree declared that Rambabai and Sundarbai had equal share in the suit property and further directed that a Commissioner will be appointed who will proceed with the partition by *metes and bounds* and issued certain other further directions. The preliminary decree came to be challenged at the instance of Sundarbai in Civil FA No.27/44 (New No.1/1948) before His Highness the Maharaja Holkar, High Court of Judicature Indore.

[8] During the pendency of first appeal Sundarbai had filed an

application on 20th July, 1945 with a prayer to add Lalchand as the party in the appeal on the ground that Lalchand was adopted by her as son on 03rd July, 1945. The application was initially rejected on 25th August, 1945, but subsequently Sundarbai had died on 26/11/1945 and Lalchand had filed an application for his substitution as her L.R u/O.22 Rule 3 read with Rule 11 of the CPC which was opposed by Rambhabai, hence the issue arose before the first appellate court if Lalchand was adopted son of Sundarbai and was entitled to prosecute the appeal as L.R. Vide order dated 17th September, 1946 the first appellate court held Lalchand to be validly adopted and he was brought on record. Meanwhile another development took place and Rambhabai adopted Mahendra Kumar and the first appellate court vide order dated 1/9/1947 held the adoption to be valid and brought Mahendra Kumar on record, Rambhabai made an application along with the affidavit stating that she had no claim in the suit property and would be contended to have a decree for ½ share of the property made in favour of Mahendra Kumar.

[9] In view of the aforesaid development, the first appellate court by judgment dated 29/4/1949 modified the preliminary decree by declaring Lalchand and Mahendra Kumar entitled to equal share in the suit property left by deceased Dhannalal. The

aforesaid preliminary decree was not challenged any further and in pursuance thereto the steps were taken for the final decree.

[10] At the stage of passing of preliminary decree Mahendra Kumar was minor who subsequently became major. In the proceedings for the final decree Mahendra Kumar had filed an application on 13/7/1976 stating that he had not engaged any counsel. Accordingly on 15/7/196 the Advocate for the plaintiffs had filed an application withdrawing the vakalatnama for Mahendra Kumar. On 15/7/1976 Rambhabai (plaintiff No.1) had filed an application for striking off the name of Mahendra Kumar (plaintiff No.2) on the ground that Mahendra Kumar had transferred his interest in the decree by an assignment written in favour of Rambhabai. This was objected by Mahendra Kumar. The alleged deed of assignment executed by Mahendra Kumar in favour of Rambhabai is dated 7/7/1961 filed as Ex.P/1. The issue relating to the admissibility of this document came up before the trial court and the trial court vide order dated 3rd October, 1979 held that the adopted son cannot repudiate his status but he can relinquish his claim over the properties which he gets in the adopted family due to adoption. The document Ex.P/1 was unregistered, hence the trial court held the document to be admissible in respect of the movable properties and admissible

only for the collateral purposes for immovable properties by holding it inadmissible for immovable properties for other purposes. The CR No.750/1979 against this order was dismissed by the High Court vide order dated 16/10/1979.

[11] The trial court thereafter has passed the final decree dated 6th June, 1987 holding that Rambhabai and Lalchand had ½ - ½ share in the suit property and partitioning it accordingly. The trial court held that much before 1976 Mahendra Kumar had lost all the interest in the immovable suit property and Rambabai's ½ share had ripened into absolute share after Hindu Succession Act, 1956 by virtue of Sec.14 thereof and she came in possession of the share of Mahendra Kumar as her own with effect from 7/7/1961 and also became the full owner of the share of Mahendra Kumar after the lapse of 12 years by virtue of adverse possession.

[12] Learned counsel for appellant submits that in the modified preliminary decree passed on 29/4/1949 Mahendra Kumar and Lalchand were held entitled to have ½ - ½ share, therefore, while passing the final decree Rambhabai can not be held to be entitled instead of Mahendra Kumar. He submits that scope of any change in the final decree is very limited and that after 29/4/1949 Rambhabai had unnecessarily continued as plaintiff when she

was not found entitled to any share in the preliminary decree and in respect of the limited scope of consideration at the final decree he has placed reliance upon the judgments of the supreme court in the matter of **Gyarsi Bai and others Vs. Dhansukh Lal and others** **AIR 1965 SC 1055** and **Muthangi Ayyana Vs. Muthangi Jaggarao and others** **AIR 1977 SC 292**. He has also submitted that the document dated 7/7/1961 Ex.P/1 is unregistered document and referring to Sec.15 of the Hindu Adoption and Maintenance Act he submitted that adopted child has no right to cancel the adoption and also submitted that the issue relating to limited admissibility of Ex.P/1 was settled by the order dated 3rd October, 1979 as affirmed in CR No.750/1979. He also submits that document Ex.P/1 is a suspicious document because it was not produced by Rambhabai till 1976 for 15 years. He has also raised an issue that the trial court could not have gone behind the preliminary decree by holding the suit property to be *sthreedhan* property of Rambhabai and finding relating to adverse possession of Rambhabai is unsustainable because the suit is pending since 1947. The document Ex.P/1 dated 7/7/1961 was executed pending the suit, therefore, no question of adverse possession pending the suit arises. He has also submitted that plaintiff Rambhabai could not have taken the plea of adverse

possession in view of the judgment in the case of **Gurudwara Sahib Vs. Gram Panchayat Village Sirthala 2014(3) MPLJ 336** and subsequent judgment reported in **Dharampal (Dead) Through L.Rs Vs. Punjab Wakf Board and others (2018) 11 SCC 449**. He has also submitted that Rambhabai had died on 9/11/1995 and Mahendra Kumar being the adopted son otherwise has become entitled to the share of Rambhabai because the will in favour of the respondent Shrikrishna Chourishi is suspicious. He has also opposed the IA filed by respondent no.3.

[13] Respondent No.3 Shrikrishna Chourishi present in person submits that he has filed IA No.824/2013 u/O.22 Rule 2, 22 Rule 5, Sec.2(11), Order 12 Rule 6 read with Sec.151 of the CPC and Sec.70 of the Evidence Act and Sec.95 of the Indian Succession Act in pursuance to the order of the Hon'ble Supreme Court in CA No.1501/2001 which is pending and deserves to be allowed. He further submits that with deletion of name of Rambhabai the decree passed in favour of Rambhabai has become final and in support of his submission he has placed reliance upon the judgment **Satguru Sharan Shrivastava Vs. Dwarka Prasad Mathuyr (Dead) through L.Rs and others (1996) 10 SCC 293**. He has fairly submitted that he has no right prior to the death of Rambhabai as he is claiming right on the basis of will executed by

Rambhabai. Referring to the order dated 2/1/1996 passed in IA No.5764/1995 he submits that the effect of deletion is required to be considered at this stage ie. at the stage of hearing of the appeal. He also submits that the appeal is not maintainable because the judgment of the trial court has become final against Rambhabai and has placed reliance upon the judgment in the matter of **Jaladi Suguna (Dead) through L.Rs Vs. Satya Sai Central Trust & Ors. 2008 AIR SCW 4733** and **Ramagya Prasad Gupta and others Vs. Brahmadeo Prasad Gupta and another AIR 1972 SC 1181**.

[14] He has also referred to order dated 13/3/1997 passed in IA No.602/1996 in connected FA No.80/1997 and has submitted that he has already been found entitled to continue the appeal as L.R of Rambhabai. He also submits that Mahendra Kumar is appellant and Rambhabai was respondent in this appeal, therefore, he cannot claim himself to be the L.R of Rambhabai as appellant and Rambhabai have conflicting interest and in support of his submission he has placed reliance upon the judgment in the matter of **Gajraj Vs. Sudha and others (1999) 3 SCC 109**, **Shivamangal through L.Rs Vs. Narainprasad and others 2007(2) MPLJ 445, Bajrang Lal & Ors. Vs. Dal Chand & Ors AIR 2009 Raj.36**. He has also submitted that ground raised in

this appeal and the connected appeal No.FA No.80/1997 are common which reflects the collusion between Lalchand and Mahendra Kumar and in support of his submission he has placed reliance upon the judgments in the matter of **Naraindas Vs. Bhagwandas 1994 JLJ 110** and **S.P. Chengalvaraya Naidu (dead) by LRs Vs. Jagannath (dead) by L.Rs and others AIR 1994 SC 853**. He also submits that his impleadment after the deletion of name of Rambhabai has no effect on the plea that decree against Rambhabai has become final. He has also submitted that the appellant has manipulated the record by mentioning incorrect date of order while amending the cause title and deleting the name of Rambhabai and inserting the name of respondent No.3 Shrikrishna Chourishi and in this regard he has placed reliance upon the judgment in the matter of **D.P. Chadha Vs. Triyungi Narain Mishra and others (2001) 2 SCC 221.**

[15] Shri A.S.Garg, learned Sr.Counsel on behalf of respondent No.2 Lalchand has supported the case of appellant Mahendra Kumar.

[16] I have heard the learned counsel for parties and perused the record.

[17] It is worth noting that none of the parties have advanced arguments referring to the oral as well as documentary evidence

in detail, but have confined the arguments mainly to the legal issues.

[18] Lengthy arguments have been advanced by counsel for parties on IA No.824/2013 u/O.22 Rule 2, 22 Rule 5, Sec.2(11), Order 12 Rule 6 read with Sec.151 of the CPC and Sec.70 of the Evidence Act and Sec.95 of the Indian Succession Act filed by the respondent No.3 Shrikrishna Chourishi and on the issue of maintainability of appeal after the death of Rambhabai.

[19] The record reflects that against the impugned judgment and decree of the trial Court, appellant Mahendra Kumar had initially filed MCC No.206/1987 seeking permission to file appeal as pauper. Pending this MCC Rambhabai had died in 1995, hence appellant Mahendra Kumar had filed an application being IA No.5764/1995 u/O.22 Rule 2 read with Sec.151 of the CPC for deleting the name of Rambhabai. This Court vide order dated 2/1/1996 passed MCC No.206/1987 had permitted Mahendra Kumar to delete the name of Rambhabai with following observation:-

> "Shri Gajankush for applicant.
> Heard on IA No.5764/1995.
> Application is allowed.
> Name of NAW No.1 is permitted to be deleted within a week from today. The effect of deletion, if any, may be considered at the time of hearing".

[20] MCC was converted into appeal vide order dated 21/2/1997 because in the mean while the court fee was paid. The appeal was registered and it was dismissed vide order dated 13/3/1997 as abated since the name of Rambhabai was struck off without bringing her L.Rs on record. MCC No.283/1998 was filed by Mahendra Kumar for setting aside the abatement order passed in the first appeal and the said MCC was dismissed vide order dated **13/9/2001**, hence the Civil Appeal No.1051/2001 (arising out of SLP(Civil) No.10121/2000) was filed by Mahendra Kumar which was allowed by the Hon.Supreme Court vide order dated 6/2/2001 reported in **AIR 2001 SC 807 Mahendra Kumar Vs. Lalchand and another** holding that the order of the High Court dismissing the appeal as abated is contrary to its own earlier order passed in the appeal filed by Lalchand. The Hon'ble Supreme Court in this regard held that:-

> "7-- Undisputedly, the appellant is a legal heir of his mother Rambhabai. Therefore, his right to sue survives and appellant was entitled to be substituted as legal representative of deceased Rambhabai. However, the question would be, whether Rambhabai has executed Will dated 20th August, 1980, in favour of respondent No.2, Shrikrishna, and if so, by not joining him whether the appeal would abate ? Respondent No.2 has not obtained probate, hence considering the procedure prescribed under the above quoted Order XXII, Rule 5, there is no question of abatement of appeal. It was for the respondent No.2, Shrikrishna Chourasia, who claims that Will has been executed by the deceased Rambhabai in his favour to file proper application to be joined as party

> respondent by contending that he is legal representative as the estate has devolved upon him on the basis of the Will. On such application being filed, the Court was required to determine it under Order XXII, Rule 5. This legal provision was completely overlooked by the High Court and on this ground the impugned judgment and order is not sustainable.
>
> 8-- Further, while dismissing the appeal filed by the present appellant by the impugned judgment, High Court did not recall the Order already passed for deletion of name of late Rambhabai. Having formed the opinion that the appeal could proceed in the absence of late Rambhabai, High Court erred in law in dismissing the appeal filed by the present appellant on the ground that appeal has abated.
>
> 9-- Learned counsel for the appellant has fairly stated that the appellant would make an application before the Court below for impleadment of the present respondent No.2 as party and we direct him to do so.
>
> 10-- For the reasons stated above, we hold that the High Court erred in law in dismissing the appeal filed by the present appellant on the ground of abatement without following the procedure laid down under Order XXII, CPC."

[21] In the aforesaid, appellant Mahendra Kumar has not filed any application for substituting him as L.R because the lis in this appeal was mainly between Mahendra Kumar and Rambhabai. The above order of the Supreme Court also reveals that the respondent No.2 Shrikrishna Chourishi was required to file an application for bringing him on record as L.R of Rambhabai on the basis of the will dated 20th August, 1980 executed by Rambhabai but he did not take immediate steps by filing any such application.

In the mean while appellant Mahendra Kumar had filed IA No.1524/2001 for impleading Shrikrishna Chourishi as additional respondent No.3 on the basis of the aforesaid order of the Hon'ble Supreme Court and this court vide order dated 25/7/2002 had allowed the application and permitted him to be impleaded as a party respondent in the appeal. IA No.451/2002 was filed by Shrikrishna Chourishi for dismissing the appeal on the ground that the appeal cannot be proceeded with after deletion of the name of Rambabai. This Court vide order dated 25/7/2002 had disposed off the IA by permitting the respondent No.2 Shrikrishna Chourishi to raise this objection at the time of hearing of the appeal. The respondent No.2 Shrikrishna Chourishi in the year 2013 has filed present IA No.824/2013 u/O.22 Rule 2, Order 22 Rule 5, Sec.2(11), Order 12 Rule 6 read with Sec.151 of the CPC, Sec.70 of the Evidence Act, Sec.95 of Indian Succession Act with the following prayer:-

> "Therefore, it is most humbly prayed, that according to the above last WILL dt.20/8/1980 duly executed by testatrix Smt. Rambhabai in favour of Shreekrishna Chourishi which is admitted by the all parties on record and considering the perfect and unimpleachable material of its proof as already exist in the record of this case, respondent No.3 Shreekrishna Chourishi held to be treated as sole legal representative of dead Rambhabai, and therefore, he is entitled to get rights and share of dead Rambhabai in the final decree dtd.14/07/1987 passed by the Trial Court. It is to be held also that the above decree dt.14/07/1987 passed by the Trial Court, has already been become final and

conclusive against the dead respondent Rambhabai due to struck-off her name from the array of the parties in this appeal, and the above decree has become final for the respondent No.2 Lalchand also, because no inconsistent decree can be passed between the same parties. It is also prayed that the name of respondent No.3 Shreekrishna Chourishi be substituted in the above final decree as sole legal representative of late respondent Rambhabai on the basis of the aforesaid WILL dt.20/08/1980 and he is held to be entitled to get all the proceeds in the above final decree as mentioned in the aforesaid registered WILL dt.20/08/1980 executed by Smt.Rambhabai. In support of this application affidavit of the propounder Shreekrishna Chourishi enclosed.

Therefore, it is prayed, that, the application be allowed with heavy cost."

[22] The respondent Shrikrishna Chourishi present in person has categorically stated before this court that he does not want himself to be impleaded in the appeal as L.R of the deceased respondent No.1 Rambhabai. He submits that since the will is undisputed, therefore, straightway his name should be recorded in the decree as legal heir of Rambhabai.

[23] Shri A.K.Sethi, learned Sr.Counsel for appellant has made a limited submission that if Shrikrishna Chourishi is brought on record as L.R of deceased Rambhabai on the basis of the will then he has no objection because the Order 22 Rule 5 provisions are meant for continuation of the appeal at the instance of the L.R but not for determining the final right of the parties on the basis of the will. He has also submitted that if the respondent Shrikrishna Chourishi does not want to be impleaded as L.R of deceased

Rambhabai, then he has nothing to say in this I.A.

[24] The respondent Shrikrishna Chourishi has also not disputed that no provision exists in the CPC under which without impleading him as L.R of Rambhabai his name can be straightway entered in the decree as the L.R of Rambhabai.

[25] So far as the legal position in this regard is concerned, if a party comes forward on the basis of the will executed by the deceased party, then an enquiry under Order 22 Rule 5 is contemplated, but in the present case neither the appellant nor the respondent Shrikrishna Chourishi is seeking the substitution of L.R of deceased respondent No.1, therefore, the provisions of Order 22 Rule 5 of the CPC cannot be attracted. Even otherwise Shrikrishna Chourishi has already been impleaded as additional respondent and he is contesting the appeal.

[26] The Supreme Court in the matter of **Suresh Kumar Bansal Vs. Krishna Bansal & another 2010(2) MPLJ 304** has clarified the position in this regard as under:-

> 9--Having heard the learned counsel for the parties and after going through the impugned order as well as the application for substitution of the appellant on the basis of the Will alleged to have been executed by the deceased plaintiff, we are of the view that the impugned order of the High Court is liable to be interfered with and the application for impleadment filed at the instance of the appellant on the basis of the Will alleged to have been executed by the deceased plaintiff must be allowed and the appellant must be impleaded in the suit along with the

natural heirs and legal representatives of the deceased plaintiff, subject to grant of probate by a competent court of law. It is true that in the impugned order, the High Court has made it clear that the finding regarding genuineness of the Will was made only for the purpose of deciding the application for impleadment filed at the instance of the appellant. But, in our view, if at this stage, the appellant is not permitted to be impleaded and in the event an order of eviction is passed ultimately against the tenant/respondent, the tenants will be evicted by the natural heirs and legal representatives of the deceased plaintiff who thereby shall take possession of the suit premises, but if ultimately the probate of the alleged Will of the deceased plaintiff is granted by the competent court of law, the suit property would devolve on the appellant but not on the natural heirs and legal representative of the deceased. Therefore, in the event of grant of probate in favour of the appellant, he has to take legal proceeding against the natural heirs and legal representatives of the deceased plaintiff for recovery of possession of the suit premises from them which would involve not only huge expenses but also considerable time would be spent to get the suit premises recovered from the natural heirs and legal representatives of the deceased plaintiff. On the other hand, if the appellant is allowed to carry on the eviction petition along with the natural heirs and legal representatives of the deceased plaintiff, in that case decree can be passed for eviction of the tenant when the appellant shall not be entitled to get possession from the tenants in respect of the suit premises until the probate in question is granted and produced before the Court. Therefore, ultimately if the court grants a decree for eviction of the tenant/respondent from the suit premises, such decree shall be passed subject to production of probate by the appellant. That apart, since the question of genuineness of the will cannot be conclusively gone into by the court in a proceeding for substitution in a pending eviction suit and in view of the fact that an application was made at the instance of the appellant for impleadment as a legal representative of the deceased on the basis of the Will which is yet to be probated, in our view, best course open to the court is to allow impleadment of the appellant in the eviction proceeding, thereby permitting him to proceed with the eviction suit along with natural heirs and

legal representatives of the deceased plaintiff, but in case the decree is to be passed for eviction of the tenant from the suit premises such eviction decree shall be subject to the grant of probate of the Will alleged to have been executed by the deceased plaintiff. At the same time, it is clear that in case the Will of the deceased plaintiff is found not to be genuine and probate is not granted, the court shall proceed to grant the eviction decree in favour of the respondent no.1 and not in favour of the appellant. It is well settled that in the event, the Will is found to be genuine and probate is granted, only the appellant would be entitled to get an order of eviction of the tenants/respondents from the suit premises excluding the claim of the natural heirs and legal representatives of the deceased plaintiff. The Code of Civil Procedure enjoins various provisions only for the purpose of avoiding multiplicity of proceedings and for adjudicating of related disputes in the same proceedings, the parties cannot be driven to different Courts or to institute different proceedings touching on different facets of the same major issue. Such a course of action will result in conflicting judgments and instead of resolving the disputes, they would end up in creation of confusion and conflict. It is now well settled that determination of the question as to who is the legal representatives of the deceased plaintiff or defendant under Order XXII Rule 5 of the Code of Civil Procedure is only for the purposes of bringing legal representatives on record for the conducting of those legal proceedings only and does not operate as res judicata and the inter se dispute between the rival legal representatives has to be independently tried and decided in probate proceedings. If this is allowed to be carried on for a decision of an eviction suit or other allied suits, the suits would be delayed, by which only the tenants will be benefited. In order to shorten the litigation and to consider the rival claims of the parties, in our view, the proper course to follow is to bring all the heirs and legal representatives of the deceased plaintiff on record including the legal representatives who are claiming on the basis of the Will of the deceased plaintiff so that all the legal representatives namely, the appellant and the natural heirs and legal representatives of the deceased plaintiff can represent the estate of the deceased for the ultimate benefit of the real legal

> representatives. If this process is followed, this would also avoid delay in disposal of the suit. In view of our discussions made hereinabove, we are, therefore, of the view that the High Court as well as the trial Court were not at all justified in rejecting the application for impleadment filed at the instance of the appellant based on the alleged Will of the deceased plaintiff at this stage of the proceedings."

[27] From the aforesaid judgment, it is clear that under Order 22 Rule 5 of the CPC, the limited question relating to the L.R is decided only for the purpose of bringing the L.Rs on record which does not operate as res-judicata and the inter-se dispute between the rival L.Rs has to be independently tried and decided in appropriate proceedings.

[28] It would not be out of place to mention here that another appeal FA No.80/87 has been filed against the same judgment by Lalchand. In that appeal the cross objection has been filed by the respondent Shrikrishna Chourishi. In that appeal IA No.6088/1995 was filed by the appellant for deleting the name of deceased respondent No.1 Rambabai on the ground that her Legal representative respondent No.2 was already on record, hence the court by order dated 17/1/1996 had allowed the application with the caveat that the effect of deletion, if any, will be considered at the time of final hearing. Subsequently, the IA No.602/1996 filed by respondent Shrikrishna Chourishi for substituting him in place of Rambhabai on the strength of will along with other I.As of the

appellant and respondent was considered and by order dated 13/3/1997 IA No.602/1996 was allowed and Shrikrishna Chourishi was substituted as L.R of Rambhabai deceased respondent No.1 therein. Shrikrishna Chourishi was also allowed to be substituted as L.R of Rambhabai in cross objection. Hence, in FA No.80/1987 Shrikrishna Chourishi has already come on record as L.R of Rambhabai.

[29] Having examined the prayer made in the IA No.824/2013 in the aforesaid back ground, it is noticed that no finding on the basis of the alleged will dated 20th August, 1980 can be given at this stage that Shrikrishna Chourishi was legal heir of Rambhabai and he had inherited the properties of Rambhabai by that will because the will is yet to be proved by Shrikrishna Chourishi in appropriate proceedings by tendering it in evidence as per the requirement of the Evidence Act and Indian Succession Act. By this I.A, the prayer of Shrikrishna Chourishi is not to bring on record as L.R of Rambhabai on the strength of the alleged will executed by her, but by this I.A Shrikrishna Chourishi is seeking substitution of his name in the decree of the court below in place of Rambhabai, but no such provision permitting the adoption of such a recourse has been pointed out. Hence, I do not find any merit in this IA.

[30] So far as the judgment in the case of **Satguru Sharan Shrivastava** (supra) relied upon by the respondent No.3 is concerned, the question therein was about maintainability of appeal against a dead person, but in view of the order of the Supreme Court dated 6/2/2001 passed in CA No.1051/2001 in this case the respondent No.3 is not entitled to the benefit of this judgment.

[31] So far as the judgment of the Supreme Court in the case of **Jaladi Suguna** (supra) is concerned, in that case it has been held that the trial cannot proceed without deciding the issue of L.R, but in this case the Supreme Court has already noted that Mahendra Kumar is one of the L.R and has set aside the order dismissing the appeal as abated.

[32] So far as the judgment in the case of **Ramagya Prasad Gupta** (supra) is concerned, no benefit of the said judgment can be granted because both the parties who are claiming right over the properties of Rambhabai are already before this Court.

[33] So far as the judgment in the case of **Gajraj** (supra) and **Bajrang Lal** (supra) are concerned, since in this case Mahendra Kumar is the appellant and Shrikrishna Chourishi is opposing the claim of Mahendra Kumar and setting up the claim in respect of the properties of the deleted deceased Rambhabai, therefore, no

benefit of the said judgment can be extended to him. This appeal as well as another appeal FA No.80/1997 arise of the same judgment, therefore, if certain facts and grounds mentioned in the memo of appeal are common that would not lead to the conclusion that Lalchand (appellant in FA No.80/1997) and Mahendra Kumar (appellant in this appeal) have colluded, therefore, no benefit of the judgment in the case of **Naraindas** (supra) and **S.P. Chengalvaraya** (supra) can be extended to respondent No.3. Even otherwise such a plea has no merit.

[34] So far as the plea of the respondent No.3 that the Advocate for the appellant has manipulated the record and has committed fraud while amending the cause title of the appeal is concerned , it is noticed that mere mentioning of the incorrect date of the court order while incorporating the amendment cannot lead to such an inference. Hence, no benefit of the judgment in the case of **D.P. Chadha** (supra) can be extended to the respondent No.3.

[35] Having regard to the aforesaid, finding no merit in the plea of the respondent No.3, IA No.824/2013 is rejected.

[36] So far as appellant Mahendra Kumar is concerned, though he has been treated to be the legal representative of Rambhabai but in view of the judgment of this court in the matter of **Shivmangal through L.Rs Vs. Narainprasad & Ors** reported in

2007(2)MPLJ 445 he cannot litigate his personal right as legal representative.

[37] Before entering into merits of the controversy, it would be appropriate to examine the argument about scope of altering, modifying or amending the preliminary decree in this appeal.

[38] The Supreme Court in the matter of **Ganduri Koteshwaramma & Anr. Vs. Chakiri Yanadi & Anr. AIR 2012 SC 169** has held that by passing the preliminary decree the partition suit does not stand disposed of and continues till the passing of the final decree and if the events and supervening circumstances occur in the mean while necessitating change in share, there is no impediment for the court to amend the preliminary decree or determine the right. In this regard it has been held that:-

> "17. A preliminary decree determines the rights and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum i.e. after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree redetermining the rights and interests of the parties having regard to the changed situation. We are fortified in our view by a 3- Judge Bench decision of this Court in the case of Phoolchand and Anr. Vs. Gopal Lal wherein this Court stated as follows:
>
> "We are of opinion that there is nothing in the Code

> of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. . . . .. So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; ..... there is no prohibition in the Code of Civil Procedure against passing a second preliminary decree in such circumstances and we do not see why we should rule out a second preliminary decree in such circumstances only on the ground that the Code of Civil Procedure does not contemplate such a possibility. . . for it must not be forgotten that the suit is not over till the final decree is passed and the court has jurisdiction to decide all disputes that may arise after the preliminary decree, particularly in a partition suit due to deaths of some of the parties. . . . .a second preliminary decree can be passed in partition suits by which the shares allotted in the preliminary decree already passed can be amended and if there is dispute between surviving parties in that behalf and that dispute is decided the decision amounts to a decree.... ....."

18. This Court in the case of S. Sai Reddy vs. S. Narayana Reddy and Others had an occasion to consider the question identical to the question with which we are faced in the present appeal. That was a case where during the pendency of the proceedings in the suit for partition before the trial court and prior to 1 AIR 1967 SC 1470 2 (1991) 3 SCC 647 the passing of final decree, the 1956 Act was amended by the State Legislature of Andhra Pradesh as a result of which unmarried daughters became entitled to a share in the joint family property. The unmarried daughters respondents 2 to 5 therein made application before the trial court claiming their share in the property after the State amendment in the 1956 Act. The trial court by its judgment and order dated August 24, 1989 rejected their application on the ground that the preliminary decree had already been passed and specific shares of the parties had been declared and, thus, it was not open to the unmarried

daughters to claim share in the property by virtue of the State amendment in the 1956 Act. The unmarried daughters preferred revision against the order of the trial court before the High Court. The High Court set aside the order of the trial court and declared that in view of the newly added Section 29-A, the unmarried daughters were entitled to share in the joint family property. The High Court further directed the trial court to determine the shares of the unmarried daughters accordingly. The appellant therein challenged the order of the High Court before this Court. This Court considered the matter thus;

> ".....A partition of the joint Hindu family can be effected by various modes, viz., by a family settlement, by a registered instrument of partition, by oral arrangement by the parties, or by a decree of the court. When a suit for partition is filed in a court, a preliminary decree is passed determining shares of the members of the family. The final decree follows, thereafter, allotting specific properties and directing the partition of the immovable properties by metes and bounds. Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. The preliminary decree which determines shares does not bring about the final partition. For, pending the final decree the shares themselves are liable to be varied on account of the intervening events. In the instant case, there is no dispute that only a preliminary decree had been passed and before the final decree could be passed the amending Act came into force as a result of which clause (ii) of Section 29-A of the Act became applicable. This intervening event which gave shares to respondents 2 to 5 had the effect of varying shares of the parties like any supervening development. Since the legislation is beneficial and placed on the statute book with the avowed object of benefitting women which is a vulnerable section of the society in all its stratas, it is necessary to give a liberal effect to it. For this reason also, we cannot equate the concept of partition that the legislature has in mind in the present case with a mere severance of the status of the joint family which can be effected by an

> expression of a mere desire by a family member to do so. The partition that the legislature has in mind in the present case is undoubtedly a partition completed in all respects and which has brought about an irreversible situation. A preliminary decree which merely declares shares which are themselves liable to change does not bring about any irreversible situation. Hence, we are of the view that unless a partition of the property is effected by metes and bounds, the daughters cannot be deprived of the benefits conferred by the Act. Any other view is likely to deprive a vast section of the fair sex of the benefits conferred by the amendment. Spurious family settlements, instruments of partitions not to speak of oral partitions will spring up and nullify the beneficial effect of the legislation depriving a vast section of women of its benefits".

20. The High Court was clearly in error in not properly appreciating the scope of Order XX, Rule 18 of CPC. In a suit for partition of immovable property, if such property is not assessed to the payment of revenue to the Government, ordinarily passing of a preliminary decree declaring the share of the parties may be required. The court would thereafter proceed for preparation of final decree. In Phoolchand this Court has stated the legal position that C.P.C creates no impediment for even more than one preliminary decree events have taken place necessitating the re-adjustment of shares as declared in the preliminary decree. The court has always power to revise the preliminary decree or pass another preliminary decree if the situation in the changed circumstances so demand. A suit for partition continues after the passing of the preliminary decree and the proceedings in the suit get extinguished only on passing of the final decree. It is not correct statement of law that once a preliminary decree has been passed, it is not capable of modification. It needs no emphasis that the rights of the parties in a partition suit should be settled once for all in that suit alone and no other proceedings.

21. Section 97 of C. P.C. that provides that where any party aggrieved by a preliminary decree passed after the commencement of the Code does not appeal from such decree, he shall be precluded from disputing its correctness

> in any appeal which may be preferred from the final decree does not create any hindrance or obstruction in the power of the court to modify, amend or alter the preliminary decree or pass another preliminary decree if the changed circumstances so require.
>
> 22. It is true that final decree is always required to be in conformity with the preliminary decree but that does not mean that a preliminary decree, before the final decree is passed, cannot be altered or amended or modified by the trial court in the event of changed or supervening circumstances even if no appeal has been preferred from such preliminary decree."

[39] So far as the judgment in the case of **Gyarsi Bai** (supra) relied upon by counsel for appellant is concerned, that is in respect of the suit by mortgagee to enforce mortgage which stands on a different footing, therefore, no benefit of the said judgment can be extended. The judgment in the case of **Muthangi Ayyana** (supra) relied upon by counsel for the appellant lays down the general proposition that the final decree cannot amend or go behind the preliminary decree on a matter determined by the preliminary decree, but in the subsequent judgment in the case of **Gandhuri Koteshwari** (supra) the circumstances permitting such a recourse have duly been laid down.

[40] Hence it is clear that at the stage of final decree in the appropriate circumstances the preliminary decree can be amended and even another preliminary decree re-determining the

rights and interest of parties can be passed.

[41] The next issue is if Mahendra Kumar has ½ share in the suit property.

[42] So far as adoption of Mahendra Kumar by Rambhabai is concerned, at the stage of the preliminary decree the issue of adoption of Mahendra Kumar by Rambhabai had come up and the first appellate court by order dated 1/9/1947 had held the adoption of Mahendra Kumar by Rambhabai as valid and on that basis the modified preliminary decree dated 29/4/1949 was passed holding Mahendra Kumar to be entitled to ½ share in place of Rambhabai. The order holding the adoption of Mahendra Kumar by Rambhabai has attained finality. The first appellate court also has noted the legal position in para 23 of the judgment that valid adoption once made cannot be cancelled. Hence, I am of the opinion that it has been conclusively established that Mahendra Kumar was adopted son of Rambhabai.

[43] The issue relating to effect of relinquishment without executing a registered duly stamped document is well settled by Supreme Court in the matter of **Yellapu Uma Maheswari and another Vs. Buddha Jagadheeshwararao and others (2015) 16 SCC 787**. In this regard it has been held that:-

> "13- Section 17 (1) (b) of the Registration Act mandates that any document which has the effect of

creating and taking away the rights in respect of an immovable property must be registered and Section 49 of the Act imposes bar on the admissibility of an unregistered document and deals with the documents that are required to be registered u/s 17 of the Act.

15- It is well settled that the nomenclature given to the document is not decisive factor but the nature and substance of the transaction has to be determined with reference to the terms of the documents and that the admissibility of a document is entirely dependent upon the recitals contained in that document but not on the basis of the pleadings set up by the party who seeks to introduce the document in question. A thorough reading of both Exhibits B-21 and B-22 makes it very clear that there is relinquishment of right in respect of immovable property through a document which is compulsorily registerable document and if the same is not registered, becomes an inadmissible document as envisaged under Section 49 of the Registration Act. Hence, Exhibits B-21 and B-22 are the documents which squarely fall within the ambit of section 17 (i) (b) of the Registration Act and hence are compulsorily registerable documents and the same are inadmissible in evidence for the purpose of proving the factum of partition between the parties. We are of the considered opinion that Exhibits B 21 and B22 are not admissible in evidence for the purpose of proving primary purpose of partition.

16- Then the next question that falls for consideration is whether these can be used for any collateral purpose. The larger Bench of Andhra Pradesh High Court in Chinnappa Reddy Gari Muthyala Reddy Vs. Chinnappa Reddy Gari Vankat Reddy , AIR 1969 A.P. (242) has held that the whole process of partition contemplates three phases i.e. severancy of status, division of joint property by metes and bounds and nature of possession of various shares. In a suit for partition, an unregistered document can be relied upon for collateral purpose i.e. severancy of title, nature of possession of various shares but not for the primary purpose i.e. division of joint properties by metes and bounds. An unstamped instrument is not admissible in evidence even for collateral purpose, until the same is

> impounded. Hence, if the appellants/defendants want to mark these documents for collateral purpose it is open for them to pay the stamp duty together with penalty and get the document impounded and the Trial Court is at liberty to mark Exhibits B-21 and B- 22 for collateral purpose subject to proof and relevance."

[44] From the aforesaid judgment it is clear that a compulsorily registerable document if unregistered is inadmissible in evidence for primary purpose and in a suit for partition, such an un-stamped instrument is inadmissible in evidence even for collateral purpose until same is impounded.

[45] So far as the issue of relinquishment of share is concerned, the trial court in the judgment under challenge has examined this issue in detail and has recorded a finding that the right of Rambhabai under the preliminary decree dated 31/7/1944 were not extinguished by a disclaimer and the order of the High Court dated 29/4/1949 does not operate as *res-judicata*. While holding so the trial court has placed reliance upon the judgment of the Supreme Court reported in **AIR 1974 SC 749** and judgment of the Nagpur High Court reported in **AIR 1936 NAGPUR 186** and had found that Rambhabai did not intend to assign her interest in the suit property to Mahendra Kumar.

[46] The record reflects that in the preliminary decree dated 31/7/1944 trial court had found that Rambhabai and Sundarbai

had ½ share each in the suit property. In appeal High Court vide order dated 29/4/1949 had modified the preliminary decree on the basis of the application filed along with an affidavit by Rambhabai that she was contented to have a decree for the ½ property in favour of her adopted son Mahendra Kumar. No registered document was executed by Rambhabai relinquishing her share in favour of Mahendra Kumar. Same was the position when vide unregistered relinquishment deed dated 7/7/1961 Ex.P/1 Mahendra Kumar had relinquished his share in favour of Rambhabai. Both these documents stand on the same footing, hence it would be travesty of justice to admit one document and hold that Rambhabai had relinquished her share on the basis of her affidavit and reject the other document Ex.P/1 by holding that since it is not registered, therefore, it cannot be considered for proving the relinquishment by Mahendra Kumar in favour of Rambhabai.

[47] The trial court vide order dated 3rd October, 1979 has held that document Ex.P-1 was admissible for relinquishment of right with regard to movable property and for collateral purposes with regard to immovable property. In that order it was also noted that stamp duty with penalty was already charged on the document by the Collector Stamps. This order has been affirmed in Civil

Revision No.750/1979 by the High Court vide order dated 16/10/1979.

[48] After examining the evidence in detail, trial court has rightly found that Mahendra Kumar had failed to prove that relinquishment deed Ex.P/1 was got executed by practicing fraud. In this regard placing reliance upon Article 493 of Mulla's Principles of Hindu Law as also Para 156 of N.R. Raghava Chariar's Hindu Law 1987 Edition it has been found by the trial court that though the valid adoption once made cannot be cancelled, but adopted son can renounce his right of inheritance in the adopted family. The relationship and conduct of Rambabai and Mahendra Kumar has been discussed by the trial court while examining the evidence from para 16 to 19 of the judgment which reflects that though Rambhabi was showering all the love and affection on Mahendra Kumar, but Mahendra Kumar had not accepted the adoption and was living with his natural family and in this back ground about eight months after attaining majority had executed the relinquishment deed Ex.P/1 dated 7/7/1961 in favour of Rambhabai. The execution of Ex.P/1 by Mahendra Kumar has duly been established from the evidence on record.

[49] The legal position as regards the nature of the suit properties in the hands of Rambhabai cannot be ignored. The

succession had opened when Dhannalal had died intestate on 20th May, 1943 leaving behind his wife Sundarbai and the widow daughter-in-law Rambhabai. (Sohanlal S/o Dhannalal had pre deceased him on 11/9/1923). By virtue of Sec.3(3) of the Hindu Women's Right to Property Act, 1937, Rambhabai had limited interest known as a Hindu woman's estate in respect of her ½ share. Hence, she was entitled to the full beneficial enjoyment of the estate to the extent of her share, but had no right to alienate it except for the necessity for the benefit of the estate.

[50] The Hon'ble Supreme Court in the matter of **Jaisri Sahu Vs. Rajdewan Dubey & Ors.** [**AIR 1962 SC 83**] has held that:-

> "4……..……If the learned Judge intended to lay down as an inflexible proposition of law that whenever there is a usufructuary mortgage, the widow cannot sell the property, as that would deprive the reversioners of the right to redeem the same, we must dissent from it. Such a proposition could be supported only if the widow is in the position of a trustee, holding the estate for the benefit of the reversioners, with a duty cast on her to preserve the properties and pass them on intact to them. That, however, is not the law. When a widow succeeds as heir to her husband, the ownership in the properties , both legal and beneficial, vests in her. She fully represents the estate, the interest of the reversioners therein being only spes successionis. The widow is entitled to the full beneficial enjoyment of the estate and is not accountable to anyone. It is true that she cannot alienate the properties unless it be for necessity or for benefit to the estate, but this restriction on her powers is not one imposed for the benefit of reversioners but is an incident of the estate as known to Hindu law. It is for this reason that it has been held that when Crown takes the property be escheat it takes it free from any alienation

> made by the widow of the last male holder which is not valid under the Hindu law, vide: Collector of Masulipatam Vs. Cavaly Venkata, 8 Moo India App 529 (PC). Where, however, there is necessity for a transfer, the restriction imposed by Hindu law on her power to alienate ceases to operate, and the widow as owner has got the fullest discretion to decide what form the alienation should assume."

[51] In view of above, Rambhabai had limited right which had ripen into full right by virtue of Sec.14 of the Hindu Succession Act, 1956, but the alleged relinquishment through affidavit was done by Rambhabai in favour of Mahendra Kumar prior to 1949 which she could not have done due to her limited right and for want of necessity on benefit of estate.

[52] The trial court has committed an error in holding the title in favour of Rambhabai on the basis of adverse possession, as no issue in this regard was framed nor the necessary ingredients of adverse possession were considered and even otherwise Rambahbai being plaintiff in view of the judgment of the Supreme Court in the case of **Gurudwara Sahib Vs. Gram Panchayat Village Sirthala 2014(3) MPLJ 336** and subsequent judgment reported in **Dharampal (Dead) Through L.Rs Vs. Punjab Wakf Board and others (2018) 11 SCC 449** could not have claimed title by way of adverse possession. Hence, the finding of the trial court in this regard is set aside, but that will have no effect on the rights of the parties because on the other issues the judgment of

the trial court has been affirmed by this court.

[53] In view of the above analysis, I find no reason to interfere in the judgment of the trial court. The trial court has rightly held the share of Rambhabai, hence the said conclusion is affirmed. Since Rambhabai has died pending this appeal and the issue relating to Shrikrishna Chourishi being her heir on the basis of the will is yet to be decided, hence the parties namely Mahendra Kumar and Shrikrishna Chourishi will be at liberty to establish their claim over the properties of Rambhabai in separate proceedings.

[54] Hence, no merit is found in this appeal which is accordingly dismissed.

(PRAKASH SHRIVASTAVA)
JUDGE

VM/BDJ