



LAW COMMISSION OF INDIA

EIGHTY SIXTH REPORT

The Partition Act, 1893

GOVERNMENT OF INDIA MINISTRY OF LAW

D.O. No. F. 2(5)/80—LC.

Justice P. V. DIXIT,

New Delhi-110 001.

27th August, 1980.

My dear Minister,

I am herewith sending the Eighty-sixth Report of the Law Commission on the Partition Act, 1893.

The Partition Act was enacted in 1893 for the purpose of providing that where division of property cannot reasonably or conveniently be made and that sale of the property and distribution of proceeds would be more beneficial for all the share-holders, then the court may direct the sale of the property and distribution of the proceeds. The Act is technical in character. It has been in force for about 87 years and it is time that the defects and deficiencies in its working should be removed.

In the light of the experience of the working of the Act and numerous conflicting decisions of several High Courts on almost all the provisions of the Act, the Commission has suggested amendments in the Act,

- (a) for overcoming practical difficulties experienced in course of the working of the Act;
- (b) for removing drafting defects and obscurities which have caused difficulty in the interpretation of the statute;
- (c) for ensuring the better Fulfilment of the purposes of the Act; and
- (d) for removing lacunae in the existing provisions.

The amendments proposed by the Commission can best be appreciated if the entire background of the Act and its provisions are kept in mind. A summary of the background or of provisions of the Act in this letter can be of little help in the appreciation of the proposal made by the Commission.

The Commission wishes to express its appreciation to Mr. P. M. Bakshi, Member Secretary for the preparation of the Report. We also acknowledge with thanks the help given by Mr. V. V. Vaze, Additional Secretary.

With regards,

Yours sincerely,

Sd/-

(P. V. DIXIT)

Shri P. Shiv Shanker,
Minister of Law, Justice & C. A.,
New Delhi-1.

CONTENTS

	PAGE
Chapter 1. Introductory.	1
Chapter 2. History.	3
Chapter 3. Scheme of the Act and analogous provisions.	7
Chapter 4. English law.	10
Chapter 5. Power of sale : sections 1-2.	11
Chapter 6. Sale to shareholders : section 3.	17
Chapter 7. Share of dwelling house : section 4	21
Chapter 8. Miscellaneous : Sections 5 to 10	32
Chapter 9. Summary of recommendations.	36

APPENDICES

Appendix 1. Text of English Act of 1858.	39
Appendix 2. Text of English Act of 1876.	41
Appendix 3. Present English law.	43

CHAPTER 1

INTRODUCTORY

1.1. This Report relates to the Partition Act, 1893. Though the Act may appear to be very technical in character, it really¹ deals with important matters pertaining to the division of property and is vitally connected with the basic function of law. Scope of the Report.

1.2. Law exists primarily for the resolution in a peaceful manner of conflicts in society (or in groups constituting the society), being relating to justiciable matters. This object it seeks to achieve in a two-fold manner—by laying down rules as to the norms to be observed by members of the society in their relations with one another, and by setting out the machinery for enforcing the norms so laid down. The latter function is conventionally regarded as belonging to the sphere of “adjective” law. The Partition Act, being primarily concerned with working out certain remedies relating to proprietary rights, pertains mainly to adjective law. Function of law as peaceful resolution of conflicts.

1.3. But the fact that the Act belongs to the field of adjective law does not mean that it is concerned only with technicalities. In the course of the determination of issues arising under various provisions of the Act, difficult questions of distributive justice very often fall to be considered. An apparently simple provision—such as is contained in section 4 which, *inter alia*, empowers the Court to determine the valuation of a share in certain situations—might involve a balancing of various factors which are not necessarily of a legal character but which pertain to certain economic facts, conduct of parties and many other matters. The Act is a part of the adjective law only in the sense that it primarily operates at the stage of litigation and its provisions are mainly concerned with the process of litigation. But its importance far transcends the mere niceties of litigation. Act not concerned with technicalities.

1.4. Even when one concentrates on the adjectival aspect, certain expectations of society must be satisfied. The machinery incorporated in adjective law should be smooth in its operation and the law relating thereto, as far as possible, free from ambiguities that might hinder its smooth operation. Unfortunately, the machinery as contained in the Partition Act has not worked satisfactorily. Experience has shown that the manner in which many of its provisions were originally framed and the conflicting interpretations which those provisions have received in the courts, have resulted in confusion and caused hardship. Defective machinery.

1.5. There is hardly any other Act on the Indian statute book in regard to which such a conflict of decisions has arisen as in regard to the Partition Act. Almost every important provision of the Act has been the subject matter of conflicting judicial decisions. On some points (e.g. as to section 4), the conflict is so wide that one is unable to find any common ground at all.² If, therefore, uniformity in law is one objective of the revision and reform of the law, then certainly the Partition Act appears to be an enactment eminently suitable for being taken up for revision. Conflict of decisions.

1.6. Besides this, the Law Commission has already forwarded Reports on several matters concerned with the substantive law of property,³ and it is appropriate to take up now its adjective counterpart. Law of property and law of partition.

1.7. The need for revision of the Act having been felt, a study of its provisions was commenced in the Commission some time ago. In the meantime, Need for revision.

1. Para 1.3, *infra*.

2. Chapter 7, *infra*.

3. E.g. Law Commission of India, 70th Report (The Transfer of Property Act, 1882) and 64th Report (Married Women's Property Act, 1874) and 81st Report (Hindu Widows Remarriage Act, 1856).

the Commission also received from the Gujarat High Court¹ a copy of its recent judgment highlighting the confusion that has arisen by reason of conflicting interpretations of section 4 of the Act. The need for revising the Act is reinforced by several other recent judgments of various Courts.

It may also be added that a suggestion pointing out some of the difficulties experienced in the working of the Act (particularly, sections 2 and 3) and urging reform of the law had also been received some time ago by the Ministry of Law (Legislative Department) from a member of the Bar.² The Legislative Department had, thereupon, suggested that the Law Commission might consider the question of revision of this Act—a suggestion made in view of the fact that the Commission had, at that time, a proposal to take up for revision the Transfer of Property Act, 1882. Since then, the Commission has already forwarded its Report on the Transfer of Property Act,³ as already stated.⁴

Scheme of
the Report.

1.8. It is therefore proposed to consider the Act section by section after a brief historical discussion. To some extent, the Act is based on English statutory law as it was in force at the time when the Indian Act was enacted.

The salient features of the English law, as it then existed and as it is in force now, have been given in an Appendix.⁵

1. Para 7.16, *infra*.

2. F. 1(1)/64-L. C. (Law Commission) and F. 14(4)/62 Leg. II (Legislative Department).

3. Law Commission of India, 70th Report (Transfer of Property Act, 1882).

4. Para 1.6, *supra*.

5. Appendix 3.

CHAPTER 2

HISTORY

2.1. The circumstances in which the Partition Act, 1893 came to be enacted are interesting. Indian statute law, as it stood in 1892, did not contain any provision empowering the Court to direct a *sale and division* of the proceeds of sale in partition suits. The Code of Civil Procedure¹ (as then in force) dealt with the procedure for the partition of lands paying revenue and lands not paying revenue respectively.² But the relevant sections of the Code authorised the Court only to divide the property (and, in some exceptional cases, to award money compensation for equalizing the value of the shares). The Court could not direct a sale of the property followed by a division of the property that remained. It was bound to give a share to each of the parties. History of the Act.

2.2. This lacuna caused a difficulty which was thus explained in the Statement³ of Objects and Reasons to the Bill which led to the Act of 1893— Statement of Objects and Reasons.

“Instances, however, occasionally occur where there are insuperable practical difficulties in the way of making an equal division; and in such cases the Court is either powerless to give effect to its decree, or is driven to all kinds of shifts and expedients in order to do so. Such difficulties are by no means of very rare occurrence, although in many cases where the parties are properly advised they generally agree to some mutual arrangement, and thus relieve the Court from embarrassment.

“It is proposed in the present Bill to supply this defect in the law by giving the Court, under proper safeguards, a discretionary authority to direct a sale where a partition cannot reasonably be made and a sale would, in the opinion of the Court, be more beneficial for the parties. But having regard to the *strong attachment of the people of this country to their landed possessions*, it is proposed to make the consent of the parties interested at least to the extent of a moiety in the property a condition precedent to the exercise by the Court of this new power. In order at the same time to prevent any oppressive exercise of this privilege, it is proposed to give such of the “shareholders as do not desire a sale the right to buy the others out at a valuation to be determined by the Court.

“The power, moreover, which it is proposed to give to the Court, will be a discretionary one, to be exercised on a consideration of all the circumstances of the case. It should be added, that where the Court is obliged to direct a sale, a right of pre-emption is given by the Bill to the parties similar to that conferred on shareholders by section 310 of the Code of Civil Procedure, 1882.”

2.3. Regarding the clause of the Bill corresponding to section 4, the Statement of Objects and Reasons further observed⁴— History of provision conferring power of sale.

“It is also proposed in the Bill to give the Court the power of compelling a stranger who has acquired by purchase a share in a family dwelling house when he seeks for a partition to sell his share to the members of the family who are the owners of the rest of the house at a valuation to be determined by the Court. This provision is only an extension of the privilege given to such “shareholders by section 44, paragraph 2 of the Transfer of Property Act, and is an application of the well known rule

1. Sections 265 and 396, Code of Civil Procedure, 1882.

2. See para 2.11, *infra*.

3. Statement of Objects and Reasons to Bill No. 8 of 1892, Gazette of India, 1892, Part V, page 46 (portion relating to sections 2 and 3).

4. Gazette of India, 1892, Part V, page 46.

Partition Act, 1893

which obtains among Mohamedans everywhere and by custom also among Hindus in some parts of the country.

“The other sections of the Bill only deal with matters of procedure and do not call for any detailed notice.”

Draft Bill.

2.4. It would appear that the draft Bill, as originally proposed, sought to incorporate almost all the provisions of the English Act¹ on the subject. For example, under clause 3 of the Bill, as proposed, a sale could be ordered even on the request of any shareholder irrespective of the *quantum of his interest* in the property, as in section 3 of the English Act of 1868. Clause 4 of that Bill required the Court to direct a sale of the property and distribute the proceeds on the application of a share-holder interested in a moiety, and mainly followed section 4 of the English Act of 1868.

Opinion on the Bill.

2.5. The Bill was circulated to local Governments, High Courts etc. for opinion, with a circular dated the 31st October, 1889. Many of the opinions so received objected to the provisions² under which a sale could be ordered irrespective of the quantum of interest of the shareholder applying for sale. For example, Mr. Justice Muttusami Aiyar of the Madras High Court suggested that, in the case of ancestral land forming the sole or principal means of subsistence of a Joint Hindu family, no sale should be directed except by the *consent of all* or the majority, of the co-shares. The experience of Sir R. West (quoted by the Bombay Government) was that the (English) Partition Act was unsuitable for India. The Government of Bombay thought that the Bill would break up half the old estates, at least in the course of a generation.

Comment of Government of Bombay.

2.6. Among the changes desired by the Government of Bombay was a provision that where members resisting partition represented one-third of the aggregate estate, partition should not be decreed if the share of the members demanding partition could be made a charge on the estate. On the other hand, the Advocate-General of Bombay and Mr. Justice Parsons and Mr. Justice Telang of the Bombay High Court approved of the Bill in substance. Mr. Batly, Acting Legal Remembrancer, Bombay, strongly opposed the Bill, and thought that before so drastic an enactment as the English Partition Act was imported that before so drastic an enactment as the English Partition Act was imported in a more modern form. His suggestion was that before a sale could be ordered, a request must have been made by one moiety of the persons interested, and the dissent of the other interested parties must be unreasonable or frivolous.³

View of the High Court of Calcutta.

2.7. The High Court of Calcutta also did not approve of the drastic provisions in the Bill. In its opinion those provisions might lead to great abuse and multiply a class of cases already too numerous. It made a further suggestion that where a partition could not be practically made, the Court should have a power to compel the plaintiff to allow himself to be bought out, and that when a share in an estate has been, or is about to be, sold by private sale to a stranger, the other co-sharers should have a right of pre-emption in the whole or such portion of the estate as the Court may think reasonable. This suggestion of the Calcutta High Court seems to have been the genesis of the provision in present section 4.

Views of Mr. Knox and British India Association.

2.8. Mr. Knox, Legal Remembrancer, North-Western Provinces and Oudh, thought that the Bill might become an instrument whereby rich shareholders owning a small interest in immovable property may bring about (to their own advantage) sale of an ancestral property and break up joint property holdings.

There was also strong opposition to the Bill from the British India Association, which stated —

“The Bill, following the English Partition Act of 1868, and favouring, without paying any regard to the difference of social conditions, the sale of

1. Partition Act, 1868 (See Appendix 1).

2. See para 2.4, *supra*.

3. Discussion regarding history of the Bill is based on papers relating to the Partition Act, 1893 (4 of 1893); National Archives, Printed file, Home (Judicial) Department, 1891, particularly pages 1-12, Minute dated the 19th September, 1890.

the property is entirely unsuited to the circumstances of this country.”

2.9. The most interesting comment, however, from our point of view, was that of Mr. Brojendra Coomar Seal,¹ District Judge, Bankoora, who suggested the following rules, namely,—

Mr. Seal's
comment.

“I. When the property can conveniently be divided into as many parts as there are shares, it should be so divided.

“II. When it cannot be so divided, but when a portion of the property can be allotted to each sharer, to *equalize* the shares the Court should have the power to direct one sharer to pay compensation to another for the difference between the portion actually allotted to him and the portion he is entitled to.

“III. When all the sharers wish, or *when the Court finds it impossible to divide the property according to Rule I or II*, the whole or a portion of the partible property may be valued by the Court at what it is actually worth, and, taking that to be the upset price, *cause it to be sold* to that sharer who will pay the highest price above the upset value. If none of the sharers wish to purchase, or to purchase at the upset price, then the surrounding neighbours may be allowed to compete for the property, and it may be sold to that neighbour who will pay the highest price above the upset value. If the neighbours do not come forward, then it may be put up to public sale irrespective of the upset price, subject to the rules in Chapter XIX of the Civil Procedure Code so far as they are applicable.”

His views found support² in the comment of Sir A. R. Scoble, Q.C.

2.10. As a few of the comments revealed opposition to some of the proposals in the Bill, it was considered that the power to equalise the shares³ was sufficient to meet all ordinary cases except family houses. The suggestion of the Calcutta High Court⁴ (regarding purchase of a share by a stranger) was also accepted. This was the tentative decision of the Government of India.

Decision as
to equalisation.

2.11. However, before taking its final decision, Government sought the advice of two legal experts, namely, Dr. W.H. Rattigan and Mr. G.H.P. Evans. Dr. Rattigan was in favour of the Bill, notwithstanding the objections received thereon. He traced the history of the Law of Partition and observed that there was authority for saying that even in Hindu Law, in the case of property indivisible by nature, partition was to be effected according to *vukti* or *equity*, and one of the modes expressly recognised in such a case was by *selling the property* and dividing the proceeds.⁵ He noted that according to Muslim Law,⁶ money compensation could be ordered while dividing, for instance, a house with a piece of ground attached. He referred to the Indian statute law as it then existed (i.e., sections 265 and 396 of the Code of Civil Procedure, 1882) and expressed the view that while those sections authorised money compensation for equalisation, they did not contain a provision to meet cases of partition of a single property (like a dwelling house) which could not be divided.

Views of
Dr. Rattigan
and Mr. Evans.

Dr. Rattigan also referred to the observations made in a Punjab case⁷ where the want of a law enabling the Court to deal properly with cases where a house could not be divided was noted, and it was pointed out that the parties were left either to buy one another out or to devise the most extraordinary shifts and contrivances of screening off their respective shares from one another. He pointed out that the apprehension that richer persons would harass the poorer co-sharers under clause 4 as proposed was not justified, as the Court had a discretion. However, to inspire greater confidence in the public, he

1. See also para 2.13, *infra*.

2. Para 2.13, *infra*.

3. This power was discussed in *Ashanullah v. Kali Kinkur*, (1884) I.L.R. 10 Cal. 675, 676.

4. Para 2.7, *supra*.

5. Dr. W. H. Rattigan, Comment on the Partition Bill, citing Jolly's Tagore Law Lectures (1888), page 93.

6. Hidayah, Book 39, Chapter III, cited.

7. Punjab Record case No. 15 of 1878; observations of Sir Dennis Fitzpatrick J. 2—317 LAD/ND/81

supported the proposal that the previous sanction of the District Court should be required before a sale was ordered.

Views of Mr. Evans—
Weakening of joint family not favoured.

2.12. Mr. G.H.P. Evans, however, thought that while, no doubt, partition cases presented considerable difficulty and a power to direct sale would greatly simplify matters, yet any measure tending to break up the joint Hindu family system would meet with great opposition, and that the time was not opportune for introducing any such measure.

View of Sir A.R. Scoble, Q.C.

2.13. It may also be noted that the Government had shown the papers to Sir A.R. Scoble, Q.C., who was inclined to think that where a partition by agreement could not be effected, a public sale of an undivided share, or of a right, title and interest should be permissible only where the other members of the family declined to purchase the share of the member claiming partition at a reasonable price. In his opinion, the suggestions of Mr. B.C. Seal¹ were commendable. It was in these circumstances that the Bill was modified, before its introduction.

Speech of Dr. Rash Behari Ghose.

2.14. Dr. Rash Behari Ghose, while moving for leave to introduce the Bill,² observed that an amendment of the law was called for, "as a state of things in which a judicial deadlock is possible can never be viewed with indifference by the Legislature". He pointed out that the Bill imposed stringent conditions before sale could be ordered, one of which was that at least one-half of the sharers must concur in the sale. He also referred to the text of Brihaspati³ that in the case of clothes and ornaments an equitable partition was made by distribution of the price after *their sale*.

Proceedings of Governor-General-in-Council.

2.15. From the proceedings of the Council of the Governor-General,⁴ it would appear that Dr. Rash Behari Ghose was aware of the criticism that some of the restrictions imposed by the Bill were unnecessary, but he replied that "for obvious reasons, sweeping innovations in matters of so much delicacy are always to be deprecated and that we cannot proceed too cautiously".

1. Para 2.9, *supra*.

2. Proceedings of the Council of the Governor-General of India, dated 25th March, 1892.

3. Digest V, 366.

4. Proceedings of the Governor-General-in-Council, dated 9th March, 1893.

CHAPTER 3

SCHEME OF THE ACT AND ANALOGOUS PROVISIONS

3.1 In order to understand the scheme of the Act, we should bear in mind what are concurrent interests. Land (or, for that matter, any other property) may be the subject of separate ownership or of co-ownership. Where two or more persons have simultaneous interests in land (or in other property) they are said to hold it concurrently and to have "concurrent" interests.¹

3.2. So long as those having concurrent interests continue to enjoy it in common, the law would not interfere. When, however, a desire arises for separate enjoyment, the law must regulate the rights and liabilities in the light of the conflicts that might ensue. The legal term "partition" is applied to the division of lands, tenements, and hereditaments belonging to co-owners and the allotment among them of the parts,² so as to put an end to the community of ownership between some or all of them. The co-owners may be joint tenants, tenants in common, or co-parceners.

Thus, if three persons are co-owners (tenants in fee simple) of Blackacre, Whiteacre, and Greenacre, the transaction by which one of them becomes sole owner in fee simple of Blackacre, another of Whiteacre, and the third of Greenacre, is a "partition".

Partition is thus a legal process by which joint title and possession of co-owners of joint property is converted into the separate title and possession of each of the co-owners in respect of specific item or items. The joint property is divided into species and each one of the erstwhile co-owners is put in possession of a specific extent of property allotted to his share. In some cases, however, partition will not be convenient and the Act concentrates on that situation seeking to provide suitable alternatives.

3.3. The Act does not purport to deal with the *whole law of partition*. This is made clear by the long title, which describes it as an Act to *amend* the law of partition. The substantive law relevant to partition, i.e. division of undivided property into separate shares, is not dealt with in the Act. That falls within the purview of the law of property, or in certain respects, with those rules of personal law which deal with the proprietary relations of co-parceners or other co-owners, *inter se*. The Act mainly deals with the field of the remedy by way of a suit for partition, i.e. when partition is sought through the machinery of the courts. This belongs to the field of adjective law.³ Even in this field, the Act covers only a small area, namely, (a) cases where a division of the property is not convenient⁴, and the *whole* property has to be sold,⁴ or (b) cases where the sale of the *share of one* of the parties entitled to partition⁵ (or of his transferee)⁶ is considered desirable. Scope of the Act of 1893.

3.4. The two important topics dealt with in the Act are—

- (a) power of the Court to order sale *instead of division* in partition suits (section 2), and
- (b) right of any member of a family to purchase a share in a dwelling house belonging to an undivided family, being a share that has been transferred to a stranger (section 4).

Scheme of
the Act.

The scheme of the Act may now be briefly summarised.

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1. Cf. Black, Law Dictionary (1979), page 264.
 2. Halsbury, 3rd Ed., Vol. 29, page 343, para 539. Also see Vol. 14 (Equity), pages 501, 502.
 3. Chapter 1, *supra*.
 4. Section 2.
 5. Section 3(1).
 6. Section 4(1).

Provisions
briefly summarised.

3.5. Section 1(1) and 1(2) deal with preliminary matters. Section 1(4) provides that the Act does not affect any local law providing for the partition of immovable property paying revenue to Government.

Under section 2, in any suit for partition, in which a decree for partition might have been made if the Act had not been passed, if it appears to the Court that (a) by reason of the nature of the property to which the suit relates or of the number of shareholders therein or of any other special circumstances, a division of the property cannot reasonably or conveniently be made, and (b) Sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court *may*, on the request of the shareholders interested in a moiety or upwards, direct a sale of the property and distribution of the proceeds. Where a request for such a sale is made by the shareholders interested in a moiety, section 3 provides that any other shareholder may apply for leave to buy the share or shares of the party or parties asking for such sale, and thereupon the Court *shall* order a valuation of the share or shares and *offer to sell the same to the applicant*. The section also contains a provision as to what happens where there is a competition between the shareholders *seeking to purchase*. Detailed provisions as to bidding, and as to the mode of conducting sales under section 2, are contained in sections 6 and 7.

Section 4 deals with the right of a member of a family to purchase the share of a stranger "suing" for partition, where the share is in respect of a dwelling house belonging to an "undivided family".

Section 5, which is common to both the groups of sections, deals with the representation of parties under disability. Sections 6 and 7 have already been referred to. Under section 8, orders for sale made by the Court under the Act are deemed to be "decrees" within the meaning of section 2 of the Code of Civil Procedure. Section 9 saves the power of the Court to make a decree for partition of a part of the property in suit and sale of the remainder under the Act. Section 10 relates to the application of the Act to pending suits.

Kinds of
sales under
the Act.

3.6. It is necessary to bring out a recurrent theme of the Act—sale of the property or of a share. There are several kinds of sales contemplated by the Act. Firstly, there is the sale under section 2. The sale can be ordered on the application of shareholders interested in a moiety or upwards, but the Court is not bound to grant the application.

Next, there is the sale under section 3. If any other shareholder applies to purchase the share or shares of the shareholders who desire a sale by public auction under section 2, they have a right to do so. Here the sale is *mandatory*, but it is a sale only of the *share* or shares of those who applied under section 2. This is not a public sale,¹ but only a *sale amongst*² the co-sharers.

The third category of sales is that contemplated in section 4, whereunder a stranger purchaser (transferee) of a share can be compelled to sell his share to a member of the family applying for such purchase. Here the Court is bound to grant the application, and the sale is, thus, *mandatory*. The sale is not of the entire property, but only of the share of the transferee. It is not held by *public auction*, being merely a sale from the transferee to the applicant.

Analogous
laws.

3.7. Besides the Partition Act, a few other enactments contain provisions which are analogous to, or connected with the Act. Of these, the most important is the provision in section 44 of the Transfer of Property Act³ concerned with dwelling houses, which reads—

"Where the transferee of a share of a *dwelling-house* belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

1. See section 3(2).

2. *Hari Charan v. Fakir Chandra*, (1936) 40 C.W.N. 955.

3. Section 44, Second paragraph, Transfer of Property Act, 1882.

It is because of this section¹ of the Transfer of Property Act that section 4 of the Partition Act was enacted. We shall have occasion to consider it in detail, later on.²

3.8. Another analogous provision, based on the same principle of excluding strangers, is contained in section 22 of the Hindu Succession Act, 1956, which gives a right of pre-emption to co-sharers. Section 22, Hindu Succession Act.

3.9. The same principle of giving preference to a co-sharer underlies the provision in Order 21, Rule 88 of the Code of Civil Procedure, 1908. It provides that where property sold in execution of a decree is a share of an undivided immovable property, and two or more persons, of whom one is a co-sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharers.³ The object of this rule is to enable the co-sharers in an undivided immovable property to keep out strangers, if the co-sharers so desire.⁴ In substance, the rule has the effect of giving the bidding co-sharer a *right to pre-empt the share*, if the other conditions given in the rule are satisfied. The rule thus safeguards the rights of co-sharers in undivided immovable property.⁵ O. 21, R. 88, C.P.C.

3.10. Finally, a Court, when allotting shares at a partition, has a general power to award monetary compensation. Where a partition of land or other property is made and the shares allotted to the parties are of unequal value, the award of a sum of money or other compensation to the owner of the less valuable portion has always been regarded as within the powers of the Court. The compensation so awarded is known as "owelty".⁶ General power to award monetary compensation (Owelty).

The matter has been exhaustively discussed in a judgment of the Supreme Court.⁷ When, on petition, an owelty is awarded to a member for equalisation of the shares on an excessive allotment of immovable property to another member, such a provision of owelty ordinarily creates a lien or a charge on the land taken under the partition.⁸ "Owelty" may thus be defined as the difference which may be paid or secured between one co-parcener or co-tenant and another for the purpose of equalising a partition.⁹

1. See also para 2.3, *supra*.

2. See discussion relating to section 4, paragraphs 7.1 to 7.9, *infra*.

3. O. 21, Rule 88, Code of Civil Procedure, 1908.

4. *Dambar Singh v. Murari Lal*, A.I.R. 1914 All. 426, 427.

5. *Cf. Munna Lal v. Gopi Lal*, A.I.R. 1940 Nag. 337, 339.

6. Jowitt, Dictionary of English Law (1959), Vol. 2, page 1283.

7. *T. S. Swaminatha v. Official Receiver of West Tanjore*, A.I.R. 1957 S.C. 577, 582, Paragraphs 14 and 18.

8. *T. S. Swaminatha v. Official Receiver of West Tanjore*, A.I.R. 1957 S.C. 577.

9. Compare Bouvier, Law Dictionary, Vol. 2, page 2437, citing various authorities including Coke and Viner, substantially to this effect.

CHAPTER 4

ENGLISH LAW

Evolution of
English law.

4.1. Evolution of the English law relating to partition is interesting. It was partly in the background of the position as to remedies in partition suits as understood in common law that Indian legislative proposals were formulated. The English law seems to have evolved through the following broad stages—

- (i) partition (physical) the only remedy available ;
- (ii) compensation made available, in addition to the above remedy ;
- (iii) sale made permissible, in addition to the above remedies ;
- (iv) sale not only made available, but also made compulsory, in case of disagreement between the co-owners.

Position in
India.

4.2. In India, the legal position as to the power of sale appears to have been the same as prevailed in England before amendment of the law by the statutes passed on the subject. The Court had no power whatsoever to direct a sale of a property in a partition suit.¹ The Partition Act of 1893 for the first time made it possible for the Court to direct *a sale* in certain circumstances, but the power conferred on the Court is a limited power, as will be evident from a detailed examination of its provisions.

It is not necessary to encumber the body of the Report with details of English law. These have been given in an Appendix² to this Report.

1. *Gadadhar v. Janaki Nath*, A.I.R. 1969 Cal. 59, 63, 64.

2. See Appendix 3.

CHAPTER 5

POWER OF SALE : SECTIONS 1-2

5.1. We proceed now to an examination in detail of each section of the Act. Sections considered.

5.2. Section 1 deals with formal or preliminary matters (short title and extent), and needs no change. Section 1.

5.3. Section 2 of the Act empowers the Court to order the sale of the property in suit in certain cases. The section reads as under :— Section 2 and inherent power of sale.

“2. *Power to Court to order sale instead of division in partition suits.*—Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein or of any other special circumstance, a division of the property cannot reasonably or conveniently be made and that a sale of the property, and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.”

The section thus requires that the application must be made by persons holding *at least a moiety* in the property and the other conditions specified in the section must also be satisfied, before sale can be ordered.

5.4. Since the requirement that there must be an application by persons holding a moiety has, in practice, been found to be rather harsh, attempts have from time to time been made to take the stand that the Court can order sale even apart from the provisions of section 2. Rulings on the subject are conflicting, and, an analysis would show that the following views have been taken on the question: Jurisdiction to order sale apart from the Act.

- (i) The Court can order sale of the property independently of the Act and such a sale can be ordered not only among the co-sharers but also (to the public) by public auction.
- (ii) Such a power exists to a limited extent—sale must be limited only amongst the co-sharers.
- (iii) The sale can be ordered by the Court only with the consent of all the co-sharers.
- (iv) *No such power exists*, and a sale cannot be ordered apart from section 2, either by public auction or among the co-sharers.

This particular question has not yet been decided by the Supreme Court,¹ though it has recognised the power of the Court to effect partition by such equitable means as may be appropriate.

Case law which supports one or other of the four possible views stated above may now be examined.

5.5. The first view, namely, that independently of the Act, the Court can order sale *by public auction*, is illustrated by a decision of the High Court of Andhra Pradesh² which so held, giving the following reasons :— First view.

- (1) The power existed under Hindu law. Certain texts of Hindu law show that clothes and ornaments are divided by distributing the

1. *Badri Narain v. Nil Ratan*, A.I.R. 1978 S.C. 845.

2. *Ramaprasada Rao v. Subbaramaiah*, I.L.R. (1957) Andhra 566; A.I.R. 1958 A.P. 647 (Subba Rao C.J. and Ansari J.), (approved on another point in *Badri Narain v. Nil Ratan*, A.I.R. 1978 S.C. 845.

proceeds after selling them,¹ and that, in some cases, where joint enjoyment or enjoyment by turns is not possible, the sale of some of items and distribution of the proceeds between the members of the family² is authorised. Besides this, many texts emphasise the proposition that species of property, such as, water, right of way, vehicles, cooked food, female slaves etc. are indivisible.

- (2) There are several judicial decisions to the effect that independently of the Partition Act, the Court has inherent power to refuse to divide a property by metes and bounds and to direct its sale.
- (3) Serious hardship would be caused if such a power was not recognised. The Court would be powerless to make an equitable distribution of the property when one or other of the properties could not be equitably partitioned, or when all the parties, colluding together, create a deadlock. The very process of partition would be retarded.
- (4) The Partition Act was designed only to meet a particular contingency, and did not, in any way, affect the power of the Court to make an equitable distribution of the properties.

Second view.

5.6. The second view, namely, that the Court can, even apart from the Act, order sale *amongst the co-sharers*, seems to have been taken in earlier decisions of the Calcutta High Court.³ The case most often cited is one decided by Sir Asutosh Mookherjee J.,⁴ where the plaintiffs suing for partition prayed that they might be allowed to retain exclusive possession of the property on payment to the defendant of compensation (at a valuation to be made by the Court), proportionate to the share of defendant's property. The lower courts concurrently found that the property could not be conveniently partitioned, and ordered the plaintiffs to pay to the defendant one-third of the value as determined by the Commissioner,—plaintiff thereafter retaining possession. On appeal by the defendant, the High Court held that the defendant was not bound to transfer his share to a plaintiff at a valuation, and in the absence of a statutory provision, the Court could not compel him to do so. Since it was admitted that the property could not be conveniently partitioned, the proper course was to direct a *sale of the property amongst the co-sharers* and to give the property to the highest bidder among the co-sharers.

Subsequent case law.

5.7. Subsequently, however, this decision was explained⁵ by the same High Court as limited to the facts of the case, and not intended to lay down a general principle of law that in a suit for partition the Court possesses a power of sale *apart from the Partition Act*. In a later case,⁶ the conclusion reached was, that the effect of the Partition Act could not be whittled down by drawing upon some undefined and uncertain inherent powers in the Court to direct a sale where the invitation of the parties is merely to make a partition between the co-sharers. It was held that a sale of the disputed property could not be ordered even *among the co-sharers* (there being no prayer to that effect in the case).

A still later Calcutta decision⁷ re-affirms the view that the power to direct a sale must be limited to the cases provided for in the Act.

Third view—sale with consent.

5.8. The third view, namely, that sale can be ordered outside the Act with the *consent* of the co-sharers, seems to have been taken in one Calcutta decision.⁸ But the Calcutta decision was overruled later.⁹

1 Brihaspathi, as stated by Smritichandrika VII, 41.
 2 Katyayana, cited in Smritichandrika VII, 47.
 3. The earlier cases are collected in *Panna Lal v. Hrishikesh*, I.L.R. (1949) 1 Cal. 192 (S. B. Sinha, J.).
 4. *Debendra Nath v. Hari Das*, (1910) 15 Calcutta Weekly Notes 552.
 5. *Atul Chandra v. Bhusan Chandra*, A.I.R. 1926 Cal. 1190 (Cuming and Page JJ.).
 6. *Nritya Gopal v. Pran Krishna*, A.I.R. 1952 Cal. 893, 57 C.W.N. 439 (G. N. Das and Guha Ray JJ.).
 7. *Probhat Kumar v. Ram Mohan*, A.I.R. 1958 Cal. 177, 178, para 9 (Mullick J.).
 8. *Narendra v. Jnanendra*, (1952) 90 Cal. L.J. 147, referred to in *Gadadhar v. Janaki Nath*, (1968) 72 C.W.N. 299.
 9. *Gadadhar v. Janaki Nath*, A.I.R. 1969 Cal. 59, 63, 65, para 32.

According to dicta in a Madras case,¹ sale by consent of the parties is outside section 2.

5.9. The fourth view, namely, that the power to order sale must be sought within the four corners of the Act, has been stressed in a decision of the Calcutta High Court.² This case holds that the intention of the Act was to prevent a request for sale being made on insufficient grounds or from improper motives, and to safeguard the rights of the co-sharers in joint properties by conferring on such co-sharers a right of pre-emption and sale limited to the co-sharers themselves. Fourth view.

5.10. Reference was made in the judgment to the speech of Dr. Rash Behary Ghose who, while introducing the Bill,³ made the following observations :— Views of Dr. Rash Behary Ghose.

“..... but the strong attachment of any countrymen to landed property, specially when it is ancestral, should make us extremely cautious in replacing in any particular case the usual remedy of an equal partition by a sale of the property and a division of the proceeds. We cannot therefore proceed too warily, and accordingly the power with which it is proposed to invest the Court is only given subject to very stringent conditions and only to the extent necessary to meet the acknowledged evil.”

It was also observed in the judgment that if the Court had power to direct a sale, there would have been no necessity for enacting the Act of 1893. Primarily, a co-sharer, in a suit for partition, has a right to have his undivided share in the property *divided into specific allotment*, and not to the money value of his share. A partition suit is merely an invitation to the Court to convert the joint possession into possession in severalty of the different portions in accordance with the shares. At common law, there was no power to direct a sale in lieu of partition. Even in the Hindu law, the power of sale was extremely limited,⁴ and same was the position in Muslim law,⁵ it was stated.

5.11. This wide disparity⁶ in judicial opinion leads to uncertainty. It has arisen primarily because there has been felt a desire to do substantial justice, but the language of section 2 comes in the way, so that Courts not inclined to stretch the language take a narrow view, while others take a wide view. Need for reforms for various reasons.

The present narrow scope of section 2 causes hardship in several cases. Where persons holding a moiety do not make the required application under the section, the Court becomes helpless in the matter. This helplessness has driven some of the High Courts to seeking a power to order sale outside the four corners of the Act, while other High Courts regard themselves as bound by the provisions of the Act.

5.12. Let us take a few concrete situations. A situation outside section 2 would arise— Concrete situations.

- (i) where the parties sue for partition, but do not apply for sale, through lethargy;
- (ii) where the parties sue for partition, but request that the sale should be held only *among the co-sharers*;⁷
- (iii) where the court is convinced that the property cannot be conveniently or equitably partitioned, but the parties create a *deadlock* by not applying for sale, thus retarding the very process of partition;⁸

1. *Subbamma v. Veerayya*, A.I.R. 1932 Mad. 15, 17.

2. *Nriya Gopal v. Pran Krishna*, A.I.R. 1952 Cal. 893; 57 C.W.N. 439 (G. N. Das and Guha Ray JJ.)

3. Dr. Rash Behary Ghose: Speech on Introduction of the Partition Bill, Fort St. George Gazette, dated 12th April, 1892.

4. Brihaspati's text, Digest V, 366, cited.

5. Hedaya, Book 39, Chapter 3, cited.

6. Paragraphs 5.5 to 5.10, *supra*.

7. Cf. *Ram Prasad v. Mukandi*, A.I.R. 1929 All. 443.

8. Cf. *Ramaprasada Rao v. Subbaramaiah*, A.I.R. 1958 A.P. 647, 651, para 22.

- (iv) where some of the parties desire a sale, but their number does not make up the requisite moiety.

In all these situations, hardship results if a narrow view is taken.

English Act.

5.13 It may be noted that the corresponding provisions of the 1868 Act in England were wider, because, apart from section 4 of that Act (which corresponds to section 2 of the Indian Act), there were two other cases dealt with in sections 3 and 5 of the English Act, whereunder partition could be ordered.¹ A request of any party interested was enough to bring those sections into play, and it was not necessary that parties holding a moiety should apply.²

History(—)
Reasons for
existing
narrow scope
of section 2.

5.14. We have had a look at the history of the Act in order to find out the reason for the existing narrow scope of section 2. It appears that this narrow scope was proposed by the framers of the Act for the following reasons³ :—

“But having regard to the strong attachment of the people of this country to their landed possession, it is proposed to make the consent of the parties interested at least to the extent of a *moiety* in the property, a condition precedent to the exercise by the court of this new power.”

Hardships
revealed in
practical
working.

5.15. There is, no doubt, some force in this reasoning.⁴ But the practical working of the Act has brought out serious hardships resulting from a strict application of its provisions. Lethargy or indifference on the part of parties interested in a moiety (or want of agreement amongst them) is, as the law now stands, enough to take the case outside the scope of the Act and to render the Court helpless as stated above. There is, therefore, sufficient justification for widening the scope of section 2 in this respect.

Section 2—
Need for
amendment.

5.16. The hardship⁵ under section 2 discussed above obviously calls for amendment of the law. In our opinion, having regard to the situations⁶ that have arisen in the various decided cases in India,⁷ it is desirable to keep the provision wide so as to empower the Court to act *suo motu*. On the existing section, such a situation would not be covered,⁸ unless its language is unduly stretched. Parties sometimes avoid taking the position that the partition is impossible or extremely inconvenient, and pray only for partition by metes and bounds; but the Court itself finds it difficult to divide the joint property into separate specific allotments.⁹ The Court then feels helpless. This is certainly a situation that must be avoided. The proper course would, therefore be to give to the Court a power as above.

Recommendation
to
expand the
scope of
section 2.

5.17. Our recommendation in this context is twofold :—

- (i) In the first place *any* shareholder should have a right to demand sale if the other conditions are satisfied. The law should not (as at present) insist on the application of shareholders of at least a moiety. Of course, the other conditions given in the section must be satisfied. Once that is established, any shareholder should have the right to demand sale.
- (ii) Secondly, a discretion should be given to the Court to order a sale of the property in a partition suit, even of its own motion, where, because of the nature of the property or other considerations already mentioned in the section, a partition would not be convenient and a sale would be more beneficial.

1. See Appendix 1.

2. Statement of Objects and Reasons, Bill No. VIII of 1892, Gazette of India, 1892, Part V, page 46.

3. Statement of Objects and Reasons, Bill No. VIII of 1892, Gazette of India, 1892, Part V, page 46.

4. Para 5.14, *supra*.

5. See para 5.15, *supra*.

6. See paragraphs 5.6 to 5.10, *supra*.

7. Cf. the facts in *Ramaprasada Rao v. Subbaramiah*, A.I.A. 1958 A.P. 647.

8. *Probhat Kumar v. Ram Mohan*, A.I.R. 1958 Cal. 177, para. 6.

9. For suggested re-draft, see para 5.20, *infra*.

Reasons, however, must be recorded for such an order¹ passed by the Court of its own motion.

5.18. This takes care of the major problem created by section 2. We may note that a partition of the entire property in suit, and then the allotment of a portion thereof to some of the parties and sale of that portion, is not authorised² by section 2 or by section 9. The reason for the narrow scope of the Act on this point is obvious. If the whole property is not sold and only a part of a house or a part of land is sold, then the part to be sold would not fetch a reasonable price and this would cause hardship to the sharers to whom it has been notionally allotted. The section is attracted in every case where a division of the property between all the sharers cannot *reasonably or conveniently be made*. Otherwise, the section would lose its application in most cases, as it would always be possible to allot a property or portion thereof to one of the co-sharers.³

5.19. We may now refer to one matter on which the section is silent. Where a plaintiff applies to the Court that a sale may be held, and that whoever among the co-sharers offers the highest bid might be given the house (the house being incapable of partition), and the parties are *agreed* that no division can be made, the Court can, according to case law,⁴⁻⁶ direct the sale to be held among the plaintiff and the defendants, and the property to be given to the highest bidder above the valuation fixed by the Court. In terms, however, the section does not expressly authorise a sale *among co-sharers*.⁷ We propose to consider the problem arising from this position at the appropriate place⁸ under section 7.

5.20. We have also certain comments to offer as to the opening words of section 2 which read—

“In any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made.” The wording is not very happy. Presumably, the object underlying these words seems to be this. The legislature was legislating only for cases where a right to partition is available under the general law. This pre-supposes that certain conditions should be satisfied. For example, there must be concurrent interests in the property in dispute, and the property must not, by reason of any statutory or other legal prohibition, be impartible.

In other words, if by the general law, there is no right to claim partition, then a party cannot invoke the provisions of the Act as to sale. This seems to be the dominant idea. But this intention is expressed in words which appear to be somewhat confusing. The reader is mentally taken back to the period before the passing of the Act and gets the impression—inaccurate though it may be—that he is expected to conduct research into the law of partition as it existed in 1893. Such, however, could not be the intention. The dominant idea (as explained above) is that there must be a right to claim partition. This idea could, and should, be expressed in better language. Accordingly, we would recommend that the portion of section 2 in question should be suitably revised. The re-draft of section 2 which follows⁹ later will indicate concretely what we have in mind.

5.21. In the light of the above discussion, we recommend that section 2 should be revised as under :—

Revised section 2

“2. Power to Court to order sale instead of division in partition suits.— Whenever in any suit for partition in which the Court is entitled to pass a decree for partition, it appears to the Court that—

(a) by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein or of any other

1. For suggested re-draft, see para 5.20, *infra*.
 2. *Jadunath v. Haran Chandra*, I.L.R. 49 Cal. 1043; A.I.R. 1923 Cal. 221.
 3. *Abdulla Haji v. Kunamina*, A.I.R. 1961 Kerala 201, 202, para 3.
 4. *Debendra Nath v. Hari Das*, (1911) 7 I.C. 844, discussed in *Mohit Krishna v. Pranab Chandra*, A.I.R. 1930 Cal. 616.
 5. *Ram Prasad v. Mukandi*, A.I.R. 1929 All. 443.
 6. *Mohit Krishna v. Pranab Chandra*, A.I.R. 1930 Cal. 616, 619 (S. K. Ghosh J.).
 7. *Ram Gopal v. Bhikani*, A.I.R. 1964 Raj. 229.
 8. See para 8.7, *infra*.
 9. See para 5.21, *infra*.

Partition Act, 1893

special circumstance, a division of the property cannot reasonably or conveniently be made, and

- (b) a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders,

the Court—

- “(i) *Shall, on the request of any such shareholder, direct a sale of the property and a distribution of the proceeds;*
- (ii) *may, even if no such request has been made, if it thinks fit in the interests of justice, for reasons to be recorded, direct such sale and distribution.”*

CHAPTER 6

SALE TO SHAREHOLDER : SECTION 3

I. Shareholders entitled to apply for sale.

6.1. We now proceed to section 3, which has been judicially described as Section 3 — a “source of trouble”.¹ The serious anomaly brought about by section 3(1), A source of trouble which we shall discuss presently,² seems to justify this description.

6.2. The first question to be considered concerns section 3(1), which, so far The anomaly as is relevant to the point to be considered, provides that where a request is of favouring made to the Court to direct a sale under section 2, and “..... any other share- small share- holder applies for leave to buy at a valuation the share or shares of the party holders. or parties asking for a sale, the Court shall order a valuation..... and offer to sell the same to such shareholder”.

6.3. There is a controversy related to the rights of shareholders who have Controversy applied under section 2. This controversy arises because of the words “any as to rights other shareholder”. Two views exist on the scope of section 3(1) in this regard. of share holders.

According to the Madras³ and Calcutta⁴ view, section 3 is confined to cases where leave to buy is applied for by any other shareholder. Its provisions cannot therefore be availed of by the very shareholders who applied under section 2 (i.e. the shareholders owning one half share in the property, as the section now stands).

According, however, to the Punjab High Court,⁵ the shareholders who applied under section 2 can also apply under section 3.

6.4. It seems to us that the narrower view creates an anomaly, as its effect Anomaly is practically to favour the smaller shareholder at the expenses of the larger. caused by The fact that a person owns a large share is, under this view, made a dis- narrower view ability, precluding him from offering to buy the interest of the party owning the smaller share. As has been observed by the Madras High Court⁶ (even though it felt constrained to adopt the narrower view on a construction of the section), if A owns 9/10th and B 1/10th of an item, A is under a disability although, if there are two persons, and one is to be favoured, then A would have a much better claim than B.

The Calcutta High Court (though taking the narrower view) has also observed⁷ that it was significant that section 3 favoured the smaller shareholder at the expense of the larger. However, it was not for the Court to enter into a discussion as to the reasonableness or otherwise of a “clear and direct” provision made by the legislature by which one particular party is given an advantage over the other.

6.5. The hardship caused by a narrow construction of section 3(1) may be Illustrative illustrated by taking the facts of an actual case from Calcutta.⁸ A holds a case as to 14 anna share in a tank, and B holds a 2 anna share. If A applies for sale hardship re- under section 2, then B can purchase A's share under section 3. But A cannot, sulting from narrower view

1. *Subbamma v. Veerayya*, A.I.R. 1932 Mad. 15, 16.

2. Paragraphs 6.2 to 6.7, *infra*.

3. *Angamuthu Mudaliar v. Ratna Mudaliar*, A.I.R. 1925 Mad. 1234.

4. (a) *Atul Chandra v. Bhushan Chandra*, A.I.R. 1926 Cal. 1190.

(b) *Manik Lal v. Pulin Behari*, A.I.R. 1950 Cal. 431, 432, 433.

5. *Seth Chiranji Lal v. Hardwari Lal*, (1964) I.L.R. 2 Punjab 321, 328 (P. C. Pandit J.).

6. *Subbamma v. Veerayya*, A.I.R. 1932 Mad. 15, 16, bottom (Venkatasubba Rao J.).

7. *Manik Lal v. Pulin Behari*, A.I.R. 1950 Cal. 431, para 8 and 433, para 13 (R. P. Mookerji J.).

8 *Atul Chandra v. Bhushan Chandra*, A.I.R. 1926 Cal. 1190.

in such proceedings, offer to purchase B's share. The Court cannot even direct a sale of the property among the co-sharers.¹ The result is that A, even though he is holding a very large share, must either—

- (a) tolerate the joint possession of B (however inconvenient it may be), until B applies for sale, or
- (b) apply under section 2 and allow the property to go out of his hands, since, according to the narrower view, he cannot apply under section 3.

This, in effect, means that the largest co-sharer cannot have peaceful and effective enjoyment of his share.

Anomaly created by section 3.

6.6. As already pointed out above,² this is a serious anomaly in section 3. The anomaly should be removed by amending section 3(1) so as to enable any co-sharer to apply under that sub-section. The hardship caused by section 3 has been referred to in many judicial decisions. Because of the anomalies to which we have referred above, the very scheme of section 3 has been criticised in a Calcutta case.⁵ We have taken due note of this criticism. The changes, which we are recommending⁶ in section 3 will, we hope, conduce to furthering the interests of co-sharers, by removing those provisions which constitute serious anomalies.

Recommendation regarding section 3(1).

6.7. Our recommendation, then, is to revise section 3(1) as under:—

“(1) If, in any case in which the Court directs a sale under section 2, any.....shareholder applies for leave to buy at a valuation the share or shares of any other party or parties, the court may order a valuation of the share or shares in such manner as it may think fit, and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in this behalf, and where such applications are made in respect of the shares of different or opposing parties, the Court may make an order under this sub-section in respect of such of those shares as it may deem just.”

II. Sale of the property.

Sale of property.

6.8. It should also be provided that if, in any case in which the Court directs a sale under section 2, any shareholder applies for leave to buy at a valuation the property to which the suit relates, the Court may order a valuation of the property in such manner as it may think fit and offer to sell the property to such shareholder at the price so ascertained and may give all necessary and proper directions, in that behalf. A new sub-section (1A) should be inserted in section 3 on the subject as under:—

“3(1A). If, in any case in which the Court directs a sale under section 2, any shareholder applies for leave to buy at a valuation the property to which the suit relates, the Court may order a valuation of the property in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained and may give all necessary and proper directions in that behalf.”

III. Time limit for application for sale

Section 3 and question of time for applying.

6.9. We now come to one point which also arises out of section 3(1). The right of a party to purchase the shares of the co-sharers who had made an application under section 2 is to be exercised within a particular time. Section 3(1) provides that if, in any case in which the Court is requested to direct a sale, any other share-holder applies for leave to buy, the Court shall order a valuation of the shares and offer to sell the same. Controversy exists as to the exact point of time at which the application under section 3(1) should be made. Should the application be made before the sale is ordered, or can it be made before the sale is actually held? There is a conflict of decisions on the subject.

1. *Atul Chandra v. Bhushan Chandra*, A.I.R. 1926 Cal 1190.

2. Para 6.4, *supra*.

3. Original suit No. 750 of 1919 (Madras) referred to in *Subbamma v. Veerayya*, A.I.R. 1932 Mad. 15, 16.

4. *Ram Prasad v. Mukandi*, A.I.R. 1929 All. 443.

5. *Nitish Chandra v. Promod Kumar*, A.I.R. 1953 Cal. 18, 20, para 22 (D.B.) (per R. P. Mookerjee J.).

6. See *infra*.

6.10. According to the narrower view (represented by an early Madras case),¹ the application must be made before the sale was ordered under section 2; once a final order is made as between the parties for sale under section 2, no order can be made under section 3. Conflict of views.

According to a contrary view, such an application can be made at any time before the sale is actually held under section 2.

The wider view has been taken in—

- (i) Bombay,²
- (ii) Calcutta,³
- (iii) Madras (later case)⁴ and
- (iv) Punjab.⁵

6.11. According to Bombay view,⁶ for example, the *terminus a quo* for making an application under section 3 arises after an application requesting the Court to direct a sale is made under section 2. The confirmation of the sale would be the last point of time before which an application could be made under section 3. However, the Court must be circumspect in granting the request under section 3, because once a sale is ordered, equities arise in favour of third parties. Bombay view.

It has also been pointed out in Calcutta⁷ that section 3 does not contain any restrictive words such as “before the Court makes an order under section 2”.

6.12. Having regard to this conflict of decisions, the question to be considered is—what is the direction in which the law should be amended? It appears to us that from the practical point of view, there is much to be said for incorporating the wider construction.⁷⁻⁸ In the earlier Madras case,⁹ which takes the narrower view,¹⁰ it has been stated that unless the sections are construed in the narrower manner, there would be much difficulty in applying them, because the sale would be by public auction when anybody might bid for the property “unless the Court expressly confines it to the parties only”. But, with great respect, it is not easy to understand how this should cause any serious difficulty. If an application is made under section 3 before the property is sold, naturally the sale would be stopped. Small inconvenience might be caused to the prospective bidders, but no serious difficulty seems to be likely to arise from a wider construction of section 3(1). Practical aspects considered.

6.13. In fact, it is the narrower view that might cause a difficulty. The difficulty is illustrated in an earlier Calcutta case.¹¹ It was pointed out in that case that if a plaintiff contests the title of the defendants or of some of them, then, until the question of title is decided in the preliminary decree, the defendant cannot avail himself of the right given by section 3, even though the plaintiff himself might have suggested a sale of the property. Difficulty caused by narrower view.

1. *Angmuthu v. Ratna*, I.L.R. 48 Mad. 920; A.I.R. 1925 Mad. 1234 (Kumaraswami Sastri & C. Krishnan JJ.).

2. *Teherbhai Abdulalli v. Nagindas*, A.I.R. 1979 Bom. 41 (Feb.).

3. (a) *Nitish Chandra v. Promod Kumar*, A.I.R. 1953 Cal. 18, 19, 20, paragraphs 12 and 19—22.

(b) *Maniklal v. Pulin Behari*, A.I.R. 1950 Cal. 431.

4. *Jayarama Chettiar v. Annamalai Chettiar*, (1966) I.L.R. 2 Mad. 530.

5. *Seth Chiranjil Lal v. Hardwari Lal*, (1964) I.L.R. 2 Punjab 321 (P. C. Pandit J.).

6. *Teheribhai Abdulalli v. Nagindas Gokuldas Saraf*, A.I.R. 1979 Bom. 41, 43, para 12 (February).

7. *Nitish Chandra v. Promod Kumar*, A.I.R. 1953 Cal. 18.

8. Para 6.10, *supra*.

9. *Angamuthu v. Ratna*, I.L.R. 48 Mad. 920; A.I.R. 1925 Mad. 1234, 1235.

10. Para 6.9, *supra*.

11. *Manik Lal v. Pulin Behari*, A.I.R. 1950 Cal. 431, 433, para 16 (R. P. Mookerjee J.).

Section 3 —
Recommendation as to
time.

6.14. In the light of what we have stated above,¹ we would recommend an amendment of section 3 to incorporate the wider view by adding an Explanation as under:—

“Explanation.—An application under sub-section (1) or under sub-section (1A) may be made at any time before the sale is actually held.”

IV. Consequential amendment of section 3(2)

Section 3(2)
— Amendment
recommended.

6.15. An amendment of section 3(2) is needed consequential on the amendment proposed in section 3(1) and the proposed insertion of section 3(1A).

We therefore recommend that section 3(2) should be revised as under:—

“(2) If two or more shareholders severally apply under sub-section (1) or sub-section (1A) for leave to buy the same share or shares or for leave to buy the property, as the case may be, the Court shall order a sale of the share or shares, or of the property, as the case may be, to the shareholder who offers to pay the highest price above the valuation made by the Court.”

1. Para 6.13, *supra*.

CHAPTER 7

SHARE OF DWELLING HOUSE : SECTION 4

I. Introductory

7.1. We propose to consider in this Chapter section 4 of the Act. The section, so far as is material, provides that where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee "sues" for partition, the Court shall, if any member, being a shareholder, undertakes to buy the share of such transferee, make a valuation of the share of the transferee and direct its sale to such shareholders. Section 4—
Principle of.

7.2. This section supplements the provisions of section 44, second paragraph of the Transfer of Property Act, which reads as follows:—^{1,2} Section 44,
Transfer of
Property Act.

"Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house."

Section 44 of that Act having thus provided that the stranger purchaser is not entitled to joint possession or other common or part enjoyment, section 4 of the Partition Act takes the next step, and enables the members of the family to buy out the outsider. It can, therefore, be said, that section 4 takes up the law from the point at which section 44 of the Transfer of Property Act has left it.

7.3. The principle of section 44, second paragraph, Transfer of Property Act can be deduced from the judgment of Westropp C.J. in a Bombay case³— Principle
underlying
section 44.

"We deem it a far safe practice and less likely to lead to serious breaches of peace, to leave a purchaser to a suit for partition, than to place him by force in joint possession with the members of a Hindu family, who may be not only of a different caste from his own, but also different in race and religion."

7.4. Section 4 of the Partition Act is also based on the same principle that forms the justification for section 44, Transfer of Property Act. As the two provisions are supplementary to each other, most Courts have tried to ensure that they are construed in harmony with each other.⁴ However, the extent to which, in order to achieve this harmony, section 4 can be given a wide interpretation, has become the subject matter of controversy, to which we shall revert later.⁵ Section 4
analogous to
section 44,
Transfer of
Property Act.

7.5. Before we discuss the points that arise on section 4, we may mention that its constitutional validity was challenged in the Madras High Court on the ground that it was "illegal discrimination" to enable the member of the family to buy out the transferee, while denying that right to the transferee.⁶ Section 4—
Constitutional
validity of.

The argument did not succeed.

II. Meaning of various expressions

7.6. Various expressions used in section 4, such as "dwelling house", "undivided family" and "member of such family", have come up for interpretation in several decisions of the various High Courts, and Courts have, in general, Section 4—
Interpretation
of "dwelling
house".

1. Section 4, Transfer of Property Act, 1882 (4 of 1882).

2. See also Chapter 2, *supra*.

3. *Balaji v. Ganesh*, (1881) I.L.R. 5 Bom. 499, 504 (Westropp C. J.).

4. *Cf. Buto Krishna v. Akhoy Kumar*, A.I.R. 1950 Cal. 111, 113, para 11 (R. P. Mookerjee and P. N. Mitra JJ.).

5. See paragraphs 7.12 to 7.33, *infra*.

6. *Krishna Pillai v. Perukutty Ammal*, A.I.R. 1952 Mad. 33, 34, para 6 (Panchapakesa Ayyar J.).

placed a wide and liberal construction on these expressions, keeping in view the object underlying section 4, namely, to provide for peaceable enjoyment of the property and to secure privacy.¹ For example, it has been held that a "dwelling house" does not cease to be so merely because of a temporary suspension of occupation or absence of the co-sharers, provided the members are likely to return to its occupation.² Continuous residence of the member is not necessary.³

Then, the term "house" has also been liberally interpreted, so as to include the appurtenant lands or premises which are necessary for its proper occupation or enjoyment.^{4,5}

Case law
on various
expressions—
"undivided"—

7.7. As regards the requirement connoted by the word "undivided", as occurring in section 4, it has been held,^{6,8} that it is not confined to a joint Hindu family, or even to any joint family but simply connotes that there is a family the members whereof have not divided *their property*.⁹ The emphasis is on the undivided *character of the house*.¹⁰ Accordingly, a Muslim widow who, though re-married long ago, continued to live with the second husband in the family house, has been held entitled to the benefit of the section.¹¹

The fact that all other property has been partitioned, would also not take away the operation of the section, if the family is still undivided in relation to the *dwelling house*.

Meaning of
"family".

7.8. The term "family" as occurring in section 4 has been widely construed,¹² so as to cover cases of Hindu sisters¹³ or Muslim sisters¹⁴ living together and even a son-in-law who¹⁵ frequently comes and stays with the father-in-law.

As observed by Kindersley V. C.,¹⁶ the word "family" is, in itself, a word of most loose and flexible description. It has also been observed¹⁷ that "family is a popular and not a technical expression and its meaning is often controlled by the context".

Indeed, in a still later case,¹⁸ the matter was put perhaps in a more general form:

"The term family embraces a collective body of persons living together in one house or within the curtilage. In legal phrase this is the generic description of a 'family'. It embraces a household comprised of parents "or children or other relatives or domestic servants, in short, every collective body of persons living together within the same curtilage, subsisting in common, and directing their attention to a common object, the promotion

1. *Dulal Chandra v. Costhabehari*, A.I.R. 1953 Cal. 259 (Chakravarti C. J. and G. N. Das J.).
2. *Kalipada v. Tulsidas*, A.I.R. 1960 Cal. 467.
3. *Sushila v. J. B. Baral*, A.I.R. 1956 Orissa 56 (case of Christians) (reviews case law).
4. *Nilkamal v. Makakshy Charan*, A.I.R. 1928 Cal. 539, 542.
5. *Khirode Chandra v. Saroda Prasad*, (1910) 12 Cal. L.J. 525; 7 I.C. 436 (Mukherji, J.).
6. *Babulal v. Hulla Mollah*, A.I.R. 1938 Pat. 13.
7. *Bai Fatima v. Gulamnabi*, A.I.R. 1936 Bom. 197.
8. *Mt. Gangl v. Atma Ram*, A.I.R. 1936 Lah. 291.
9. *Sultan Begum v. Debi Prasad*, (1908) I.L.R. 30 All. 324 (F.B.).
10. *Buto Krishna v. Akhoy Kumar*, A.I.R. 1950 Cal. 111.
11. *Shafina Begum v. Mt. Kifita*, A.I.R. 1939 All. 640 (Collister J.).
12. *Khirode Chandra v. Saroda Prasad*, (1910) 7 I.C. 436 (Autosh Mukerjee J.).
13. *Krishna Pillai v. Perukutty*, A.I.R. 1952 Mad. 33.
14. *Aley Hussain v. Toorab Hussain*, A.I.R. 1958 Pat. 232 (Ramaswami C.J. and Prasad J.).
15. *Ahmad Khan v. S. Maijar*, A.I.R. 1971 Orissa 284 (B. K. Patra & R. N. Misra JJ.).
16. *Green v. Marsden*, (1853) 1 Drew 646, 651; 61 E.R. 598.
17. *Burt v. Hellar*, (1872) 14 Eq. 160.
18. *Wilson v. Cochran*, (1869) 31 Texas 677, cited in *Salim Ullah v. Baqir Ullah*, A.I.R. 1948 All. 142, 143.

of their mutual interests and social happiness. This is the most popular acceptance of the word."

7.9. The matter came up for detailed consideration in a Calcutta case.¹ Asutosh Mookerjee J. summed up his own view in these terms: Calcutta case as to "family".

"The word 'family' as used in the Partition Act, ought to be given a liberal and comprehensive meaning and it includes a group of persons related in blood, who live in one house or under one head or management."

The principle underlying the section and the authorities, both English and Indian, appear to be to maintain the integrity of a body of people knit together by the tie of common residence. The advent of a stranger is bound to lead to disruption.²

In an Allahabad case, ³Sir John Stanley, C.J., delivering the judgment of the High Court, observed :

"(a) The words 'undivided family' as used in this section appears to be borrowed from section 44, T. P. Act.

(b) The words 'undivided family' must be taken to mean 'undivided *qua* the dwelling house in question, and to be a family which own the house but has not divided it'."

7.10. A good summary of the effect of the various decisions regarding section 4 is contained in a Calcutta ruling as follows⁴:— Summary of decisions.

"These decisions lay down that the word 'family' as used in the section ought to be given a liberal and comprehensive meaning and it includes a group of persons related in blood, who live in one house under one head or management; that it is not restricted to a body of persons who can trace their descent from a common ancestor; but it is not necessary for the members to constitute an undivided family that they should constantly reside in the "dwelling house, nor is it necessary that they should be joint in mess; that it is sufficient if the members of the family are undivided *qua* the dwelling house which they own; that it is the ownership of the dwelling house and not its actual occupation which brings the operation of the section into play: and that the object of the section is to prevent a transferee of a member of a family who is an outsider from forcing his way into a dwelling house in which other members of his family have a right to live."

7.11. It may be noted that section 4 stands apart from the group comprising sections 2, 3 and 6. In the case of section 4, one of the parties must be a *stranger* transferee. In the case of the other sections, one of the parties may, or may not, be a stranger.⁵ Section 4 available only against strangers.

With these preliminary observations, we proceed to a consideration of the points arising on the section.

III. Suit against stranger purchaser

7.12. The most important question to be considered with reference to section 4(1) is whether the section is attracted when the suit for partition is brought not by *the* stranger purchaser, but by a member of the family against the stranger purchaser. The section uses the expression "and such transferee *sues* for partition", which, if taken literally, would be confined to cases where the stranger purchaser is a *plaintiff* in the *partition* action. Controversy has arisen as to the proper construction of the section. While many High Courts have construed the section widely, so as to extend it even to cases where the stranger purchaser figures as a *defendant* in a suit for partition,⁶ other decisions take a contrary view. The controversy was already acute enough in 1955, when

1. *Kshirode Chandra v. Saroda Prasad*, 12 C.L.J. 525.

2. *Salim Ullah v. Faqir Ullah*, A.I.R. 1948 All. 142, 143.

3. *Sultan Begum v. Debi Prasad*, (1908) I.L.R. 30 All. 324, 327, 328 (F.B.).

4. *Nilkamal v. Kamakshya Charan*, A.I.R. 1928 Cal. 539, 541 (M. N. Mukerji, J.).

5. *Subbamma v. Veerayya*, A.I.R. 1932 Mad. 15, 16.

6. See para 7.16, *infra*.

the Calcutta High Court had occasion to review the cases on the subject.¹ Subsequent decisions have even intensified the controversy. The conflict of decisions on the question now requires serious consideration.

Views of three High Courts referred to by way of illustration.

7.13. We shall, in due course, give an analysis² of all the important rulings. However, by way of illustrating the nature of the controversy, we would, at this stage, refer to the views of three High Courts.—

(i) Two decisions of the Bombay High Court³⁻⁴ take a narrow view, holding that section 4 applies only where the transferee is a plaintiff claiming partition or separate possession.

(ii) A Full Bench decision of the Allahabad High Court,⁵ while following the Bombay view, indicates that the Court would be prepared to extend the benefit of section 4 to a case where the transferee, though not the plaintiff, makes a claim for partition.

(iii) The Calcutta High Court⁶ takes a wide view, holding that the transferee defendant need not even have made a claim for partition.

Three interpretations of section 4(1).

7.14. Thus, three interpretations of section 4(1) seem to be prevailing⁷—

(i) The section applies only where the transferee is the plaintiff and sues for partition. This is the narrower view.

(ii) The section applies either where the transferee sues for partition, or where a member sues for partition and the transferee makes a claim for allotment of his share. This is the intermediate view.

(iii) The section applies even where the transferee is a defendant, irrespective of whether he applies for allotment of his share or not. This is the wider view.

First view—the narrower one.

7.15. The first view⁸ is based on the language of the section as interpreted strictly. The Bombay decisions⁹ on the subject represent this view.

Second view—every party a plaintiff.

7.16. The second view¹⁰ is based on the principle that in a partition suit every party is a plaintiff as well as a defendant, and this dual capacity arises from the very nature of the partition proceedings, wherein each party is entitled to partition or a separate allotment. It is also urged in support of this interpretation that it promotes the object of the statute, namely, to prevent the intrusion of strangers into the dwelling house^{11,14}

In an Allahabad case,¹⁵ it was held that if a defendant transferee in a suit for partition claimed a share in the dwelling house, he can be treated as a "plaintiff" under section 4. In a later Full Bench case¹⁶ also, it appears to have been prepared to go to this extent. However, in that case there was no such prayer by the stranger purchaser.

1. *Haradhong Haldar v. Usha Charan Karmakar*, A.I.R. 1955 Cal. 292, 294, paragraphs 11 and 12 (reviews case law).

2. Para 7.18, *infra*.

3. *Balshet v. Miran Saheb*, (1899) I.L.R. 23 Bom. 77.

4. *Khanderao v. Balkrishna*, A.I.R. 1922 Bom. 121.

5. *Sakhawat Ali v. Ali Hussain*, A.I.R. 1957 All. 356, 358, para 12 (F.B.).

6. *Haradhong v. Usha Charan*, A.I.R. 1955 Cal. 292 (review cases).

7. For an analysis of case law, see para 7.18, *infra*.

8. Para 7.14(i), *infra*.

9. Para 7.13, *supra*.

10. Para 7-14(ii), *supra*.

11. *Sheodhar v. Kishun Prasad*, A.I.R. 1941 Pat. 4.

12. *Abu Isa Thakur v. Dina Bandhu*, (1948) I.L.R. Cal. 248; A.I.R. 1947 Cal. 426 (Das J.).

13. *Satyabhama De v. Jatindra*, A.I.R. 1929 Cal. 269.

14. *Laxman v. Mt. Lahana Bai*, (1937) I.L.R. Nag. 73; A.I.R. 1937 Nag. 4.

15. *Ramzan Baksh v. Nizamuddin*, A.I.R. 1956 All. 687.

16. *Sakhawat Ali v. Ali Hussain*, A.I.R. 1957 All. 356, 358, para 12 (F.B.)—See para 7.11, *supra*.

The Madras High Court, in an earlier case,¹ took the view that section 4 does not apply where the transferee is a defendant, at least where he has not made any prayer for specific allotment. Later, however, that High Court has taken a different view, applying the section where the transferee (though a defendant) claims partition.² This is the second and intermediate view.

7.17. The third and widest view is represented by a Calcutta case.³ The High Court not only held the section to be applicable even where the transferee figures as a defendant, but also observed that the presence or absence of the additional factor, namely, that the defendant transferee had applied for allotment (of a specific share), did not make any real difference. In the opinion of the Court, the basic reason behind some of the decisions which took the wider view was, that the words "to sue" signified not only "to prosecute", but also "to defend"—of course, in the light of the peculiar nature of a partition suit.

Third view ---
the widest
one.

7.18. The following analysis of cases on the subjects High Court-wise, may be helpful for giving an idea of the position at a glance :—

Analysis of
cases—High
Court-wise.

1. *Sakhawat Ali v. Ali Hussain*, A.I.R. 1957 All. 356, Para 13, (narrower view) (with dicta favouring the intermediate view) (see discussion of this case in *Ramaswami v. Subamma*, A.I.R. 1967 Mad. 158, 162).
2. *Khanderao v. Balkrishna*, A.I.R. 1922 Bom. 121 (narrower view).
3. *Satyabhama v. Jatindra Mohan*, A.I.R. 1929 Cal. 269, 271 (Sahrawardy & Jack JJ.) (intermediate or wider view) (See discussion of this case in *Alekha v. Sagabandhu*, A.I.R. 1971 Orissa 127, 131, para 8).
4. *Haradhone v. Usha Charan Karmakar*, A.I.R. 1955 Cal. 292, 294, para 13 (P. N. Mookerjee J.) (wider view).
5. *Gulam Rasool v. Deceased Dulhanbai, widow of Sardarkhan by his heir Rasulkhan and others*, Appeal from Order No. 3 of 1978 decided by the High Court on 30-8-1979/F7-10-1979 (Gujarat High Court) (wider view).
6. *B. Ramayya v. Venkatasubbarao*, A.I.R. 1950 Mad. 214 (narrower view).
7. *Ramaswami v. Subramania*, A.I.R. 1967 Mad. 156, 158, 160, 162, paragraphs 6 and 16 (Natesan J.) (intermediate view).
8. *Laxman v. Mt. Lahana Bai*, A.I.R. 1937 Nag. 46 (Stone C. J.) (intermediate view).
9. *Aleka v. Jagatbandhu*, A.I.R. 1971 Orissa 127, 130 (A. Misra & B. K. Palra JJ.) (wider view), followed in *Tejpal v. Purnima Bai*, A.I.R. 1976. Orissa 62.
10. *H. N. Mukharjee v. Shyam Sunder*, A.I.R. 1973 Pat. 142, 144 (wider view).

7.19. So much as regards the case law on section 4. Having regard to the object underlying the section, we see no reason why it should not extend to every proceeding wherein partition of a family dwelling-house is in issue, irrespective of the manner in which the parties are arrayed and irrespective of the question whether there is a prayer for specific allotment. To adopt the first view (which is the narrowest one) on the subject would mean that the members of the family will have to wait until the transferee sues for partition. Similarly, to confine the section to cases where the transferee (though a defendant) asks for specific allotment of a share (the second view), would also cause some hardship, because it would deprive the plaintiff of a beneficial provision of the law if the transferee keeps quiet and asks for no relief. In fact, some of the judicial decisions which have taken this view have themselves recognised the hardship that would sometimes be caused by such an interpretation.⁴⁻⁶

Wider scope
of section
4 favoured.

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1. *Butchi Ramayya v. Venkatasubba Rao*, A.I.R. 1950 Mad. 214.
 2. *Ramaswami v. Subramania*, A.I.R. 1967 Mad. 156, 158, 160, Paragraph 6, 16.
 3. *Haradhone Haldar v. Usha Charan Karmakar*, A.I.R. 1955 Cal. 292, 294.
 4. *Butchi Ramayya v. Venkatasubba Rao*, A.I.R. Mad. 214.
 5. See also para 5.17, *supra*.
 6. *Sakhawat Ali v. Ali Hussain*, A.I.R. 1957 All. 356, 359, para 13 (F.B.).

The third and widest view has, therefore, much to commend itself.

Justification for legislation adopting wider approach.

7.20. If due regard be had to the object of section 4, there is justification for a legislative reform adopting the widest approach, rather than the narrowest one. Whatever difficulties may have been felt by some of the High Courts in view of the constraints imposed by the present wording of section 4—a wording which may be ambiguous—when there is an opportunity for review of the law, there is ample justification for amending the section so as to widen it. Such an amendment would not only facilitate peaceful enjoyment amongst co-sharers, but also carry out fully the policy underlying section 44 of the Transfer of Property Act and introduce harmony between that provision and section 4 of the Partition Act. It would also be in conformity with the essential nature of a partition suit.

Semantics not considered.

7.21. On this approach, it becomes unnecessary to deal in detail with the semantics of the matter or to discuss the precise meaning of the expression “sue”, since what we are now concerned with is not the interpretation of the present provision, but the shape which, as a matter of justice, it ought to assume.

Need for clarification.

7.22. The amendment that we contemplate would not amount to introducing a totally new approach, as many High Courts have already taken a similarly wide view, even of the present section. Many decisions, however, point out that the language of the section is not happy,¹ and lends itself easily to a strict construction.² For these reasons, clarification of the scope of section 4 is needed.

Recommendation regarding section 4(1).

7.23. In view of what has been stated above, we recommend that section 4(1) should be widened so as to ensure that it applies whether the transferee is a plaintiff or a defendant, and whether the transferee makes a prayer for specific allotment or not, provided that the suit is one for partition (the usual situation) or a suit for possession against the transferee (a situation which may arise, for example, where the plaintiff member is not in possession). Such an amendment will set right the hardship of an extreme character that is often caused by the present law, an illustration of which would be found in the facts of the Allahabad case³ to which we have referred. There the plaintiff had brought a suit against the transferee for possession or, alternatively, for partition. It was admitted, that he was the owner of 47/48th share in a house, and defendants No. 1 to 9 (transferees) owned only 1/48th share (being the share of certain former co-sharers). Still, the section could not be applied.

Recommendation to revise section 4(1).

7.24. In the light of what we have stated above, we recommend that section 4(1) should be revised as under :—

“4. (1) Where—

- (a) a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family, and
- (b) a suit for partition of the dwelling house or for separate possession of a share of the dwelling house is instituted, and
- (c) the transferee is a party to such suit whether as a plaintiff or as a defendant,

the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.”

1. *Haradhone Haldar v. Usha Charan Karmakar*, A.I.R. 1955 Cal. 292, 293, para 10 (P. N. Mukerjee J.).

2. *Banchhanidi v. Balram*, A.I.R. 1951 Orissa 180, para 3.

3. *Sakhawat Ali v. Ali Hussain*, A.I.R. 1957 All. 356, 357, para 5 (F.B.).

IV. Female members marrying into another family.

7.25. One more question arising out of section 4(1) may now be considered. There is a conflict of decisions on the question whether a female member marrying into another family ceases to be a "member" (within the meaning of section 4). The view of the Bombay High Court¹ is that when a Muslim woman leaves the family house to live in her husband's house, she *prima facie* gives up her intention to reside in the house, and is not therefore entitled to apply under section 4. This was on the ground that a person who was not in occupation and who had no intention of occupying could not be entitled to apply under section 4. A woman who marries and goes to live in her husband's house (it was stated), *prima facie* gives up her intention of continuing to reside in her old house.

Section 4(1) and cases of Muslim females marrying into another family.

But the Madras view² is that she does not cease to be a "member" of the family. The Judgment rests on two considerations—(i) marriage under the Muslim law is a contract and no question of change of status arises, (ii) under section 4, it is not necessary that the co-sharer applying for leave should continue to be a member of the family. It is enough if she is entitled to a share on partition.

7.26. In view of the conflicts of decisions on the above point, we are of the opinion that a clarification of the position is required. As regards the course to be adopted, we would favour a more liberal approach in the matter than that adopted by the Bombay High Court. There are, in practice, many situations in which a married daughter's attachment to the family house may be revived. Divorce, separation and widowhood are some important instances. The claim of a female with regard to section 4 should not be disregarded merely because she had married and taken up residence with her husband's family or with her husband, at another place.

Need for clarification.

Social justice demands that she should have the same rights under section 4 as any other co-sharer who has not married. Such an approach is all the more necessary in the changed social conditions, with increasing emphasis on the rights of women. Even as the section now stands, it could be so construed. However, without entering into the niceties of the correct interpretation of the section, we would, for the reasons that we have already mentioned, recommend an amendment of section 4 by adding a suitable Explanation.

Having regard to the fact that the situations to which we have made a reference above might recur frequently in Indian Society, we are of the view that the law on the subject should be clarified.

Incidentally, we may also mention that though the case law to which we have made a reference was concerned with Muslims, the position would not be different as regards Hindus, or, for that matter, as regards persons of any other community.

In the light of the above, we recommend that the following Explanation should be inserted below section 4 :—

Explanation to be added to section 4

"Explanation.—For the purposes of this section a person who is a member of the family does not, on marriage, cease to be such member."

7.27. It may be noted that in order to attract section 4, it is not necessary that the members who claim its benefit must be actually residing in the house.^{3,4}

Actual residence not necessary.

V. Stage for applying under section 4

7.28. Some questions seem to have arisen in the past as to the stage at which an application can be made under section 4(1). It has been held that it can be made at any stage of the partition suit, even after the passing of the final decree. Thus, in a Calcutta case,⁵ a final decree was passed on 28-11-1913.

1. *Bai Fatima v. Gulam Nabi*, A.I.R. 1936 Bom. 197, 199 (Macklin J.).

2. *Rukia v. Rajia Bibi*, A.I.R. 1963 Mad. 298.

3. *Nil Kamal v. Kamakshya*, A.I.R. 1928 Cal. 539, 542.

4. *Md. Sulaiman v. Mt. Amir Jan*, A.I.R. 1941 All. 281, 282.

5. *Prankrishna v. Surath Chandra Roy*, I.L.R. 45 Cal. 873; A.I.R. 1919 Cal 1055.

Defendants 2 and 3, who were members of the family, thereafter claimed to purchase the share sold. An argument was advanced that the Subordinate Judge had no jurisdiction to pass an order under section 4 after the passing of the final decree. The contention was negated by the High Court. In a later Calcutta case,¹ it has been held that "the right conferred by section 4 may be exercised at any time before the final allotment takes place".

A similar view has been expressed by a Bench of the Allahabad High Court,² which held that "the section itself fixes no stage up to which alone the application can be made. On the contrary, the language of the section shows that it can be made at any stage".

Later case law.

7.29. The Calcutta High Court³ has in a fairly recent case expressly laid down that an application under section 4 is maintainable after the passing of the final decree and before the possession of the allotted property is delivered to the stranger transferee in execution of the decree. This view is consistent with the scheme of the section, which aims at the preservation of homogeneity amongst the members of a family with respect to the dwelling house.

In this position, no clarification is required on the above point.

VI. Form of decree

Section 4(1) and form of the decree—Earlier case.

7.30. There remain to be considered some procedural points concerned with section 4(1). The exact form of the decree to be passed under section 4(1) seems to have been a matter of some doubt in the past. Thus, in an Allahabad case,⁴ the Court, while not pronouncing a final opinion on this point, expressed a doubt as to the decree passed in that case by the lower court. The decree passed by the lower court was a *simple money decree* in favour of the plaintiff (transferee) for the sum awarded on account of compensation for the house (together with costs of the suit), against the defendant who had claimed the benefit of section 4. The High Court pointed out that this decree had not the effect of *transferring* to the defendants the plaintiff's share, and observed—"We feel some doubt as to the precise form of decree which the Legislature intended to be passed in such a case". The High Court considered one possibility, namely, that the intention of the Legislature might be that the transferee should execute a *deed of sale* in favour of the member applying under section 4 (as in the case of a suit for specific performance of a contract of sale), and that, after the execution of such a document, the defendant would become liable to the plaintiff for the unpaid purchase-money and the plaintiff would obviously be entitled to maintain his suit "for the recovery of the same if not already paid". The High Court observed that perhaps the Legislature did not intend a cumbersome procedure. But it had no doubt that the decree passed should be one which has the effect, in law, of transferring the ownership of the plaintiff's share to the defendants, and for that reason it modified the decree so as to direct that the plaintiff was entitled to recover the sum from the defendants and that the Court shall put the defendants in possession of the plaintiff's share and *declare them to be the owners of the same*.

Subsequent cases—Allahabad view.

7.31. Subsequent decisions, however, have expressed more definite views in the matter. Thus, in a later Allahabad case,⁵ the following observations were made :—

"In such cases ordinarily the purchaser should be asked to deposit in Court the purchase money by a time fixed by the Court, the time to be fixed and extended at the discretion of the Court. If the purchaser deposits the said purchase money within the time allowed by the Court, a decree should be passed in the suit in favour of the purchaser declaring

1. *Niranka Sashi Roy v. Swarganath Banerjee*, A.I.R. 1926 Cal. 95.

2. *Dwarka Das v. Godhana*, A.I.R. 1939 All. 313, followed in *Kashi Nath v. Atma Ram*, A.I.R. 1973 All. 548.

3. *Satya Narayan Chakravarty v. Vishwanath Paul*, (1970) 74 C.W.N. 871.

4. *Ilias Ahmad v. Bulaqi Chand*, I. L. R. 39 All. 672, 674; A.I.R. 1917 All. 2, 3 (Piggott and Ryves JJ.).

5. *Mohammad Sulaiman Khan v. Mt. Amir Jan*, A.I.R. 1941 All. 281, 283, (S. K. Dar J.), discussed in *Sumitru v. Dhantju*, A.I.R. 1952 Nag. 193.

that all rights of the plaintiff or persons claiming partition in the property in suit have been transferred by a Court sale in favour of the defendant on payment of the said sale price and the plaintiff's claim for partition is dismissed. *If necessary, a sale certificate may also be issued to the purchaser.* In case the defendant or the purchaser makes default in payment of purchase money, a decree for partition be made in favour of the plaintiff and the partition should be proceeded with."

7.32. The question came up for interpretation before the High Court of Nagpur.¹ In that case, the lower Appellate Court had dismissed the claim under section 4. The High Court, allowing the appeal, passed an elaborate decree to the effect that the claimants under section 4 shall deposit in the trial court a specified sum on or about a certain date for payment to the transferee for purchase of his share, and, on such deposit being made within the time fixed the amount shall be paid to the transferee, and the claimants "shall become owners of two-thirds share of the plaintiff in the site in suit.....", and the plaintiff's claim for partition and separate possession stands dismissed. In case defendants 2 and 3 fail to deposit the same, their claim under section 4 shall stand dismissed and the plaintiff shall be entitled to apply to the trial court for partition of his share.

It may be noted, that in this case the decree itself vested the share in the claimant under section 4.

7.33. In a later Nagpur case,² the decree directed by the High Court was, that the defendant (claimant under section 4) depositing the amount in the lower court by a specified date, the plaintiff shall *execute a sale deed of his half share of his property* at the cost of the defendant. If such payment is made, the parties will bear the costs of the lower court. If the payment is not made on or before that date, the lower court will pass a preliminary decree for partition of the house and appoint a Commissioner to effect that partition. In that event, the defendant will pay the costs of the plaintiff in the lower court. Thus, here the *transferee* was directed to execute a *sale-deed* in favour of the claimant under section 4, instead of the decree *itself* providing that the claimant shall become the *owner*. Later Nagpur case.

7.34. In a Madras case,³ a decree passed in favour of one of the parties in an earlier suit in respect of a claim under section 4 came up for consideration. The High Court noted the observations made in the earlier Allahabad case⁴ to the effect that perhaps the Legislature did not intend a cumbersome procedure etc. and observed that it would be very hard to force the transferee to give up the property which he had purchased, and, in return, to give him nothing but a right to bring a *fresh suit* against the claimant under section 4. Madras case.

7.35. We think that the form of the decree has been laid down in substantially correct manner in the later Allahabad case,⁵ to which we have already referred. The essential stages to be followed should be reflected in the decree. These stages would appear to be as follows:— Stages to be reflected in the decree.

- (i) The claimant under section 4 should be directed to deposit in Court the sum fixed within a specified time,—which may, however, be extended at the discretion of the court.⁶

[A Court has, in an application under section 4(1), first to ascertain whether the property is a dwelling house. If yes, then it is to proceed to value the share of the stranger. Then it is to require the co-sharer who was a member to deposit the amount *within a date to be fixed by the Court.*]

1. *Sumitra v. Dhannu*, A.I.R. 1952 Nag. 193, 195, paragraphs 15 and 16.

2. *Kalyan Mal v. Jagdish Prasad*, A.I.R. 1953 Nag. 130, 132, para 14 (Mangal Murti & Deo JJ.).

3. *Subramanya v. Sheik Ghannu*, A.I.R. 1935 Mad. 628, 630 (Walah J.).

4. *Nias Ahmad v. Bulaqi Chand*, I.L.R. 30 All. 672; A.I.R. 1917 All. 2.

5. *Mohammad Sulaiman v. Mt. Amir Jan*, A.I.R. 1941 All. 281, 283; para 7.31, *supra*.

6. *Cf. Subal Chandra v. Gostha*, (1956) 60 C.W.N. 829, 833.

- (ii) If the deposit is not made in time, then the transfer fails, and the Court takes necessary steps for *partitioning the entire property*, including the dwelling house.

The application under section 4 should be dismissed, and an order for partition by metes and bounds should be passed (or, if a preliminary decree is already passed, it will be proceeded with).

- (iii) If the money is deposited in time, the transferee should be required to transfer his share to the applicant *by executing a conveyance*.
- (iv) If the transferee fails or neglects to execute the conveyance, a decree should be passed ordering him to execute the deed, and, in execution of such a decree, the Court itself may execute the document.¹

Decree analogous to specific performance of contract for sale.

New provision not recommended.

7.36. The decree would, thus, be substantially analogous to the decree which the Court passes in a suit for specific performance of a contract for the sale of immovable property.²⁻³

7.37. The enactment in the Act of a provision as to the form of decree is not necessary. However, we recommend to the High Courts that the suggestion⁴ made by us may be incorporated in the rules under the Code of Civil Procedure.

VII. Date of valuation

Valuation of share how done.

7.38. When the applicant under section 4 gives an "undertaking"—which means an unconditional offer from which he cannot resile,⁵—then the Court has to make a valuation of the transferee's share and direct its sale.⁶ The valuation is ordinarily done through the Commissioner,⁷⁻⁸ but if the matter is simple it can be done by the Court. The important thing is that the decree should have the effect, in law,⁹⁻¹⁰ of *transferring* the ownership of the stranger's share to the applicant under section 4.

Date of valuation — Calcutta view.

7.39. There seems to be some controversy as to the date *with reference to which* valuation is to be made. According to the Calcutta view,¹¹ the relevant date which requires to be considered is the date when the undertaking is given and it is only at that point of time that valuation can be made as envisaged by the section. Disagreeing with the reasoning of the Orissa Judgment¹² on the subject, the Court made these observations—

"To my mind, section 4 does not contemplate that the market value is to be taken on the date of institution of the suit. It is true that the sale by the stranger to the co-sharer being in the nature of a forced sale or under compulsion, valuation of the premises has to be determined with great care and caution so as not to cause any hardship to either of the parties.

"I find however considerable force in the submission made by the learned Advocate for the plaintiff that the valuation thereof should be made on the date when an undertaking to purchase is given, and the wording of section 4, to my mind, also indicates that such valuation is to be made only when an undertaking is given by any member of the family to buy the share in question."

1. Order 21, Rule 34, Code of Civil Procedure, 1908.
2. Cf. section 28, Specific Relief Act, 1963 (47 of 1963).
3. See also—
- (a) Law Commission of India, 27th Report (Code of Civil Procedure), page 58 (Order 20, Rule 12A proposed), and page 172 (not modified in the 54th Report).
- (b) Order 20, Rule 12A, Code of Civil Procedure, 1908.
4. Paragraphs 7.35 and 7.36, *supra*.
5. *Ilias Ahmad v. Bulaqi Chand*, I.L.R. 39 All. 672; A.I.R. 1917 All. 2.
6. *Athappa v. Somasundaram*, A.I.R. 1944 Mad. 428.
7. As to Commissioners, see Order 26, Rules 9 and 10, Civil Procedure Code.
8. As to partition see Order 26, Rules 13 and 14, Civil Procedure Code.
9. *Niranka Sashi v. Swarganath*, A.I.R. 1926 Cal. 95.
10. As to form of the decree, see *supra*.
11. *Monomohan v. Usharani*, A.I.R. 1979 Cal. 79, 83, para 15.
12. *Bhikari Behera v. Dharmamanda Nayak*, A.I.R. 1963 Orissa 40, Para 7.40, *infra*.

7.40. According to the Orissa view,¹ it is the market value as ruling on the *date of suit* that governs the matter. This also seems to be the view taken,² though impliedly, in Nagpur. The point was not specifically in issue, the competition being between purchase price and market price on the date of suit.

7.41. The need for a clarification on the above point is obvious. It is evident that the valuation must be fair to the stranger purchaser as well as to the co-sharer of the erstwhile undivided family. It is not easy to decide which of the two views on the subject should be codified—the Calcutta view or the Orissa view. There is much to be said in support of either view. However, on balance, it seems to us that it would be reasonable to fix the valuation with reference to the date of the undertaking given by the co-sharers. This would avoid the impact on the co-sharer of fluctuations in market price after the undertaking.

7.42. Accordingly, we recommend that a new sub-section should be added in section 4, as under:—

“(3) *The valuation under sub-section (1) shall be with reference to the market value on the date on which the co-sharer undertakes to purchase the share.*”

Need for clarification as to date of valuation.

Recommendation to add new sub-section in section 4.

1. *Bhikari Behera v. Dharmananda Natia*, A.I.R. 1963 Orissa 40, 41, para 6.
2. *Sumitra v. Dhannu*, A.I.R. 1952 Nag. 193, 195, 196, paragraphs 13-14.

CHAPTER 8

MISCELLANEOUS : SECTIONS 5 TO 10

Scope of the Chapter.

8.1. We have disposed of the important provisions of the Act. The rest of the Act contains provisions of a miscellaneous character which do not require much discussion.

Section 5.

8.2. Section 5 deals with certain acts to be done on behalf of a person under disability in a suit for partition and provides as follows:—

“5. In any suit for partition a request for sale may be made or an undertaking, or application for leave, to buy may be given or made on behalf of any party under disability by any person authorised to act on behalf of such party in such suit, but the Court shall not be bound to comply with any such request, undertaking or application unless it is of opinion that the sale or purchase will be for the benefit of the party under such disability.”

The section is analogous to the provision in the Code of Civil Procedure,¹ whereunder an agreement or compromise by a next friend or guardian for the suit requires leave of the Court.

The section needs no change.

Section 6.

8.3. Section 6, which is concerned with certain matters concerning bidding at sales under the Act, reads as under:—

“6. *Reserved bidding and bidding by share-holders.*—(1) Every sale under section 2 shall be subject to a reserved bidding, and the amount of such bidding shall be fixed by the Court in such manner as it may think fit and may be varied from time to time.

(2) On any such sale any of the shareholders shall be at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off or accounting for the purchase-money or any part thereof, instead of paying the same, as to the Court may seem reasonable.

(3) If two or more persons, of whom one is a shareholder in the property, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be bidding of the shareholder.”

Section 6(1) and upset price.

8.4. The provision in section 6(1) that the Court² shall fix an upset price is a beneficial provision,—or even necessary—because otherwise one of the co-sharers may (at the auction) knock off the property at a low price, thus causing prejudice to the other co-sharers.

Section 6(3).

8.5. Sub-section (3) of section 6 is also of particular interest, as showing that under the law as it now stands, shareholders and strangers may alike bid at the sale.³ The question whether there is need to give a power to the Court in certain special cases to confine *the sale* to co-sharers will be considered later.⁴

Section 7.

8.6. This takes us to section 7, which is in the following terms:—

“7. Save as hereinbefore provided, when any property is directed to be sold under this Act, the following procedure shall, as far as practicable, be adopted, namely—

(a) if the property be sold under a decree or order of the High Court of Calcutta, Madras or Bombay in the exercise of its original jurisdiction, the procedure of such Court in its “original civil jurisdiction” for the sale of property by the Registrar;

1. O. 32, R. 7, Code of Civil Procedure, 1908.

2. Para 8.3, *supra*.

3. *Subbamma v. Veerayya*, A.I.R. 1932 Mad. 15, 17.

4. See discussion relating to section 7, para 8.7, *infra*.

(b) if the property be sold under a decree or order of any other Court, such procedure as the High Court may from time to time by rules prescribe in this behalf, and until such rules are made, the procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees.”

8.7. Section 7(a) mentions only the three High Courts in the Presidency towns. Since the passing of the Act, a few other High Courts have been created with ordinary original civil jurisdiction and clause (a) should be amended to cover them. Accordingly, we recommend that section 7(a) should be suitably revised.¹

Section 7(a)—
High Courts
with original
civil juris-
diction—Re-
commendation.

8.8. When a sale is ordered under section 2, the procedure to be adopted is (subject to rules) the same as the procedure for execution sales. A sale confined to co-sharers is not permissible—a matter to which² we have already referred.

Section 7 and
sale among
co-sharers—
Recommendation.

Some Courts have assumed that such a power exists,³⁻⁵ but we think that the Act does not, at present, give such a power.⁶

At the same time, such a power is required in the interests of justice. In certain special cases—for example, in the case of a family dwelling-house to which the co-sharers have an emotional attachment—the Court should have a power to confine the sale to co-sharers. No doubt, in general, a sale by public auction would fetch a higher price than a sale confined to certain parties. But there may be special cases where the monetary aspect may not be the only relevant one, and other over-riding considerations require that only co-sharers should be allowed to offer bids. We therefore recommend that present section 7 should be re-numbered as sub-section (1), and a new sub-section should be inserted in the section to provide for a power of the nature mentioned above.⁷

8.9. Under section 7(b), the procedure for a sale under the Act is (subject to rules made by the High Court) the same as is prescribed in the Code of Civil Procedure in respect of sales in the execution of decrees. From this, certain important consequences follow. For example, objections to the sale would have to be dealt with under Order 21, rule 89 *et seq.*, Code of Civil Procedure, 1908. Now, the question may arise whether an order dismissing an objection to a sale held under the Act is appealable under Order 43, rule 1(j) of the Code of Civil Procedure, 1908 which allows an appeal against “an order under rule 72 or rule 92 of Order XXI, setting aside or refusing to set aside a sale”.

Section 7
and appeals
against orders
passed in the
course of sale.

8.10. An earlier decision⁸ of a single Judge of the Punjab High Court held that such an order was appealable. However, in a later ruling of a Division Bench of that High Court,⁹ this view was disapproved. It was held that section 7 has not the effect of converting the sale proceedings into “execution proceedings” and since the Act does not make any provision for appeal expressly or by necessary implication, and does not provide that a person who is dissatisfied with an order declining to set aside a sale under the Act, shall have the same rights of appeal as a person dissatisfied with an order declining to set aside a sale in *execution* of a decree, no such right of appeal could be spelt out from the section.

Case law

8.11. We do not think it necessary to disturb the proposition laid down in the latter case.

No change in
above point.

1. See para 8.12, *infra* for re-draft.

2. See *supra*.

3. *Ram Prasad v. Mt. Mukandi*, A.I.R. 1929 All. 443. (Banerji & King JJ).

4. *Mohit Krishna v. Pranab Chander*, A.I.R. 1930 Cal. 616, 619 (S. K. Ghose J.).

5. *Babendra Nath v. Haridas*, (1911) 15 C.W.N. 552 (Mookerji J.).

6. *Gadadhar v. Janakinath*, A.I.R. 1969 Cal. 66, 67, paragraphs 36—40.

7. For re-draft of section 7, see para 8.12, *infra*.

8. *Hans Raj v. Nirenjan Lal*, A.I.R. 1952 Punj. 159.

9. *Hukum Chand v. Harish Chander*, A.I.R. 1959 Punj. 129, 130, paragraphs 6 to 8 (Bhandari C.J. and Dulat J.).

Revised
Section 7.

8.12. In the light of the above discussion, section 7 should be revised as under :—

“Section 7. Procedure to be followed in case of sales.—(1) Save as hereinbefore provided, when any property is directed to be sold under this Act, the following procedure shall, as far as practicable, be adopted, namely,

(a) if the property be sold under a decree or order of a High Court..... in the exercise of its original jurisdiction, the procedure of such Court in its original civil jurisdiction for the sale of property by the Registrar;

(b) if the property be sold under a decree or order of any other Court, such procedure as the High Court may from time to time by rules prescribe in this behalf, and until such rules are made, the procedure prescribed in the Code of Civil Procedure, 1908 in respect of sales in execution of decrees.

(2) Notwithstanding anything contained in sub-section (1), the Court may, in a particular case, for reasons to be recorded, direct that only shareholders, or only shareholders and such other persons as the Court may specify, shall be entitled to bid at the sale of the property.”

Section 8—
Appeals.

8.13. This takes us to section 8, which provides that any order for sale made by the Court under section 2, 3 or 4 shall be deemed to be a decree within the meaning of section 2 of the Code of Civil Procedure. As is well known, such provisions have important consequences as to appealability of the orders in question. For example, where the trial court allows the sale, but the appellate court refuses to pass an order for sale, and thus reverses the order of the trial court, the order of the trial court is a “decree” and is subject to second appeal if the requirements of a second appeal under section 100 of the Code of Civil Procedure are fulfilled.¹

An order rejecting an application under section 4 is not, however, a “decree” as it does not fall within the section; but its correctness can be questioned in appeal from the final partition decree.²⁻³ This is also the position regarding an order rejecting an application under section 3.⁴ We think that an order rejecting an application for sale should also be treated as a decree in view of its importance. Section 8 should be revised as under :—

“8. Orders for sale to be deemed decrees.—Any order for sale or rejecting an application for sale made by the Court under section 2, 3 or 4 shall be deemed to be a decree within the meaning of section 2 of the Code of Civil Procedure, 1908.”

Section 8 and
order for sale
passed outside
the Act.

8.14. It has been held⁵ that even where the order for sale is passed in a case which falls outside the Partition Act (i.e. without an application by the parties), after the passing of a preliminary decree for partition, the order can be viewed as a further preliminary decree and is therefore appealable. The order has a general effect on the entire proceedings in the suit, and precludes the possibility of the plaintiff getting an allotment in specie of his share, and the order thus negatives the right to which he is entitled as a co-sharer, and is final and conclusive so far as the trial court is concerned.

The point discussed above does not, however, necessitate any change in the section.

Section 9.

8.15. Section 9 provides that in any suit for partition the Court may, if it shall think fit, make a decree for a partition of part of the property to which the suit relates and a sale of the remainder under this Act. The section needs no change.

1. *Satyabhama v. Jatindra Mohan*, A.I.R. 1929 Cal. 270.

2. *Bhuban Mohan v. Brojendra Chandra*, A.I.R. 1941 Cal. 311.

3. *Wali Mohammad v. Shamsul Huq*, (1967) All. Law Journal 379, dissenting from A.I.R. 1937 Nag. 4.

4. *Nitish Chandra v. Promode Kumar*, A.I.R. 1953 Cal. 18, para 9 (R. P. Mookerjee and Lahiri JJ.).

5. *Vissanna v. Visabrahmam*, A.I.R. 1957 A.P. 25 (Vishwanatha Sastri J.) followed in *Mayimu v. Maliyaminai*, A.I.R. 1968 Ker. 282.

8.16. Section 10 provides that this Act shall apply to suits instituted before Section 10— the commencement thereof, in which no scheme for the partition of the property ^{Repeal re-} has been finally approved by the Court. The utility of the section at the present ^{commended.} day is nil, and we recommend that the section should be repealed.

8.17. Appendix 1 and Appendix 2 to this Report contain the text of the ~~Appendices~~ English Acts of 1868 and 1876 (now repealed). As copies of these Acts are not readily available, we have included them for ready reference. Appendix 3 deals with the present English Law and its evolution.

CHAPTER 9

SUMMARY OF RECOMMENDATIONS

We summarise below the recommendations made in this Report.

Chapter 5.—Power of sale : sections 1-2

(1) Section 2 (Power to order sale instead of division in partition suits) should be revised so as to provide that where division cannot reasonably or conveniently be made and sale of the property and distribution of the proceeds could be more beneficial, the Court shall, *on the request of any shareholder*, direct such sale and distribution. Further, even if no request has been made by any shareholder, the Court may, if it thinks fit in the interests of justice, for reasons to be recorded, direct such sale and distribution.¹

The opening words of the section should also be revised as recommended.²

Chapter 6—Sale to shareholders : section 3

(2) In section 3(1) (Procedure where a sharer undertakes to buy), under which, at present, *only certain co-sharers*—i.e. co-sharers who have not sued under section 2—can apply for purchase, an amendment should be made to enable any co-sharer to apply under that sub-section.³

(3) In section 3, a new sub-section (1A) should be inserted to provide that if, in any case in which the Court directs a sale under section 2, any shareholder applies for leave to buy at a valuation *the suit property*, the Court may order valuation and offer to sell the property to that shareholder at the price so ascertained and may give all necessary and proper directions in that behalf.⁴

(4) An Explanation should be inserted in section 3 to the effect that an application under sub-section (1) or under (newly inserted) sub-section (1A) may be made at any time before the sale is actually held.⁵

(5) Consequential changes may be made⁶ in section 3(2).

Chapter 7—Share of dwelling house : section 4

(6) Section 4 (partition suit by transferee of share in dwelling house) should be widened so as to ensure that the right to seek purchase of the share of the transferee should be available to a co-sharer who is a member of the family—

(a) whether the transferee is a plaintiff or defendant, and

(b) whether the transferee has made a prayer for specified allotment or not, provided that the suit is one for partition (the usual situation) or a suit for possession against the transferee (a situation which may arise, for example, when the plaintiff member is not in possession).⁷

(7) While the enactment of a provision as to the form of a decree to be passed under section 4 is not necessary, the suggestion made in the Report as to the lines on which a proper decree could be drawn is commended to the High Courts,⁸ for being incorporated in the rules to be made under the Code of Civil Procedure.

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1. Para 5.21.
 2. Para 5.20.
 3. Para 6.7.
 4. Para 6.8.
 5. Para 6.14.
 6. Para 6.15.
 7. Para 7.23.
 8. Paragraphs 7.35 to 7.37.

(8) An Explanation should be added to section 4 to provide that for the purposes of this section, a person does not, on marriage, cease to be member of the family.¹

(9) In section 4, there should be inserted a new sub-section to the effect that the valuation under section 4(1) shall be with reference to the market value on the date on which the co-sharer undertakes to purchase the share.²

(10) As regards the procedure to be followed in case of sales under the Act, all High Courts having original jurisdiction should be governed by section 7(a). The specific mention of High Courts of the three Presidency towns should accordingly be deleted from that clause.³

(11) In section 7, a new sub-section should be inserted to provide that the Court can (in an appropriate case) direct that the property should be sold, only among the co-sharers.⁴

(12) Section 8 should be amended to provide that an order rejecting an application for sale should also be deemed to be a decree.⁵

(13) Section 10 (Application of the Act to pending suits) should be repealed.⁶

P. V. DIXIT

— Chairman

S. N. SHANKAR

— Member

GANGESHWAR PRASAD

— Member

P. M. BAKSHI

— Member-Secretary

19th August, 1980.

1. Para. 7.26.

2. Para 7.42.

3. Paragraphs 8.7 and 8.12.

4. Paragraphs 8.8 and 8.12.

5. Para 8.13.

6. Para 8.16.

APPENDIX 1

PARTITION ACT, 1868

(31 & 32 Vic. C. 40) (Repealed)

CAP. XL.

An Act to amend the law relating to Partition.

(25th June, 1868).

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled and by the Authority of the same, as follows :—

1. This Act may be cited as the Partition Act, 1868. Short Title.
2. In this Act the term "the Court" means the Court of Chancery in England, the Court of Chancery in Ireland, the Landed Estates Court in Ireland, and the Court of Chancery of the County Palatine of Lancaster, within their respective Jurisdictions.
3. In a Suit for Partition, where if this Act had not been passed, a Decree for Partition might have been made, then if it appears to the Court that, by reason of the Nature of the Property to which the Suit relates, or of the Number of Parties interested or presumptively interested therein, or of the Absence of Disability of some of those Parties, or of any other Circumstance, a Sale of the Property and a Distribution of the Proceeds would be more beneficial for the Parties interested than a Division of the property between or among them, the Court may, if it thinks fit, *on the Request of any of the Parties interested*, and notwithstanding the Dissent or disability of any others of them, direct a Sale of the Property accordingly, and may give all necessary or proper consequential Directions. Power to Court to order sale instead of Division.
4. In a Suit for Partition, where, if this Act had not been passed, a Decree for Partition might have been made, then if the Party or Parties interested, *individually or collectively, to the Extent of One Moiety or upwards* in the Property to which the Suit relates, request the Court to direct a Sale of the Property and a Distribution of the Proceeds instead of a Division of the Property between or among the Parties interested, the Court *shall*, unless it sees good Reason to the contrary, direct a Sale of the Property accordingly, and give all necessary or proper consequential Directions. Sale on Application of certain Proportion of Parties interested.
5. In a Suit for Partition, where, if this Act had not been passed, a Decree for Partition might have been made, then; if any party interested in the Property to which the Suit relates requests the Court to direct a Sale of the Property and a Distribution of the Proceeds instead of a Division of the Property between or among the Parties interested, the Court may, *if it thinks fit*, unless the other Parties interested in the Property, or some of them, undertake to purchase the Share of the Party requesting a Sale, direct a Sale of the Property; and give all necessary or proper consequential Directions, and in case of such Undertaking being given the Court may order a Valuation of the Share of the Party requesting a Sale in such manner as the Court thinks fit, and may give all necessary or proper consequential directions. As to Purchase of share or Party desiring sale.
6. On any Sale under this Act the Court may, if it thinks fit, allow any Authority for the Parties interested in the Property to bid at the sale, on such Terms as Parties interested to bid. to Non-payment of Deposit, or as to setting off or accounting for the Purchase money or any Part thereof instead of paying the same, or as to any other Matters, as to the Court seem reasonable.
7. Section Thirty of the Trustee Act, 1850, shall extend and apply to Cases where, in Suits for Partition, the Court directs a Sale instead of a Division of the Property. Application of Trustee Act. (13 & 14 Vict. c. 60).

Application of Proceeds of Sale (19 & 20 Vict. c. 120).

8. Sections Twenty-three to Twenty-five (both inclusive) of the Act of the Session of the Nineteenth and Twentieth Years of Her Majesty's Reign (Chapter One hundred and twenty), to facilitate "Leases and Sales of Settled Estates", shall extend and apply to money to be received on any Sale effected under the Authority of this Act.

Parties to Partition Suits.

9. Any person who, if this Act had not been passed, might have maintained a Suit for Partition may maintain such Suit against any One or more of the Parties interested, without serving the other or others (if any), of those Parties; and it shall not be competent to any Defendant in the Suit to object for Want of Parties; and at the Hearing of the Cause the Court may direct such Inquiries as to the Nature of the Property, and the Persons interested therein, and other matters, as it thinks necessary or proper with a view to an Order for Partition or Sale being made on further Consideration; but all Persons who, if this Act had not been passed, would have been necessary Parties to the Suit, shall be served with Notice of the Decree or Order on the Hearing, and after such Notice shall be bound by the Proceedings as if they had been originally Parties to the Suit, and shall be deemed Parties to the Suit; and all such persons may have Liberty to attend the Proceedings, and any such Person may, within a Time limited by General Orders apply to the Court to add to the Decree or Order.

Costs in Partition Suits.

10. In a Suit for Partition the Court may make such Order as it thinks just respecting Costs up to the Time of the Hearing.

As to General Orders under this Act. (21 & 22 Vict. c. 27).

11. Sections 9, 10 and 11 of the Chancery Amendment Act, 1858, relative to the making of General Orders, shall have effect as if they were repeated in this Act, and in Terms made applicable to the Purposes thereof.

Jurisdiction of County Courts in Partition. (28 Vict. c. 99).

12. In England the County Courts shall have and exercise the like Power and Authority as the Court of Chancery in Suits for Partition (including the Power and Authority conferred by this Act) in any Case where the Property to which the Suit relates does not exceed in Value the same shall be had and exercised in like Manner and Subject to the like Provisions as the Power and Authority conferred by Section 1 of the County Courts Act, 1865.

APPENDIX 2

THE PARTITION ACT, 1876

(39 & 40 Vic. c. 17) (Repealed)

CHAPTER 17

An Act to amend the Partition Act, 1868.

A.D. 1876.

(27th June, 1876).

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in the present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the Partition Act, 1876, and shall be read as Short title one with the Partition Act, 1868.

2. This Act shall apply to actions pending at the time of the passing of Application of this Act as well as to actions commenced after the passing thereof and the term Act. "action" includes a suit, and the term "judgment" includes decree or order.

3. Where in an action for partition it appears to the court that notice of the judgment on the hearing of the cause cannot be served on all the persons on whom that notice is by the Partition Act, 1868, required to be served, or cannot be so served without expense disproportionate to the value of the property to which the action relates, the court may, if it thinks fit, on the request of any of the parties interested in the property, and notwithstanding the dissent or disability of any others of them, by order, dispense with that service on any person or class of persons specified in the order, and, instead thereof, may direct advertisements to be published at such times and in such manner as the court shall think fit, calling upon all persons claiming to be interested in such property who have not been so served to come in and establish their respective claims in respect thereof before the Judge in Chambers within a time to be thereby limited. After the expiration of the time so limited all persons who shall not have so come in and established such claims, whether they are within or without the jurisdiction of the court (including persons under any disability), shall be bound by the proceedings in the action as if on the day of the date of the order dispensing with service whereof is dispensed with; and thereupon the powers of the court under the Trustee Act, 1850, shall extend to their interests in the property to which the action relates as if they had been parties to the action; and the court may thereupon, if it shall think fit, direct a sale of the property and give all necessary or proper consequential directions.

Power to dispense with service of notice of decree or order in special cases.

4. Where an order is made, under this Act dispensing with service of notice on any person or class of persons, and property is sold by order of the court, the following provisions shall have effect:— Proceedings where service is dispensed with.

- (1) The proceeds of sale shall be paid into court to abide the further order of the court;
- (2) The court shall, by order, fix a time, at the expiration of which the proceeds will be distributed, and may from time to time, by further order, extend that time;
- (3) The court shall direct such notices to be given by advertisements or otherwise as it thinks best adapted for notifying to any persons on whom service is dispensed with, who may not have previously come in and established their claims, the fact of the sale, the time of the intended distribution, and the time within which a claim to participate in the proceeds must be made;
- (4) If at expiration of the time so fixed or extended the interests of all the persons interested have been ascertained, the court shall distribute the proceeds in accordance with the rights of those persons;

- (5) If at the expiration of the time so fixed or extended the interests of all the persons interested have not been ascertained, and it appears to the court that they cannot be ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the court shall distribute the proceeds in such manner as appears to the court to be most in accordance with the rights of the persons whose claims to participate in the proceeds have been established, whether all those persons are or not before the court, and with such reservations (if any) as to the court may deem fit in favour of any other persons (whether ascertained or not) who may appear from the evidence before the court to have any prima facie rights which ought to be so provided for, although such rights may not have been fully established, but to the exclusion of all other persons, and thereupon all such other persons shall by virtue of this Act be excluded from participation in those proceeds on the distribution thereof, but notwithstanding the distribution any excluded person may recover from any participating person any portion received by him of the share of the excluded person.

Provision for case of successive sales in same action.

5. Where in an action for partition two or more sales are made, if any person who has by virtue of this Act been excluded from participation in the proceeds of any of those sales establishes his claim to participate in the proceeds of a subsequent sale, the shares of other persons interested in the proceeds of the subsequent sale shall abate to the extent (if any) to which they were increased by the non-participation of the excluded person in the proceeds of the previous sale, and shall to that extent be applied in or towards payment to that person of the share to which he would have been entitled in the proceeds of the previous sale if his claim thereto had been established in due time.

Request by married woman, infant, or person under disability.

6. In an action for partition a request for sale may be made or an undertaking to purchase given on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorised by order in lunacy), or other person authorised to act on behalf of the person under such request or undertaking on the part of an infant unless it appears that the sale or purchase will be for his benefit.

Action for partition to include action for sale and distribution of the proceeds.

7. For the purposes of the Partition Act, 1868, and of this Act, an action for partition shall include an action for sale and distribution of the proceeds, and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition.

APPENDIX 3

PRESENT ENGLISH LAW AND ITS EVOLUTION

I. General

In England, partition took place where land belonging to joint tenants, tenants in common, coparceners, or (in Kent) heirs in gavelkind was divided amongst them, each taking a distinct part.¹ Partition in English law.

Compulsory partition *amongst co-parceners* was effected at common law by the "writ of partition". Position at common law as to co-parcener.

In the case of joint tenants or tenants in common, at common law,² there was no right to compel a partition.³ Co-parceners, *who took their land by descent from the former owner*,⁴ were allowed to insist upon partition,⁵ for, as their co-ownership was "cast on them by the act of the law, and not by their own agreement, it was thought right that the perverseness of one should not prevent the others from obtaining a more beneficial method of enjoying the property".⁶ Position at common law as to joint tenants.

This argument, however, was not applied to joint tenancy or tenancy in common, which necessarily arose by act of parties.⁷

However, by the Partition Acts, 1539 and 1540,⁸ as amended⁹ in 1697, a statutory right to compel partition was conferred upon joint tenants and tenants in common,¹⁰ one tenant being entitled to insist upon a partition,¹¹ however inconvenient it might be.¹² Partition Acts 1539 and 1540.

The procedure in England for actually effecting the partition (where permissible) was this. A Commission was issued to Commissioners to divide the property and, on their "return" coming in, the parties were ordered to execute mutual conveyances to carry out the division.¹³ Procedure for effecting partition.

Failing agreement,¹⁴ the only method by which partition could be compelled was by the *writ de partitione facienda*.¹⁵ The writ of partition was, however, a cumbersome and difficult process. After some attempt to simplify the process in 1697,¹⁶ the writ was abolished in 1833.¹⁷ Writ at common law.

Thereafter, partition was effected by an action for partition in Chancery—a jurisdiction confirmed by statute in regard to the Chancery Division.¹⁸

1. Jowitt, Dictionary of English Law (1959), Vol. 2.
2. Megarry and Wade, Real Property (1966), pages 438, 439.
3. Litt. 290, 318.
4. Megarry and Wade, Real Property (1966), page 441.
5. Litt. 241.
6. Williams R.P., 243, 244.
7. Williams 149; B1, Comm. ii, 180.
8. Partition Act, 1539, 31 Hen. 8, c. 1 (estates of inheritance); Partition Act, 1540, 32 Hen. 8, c. 32 (estates for life or years).
9. Partition Act, 1697 (7 & 9 Will. 3, c. 31) (improving the procedure).
10. See note (2) to Co. Litt. 169a.
11. *Parker v. Gerard*, (1754) Amb. 236.
12. *Warner v. Boynes*, (1750) Amb. 589.
Baring v. Nash, (1813) 1 V. & B. 551 at 554.
13. Jowitt, Dictionary of English Law (1959), Vol. 1, page 416.
14. Halsbury, 3rd Ed., Vol. 32, page 344, para 541.
15. As to the development of partition actions, see generally *Patel v. Premabhai*, (1954) A.C. 35; (1953) 3 W.L.R. 836 (P.C.).
16. I.e. by 8 & 9 Will. 3, c. 31 (1696-7) (repealed).
17. Section 36, Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27) (repealed).
18. Section 34, Judicature Act, 1873.

II. Compensation

No power of sale.

Before the Partition Act 1868, Courts of Common Law could not award compensation, but could direct only a mere partition or allotment of lands and other real properties between the parties, according to their respective shares, having regard to the value of the properties.¹ The Courts of Equity could, however, with a view to a more convenient and just partition, order payment of compensation to one of the parties for "owelty" or equality of partition, so as to prevent any injustice or avoidable inequality.

III. Sale

Power of sale in English law.

There still remained another difficulty, even in Chancery. Though the Court of Chancery assumed jurisdiction to decree partition, the Court had no discretion to refuse partition or to order *sale* in lieu thereof.² This position produced numerous inconveniences and absurdities. Before the Partition Act of 1868, the Court had no power at common law to direct a sale in lieu of partition, even in case where partition *in specie* was highly inconvenient and largely affected the value of the property. Statutes³ were, therefore, passed in 1868 and 1876 to give jurisdiction to the Court to order, in certain cases, sale of the property and distribution of the proceeds in lieu of partition.

A classic example of the inconvenience experienced at common law is provided by the case of *Turner v. Morgan*.⁵ A decree had been passed for the partition of a house among three persons. The Commissioner allotted to the plaintiff the entire stock of chimneys, all the fire places, the only staircase in the house and all the conveniences in the yard. On appeal, Lord Eldon, the Lord Chancellor, in overruling the objection, said that "he did not know how to make a better partition for the parties; that he granted the commission with great reluctance; but was bound by authority; and it must be a strong case to induce the Court to interpose; as the parties *ought to agree to buy and sell*".

Effect of Partition Act, 1868.

It was in 1868⁶ that the Court was empowered to decree a *sale* instead of partition. Such an order might be highly desirable where, for example, the cost of partition proceedings would exceed the value of the property,⁷ or where a single house had to be partitioned into thirds, and the owner of two-thirds was given all the chimneys and fireplaces and the only stairs;⁸ but if there were three houses, each share would have consisted of one house, and not a third of each house.⁹

Power to direct sale.

The Act of 1868 provided for sale at the discretion of the Court, and also for mandatory sale if a moiety of the co-owners requested for sale. By an amendment made in 1876, it was provided that an action for partition was to include action for sale and distribution of proceeds.

Present law.

The Partition Acts have now been repealed.¹⁰ Instead, subject to certain qualifications, a power is given to the trustees for sale (in whom the legal estate is vested) to effect a partition with the consent of the beneficiaries, and convey the land to them.¹¹ If the trustees or any of the beneficiaries refuse to agree to a partition, any person interested¹² may apply to the court, which may make such order as it thinks fit,¹³—such as, an order for sale.

1. *Gadadhar Ghose v. Janaki Nath Ghosh*, A.I.R. 1969 Cal. 59, referring to Story, Equity Jurisdiction, 3rd Edn., Art. 654.

2. Halsbury, 3rd Ed., Vol. 32, page 35, paragraphs 541, 542.

3. The Partition Act, 1868 (31 & 32 Vic. c. 40) (Appendix 1).

4. The Partition Act, 1876 (39 & 40 Vic. c. 17) (Appendix 2).

5. *Turner v. Morgan*, (1803) 8 Ves. 143, 11 Ves. 157.

6. Partition Act, 1868 amended by the Partition Act, 1879. See *Pemberton v. Barnes*, (1871) 6 Ch. App. 685; *Powell v. Powell*, (1874) 10 Ch. App. 130; *Drinkwater v. Ratcliffe* (1875) L.R. 20 Eq. 528.

7. See *Griffies v. Griffies*, (1863) 11 W.R. 943.

8. See *Turner v. Morgan*, (1803) 8 Ves. 143, 11 Ves. 157 n.

9. *Earl of Clarendon v. Hornby*, (1718) 1 P. Wms. 446.

10. L.P. (Am.) A., 1924, ss. 10, 12(3), 10th Sched.; L.P.A., 1925, 7th Sched.

11. L.P.A., 1925, s. 28(3).

12. For the meaning of "persons interested", see *Stevens v. Hutchinson*, (1953) Ch. 299.

13. L.P.A., 1925, s. 30.

IV. *Partition Acts of 1868 and 1876 in England*

It may be mentioned that in the (English) Partition Act of 1868, the power of sale could be exercised under three sections applicable to three different situations. Though the Act has been repealed, an analysis of these sections might be useful from various points of view. Sections of the earlier Act analysed.

Under section 3 of the English Act of 1868, if it appears to the Court, that by reason of the nature of the property or the number of the parties interested or presumptively interested, or the absence or disability of some of the parties, or of any other circumstance, a sale of the property would be more beneficial for the parties interested than a division, the Court may, if it thinks fit, on the request of any of the parties interested and notwithstanding the absence or disability of any of the other parties, direct a sale of the property and make all necessary or proper consequential directions.

Under section 4 of the Act of 1868, if a party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property etc. instead of a division, the Court shall, unless it sees good reason to the contrary, direct a sale of the property.

Under section 5 of the English Act of 1868 if any party interested in the property requested the court to direct a sale of the property etc., the court might, if it thinks fit, unless the other parties interested in the property or some of them undertake to purchase the share of the party requesting a sale, direct a sale of the property and give all necessary or proper consequential directions, and in case of such undertaking being given, the court may order a valuation of the share of the party requesting a sale in such manner as the court thinks fit and may give all necessary or proper consequential directions. Power to order sale under section 5.

Generally¹ in determining whether² a sale was more beneficial than a partition, the court considered only the pecuniary results, disregarding matters of sentiment, and had regard to the interest of all parties interested as a whole. But the court could, and would, order a sale where in its discretion it thought fit, unless the parties opposing a sale undertook to purchase the shares of those desiring sale. It may be added that a party asking for sale was not compellable to part with his share at a valuation.³ Position in England as to sale.

All these sections applied only where there was a suit for partition in which a decree for partition could have been made "if the Act had not been passed".

The following analysis will show the points of difference between the three sections :—

Section 3 (1868 Act)	Section 4 (1868 Act)	Section 5 (1868 Act)
(i) Sale ordered because of the nature of the property etc.	Sale ordered because of request of parties interested in a moiety.	Sale ordered on the request of a party, irrespective of any consideration of nature of the property etc. or desire of persons interested in moiety of the interest etc.
(ii) Sale discretionary.	Sale obligatory, unless good reasons to the contrary.	Sale discretionary.
(iii) Request of any interested party is enough.	Request of parties interested in a moiety is necessary.	Request of any interested party is enough.
(iv) No right to other co-sharers to purchase the share of the party requesting a sale and thus to avert a sale.	No right to other co-sharers to purchase and thus to avert a sale.	Other co-sharers can purchase the share of the party requesting sale.

1. Halsbury, 3rd Ed., Vol. 32, page 346, para 543.

2. Section 5, Partition Act, 1868 (31 & 32 Vic. c. 40).

3. Pitt. v. Jones, (1880) 5 App. Cas. 651.

V. Legislation of 1925

Reasons for repeal of Partition Acts.

The Partition Acts of 1868 and 1876 have now been repealed by the Law of Property Act.

The reasons for repeal of the Partition Acts (in England) may be briefly stated. In a tenancy-in-common, the existence of a number of persons interested in the land, each of them entitled to a separate share, raised a serious difficulty in transfer. There was no one person in whom the legal estate could properly be vested, because all tenants had the equal right to present enjoyment and possession. Not only was it necessary to obtain the consent of each party, but also the title of each of them had to be deduced for transfer. This created confusion.

Effect of 1925 Act.

To end such a confusion, the Law of Property Act, 1925 radically altered the law relating to tenancies-in-common.³ The object of this legislation was to enable land which is subject to tenancies-in-common to be sold without casting upon the purchaser any obligation to consider the titles or the beneficial rights of the tenants. Section 1(6) of the Act of 1925 therefore provided, as a first step,⁴ that a legal estate is not capable of subsisting or of being created in "an undivided share in land".

It is then enacted that an undivided share in land shall not be created except behind a trust for sale. This involves two consequences.⁵⁻⁶

First, the legal estate must be held by trustees holding as joint tenants upon *trust for sale*.

Secondly, the subject-matter of the tenancy in common is converted⁷ from land to money, for land directed to be sold is regarded by equity as *having* already been sold.

The third step is the group of provisions in sections 34-38 of the Law of Property Act, 1925 whereunder, the legal estate must be held upon a "statutory trust for sale".

As a result of this statutory trust for sale, the purchaser is released from the old duty of checking the title of each person. Further, the receipt in writing of the trustee is sufficient discharge to the purchaser, and he is not bound to see to application of the money.⁸⁻⁹

Advantage to the purchaser.

The advantage to the purchaser by this scheme is that he is no longer compelled to investigate the title to each tenant in common. He is concerned only with the legal estate held by the joint tenants upon trust for sale, since the rights of the persons beneficially entitled exist merely as equitable interests *behind the trust for sale*, and they are overreached upon a conveyance of the land by the trustees for sale, provided that the purchase money is paid to at least two trustees or to a trust corporation. It is a matter of indifference, therefore, that some of the tenants in common are minors, or that some of them are unwilling to acquiesce in the sale.

Although, in the case of a statutory (as distinct from an express), trust for sale the trustees are required, so far as practicable, to consult, and give effect to

1. See section 207, Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20).

2. For a summary, see Halsbury, 3rd Ed., Vol. 32, pages 345 and 346, paragraph 543, and footnote (h) at page 346.

3. As to conversion, see Snell, Equity (1966), pages 517—519.

4. Cf. Cheshire, Modern Law of Real Property (1976), page 222.

5. Section 36(4), L.P.A. 1925.

6. Cheshire, Modern Law of Real Property (1976), page 225.

7. As to conversion, see Snell, Equity (1966), pages 517, 519.

8. See section 14(1), Trustee Act, 1925 (15 & 16 Geo. 5 c. 19).

9. Snell, Equity (1966), page 273.

the wishes of the beneficiaries entitled in possession, or in the case of a dispute, of the majority in terms of value, yet it is expressly enacted that it shall be no concern of a purchaser to see that this requirement has been complied with.¹

In view of these detailed provisions, retention of the Partition Acts became unnecessary in England. Sale is now the rule in the case of all lands held by co-owners (subject to certain exceptions which are not relevant for the present purpose), and partition an exception, unless by consent. Why English Acts repealed.

VI. Statutory trust for sale—The machinery

The statutory trust for sale in England operates as follows :—

Operation of statutory trust for sale.

Under the Law of Property Act, when there is a statutory trust, the land is held upon trust to sell the land, with power to postpone the sale and to hold the rents and profits until sale and the ultimate proceeds of the sale upon trust to give effect to the beneficial and equitable rights of the persons to whom the land was limited.²

So long as all the trustees desire to continue their enjoyment of the property, they need not sell the land, in view of the power to postpone the sale.³ But if all of them cannot agree to postpone the sale, the imperative direction to sell must be given effect to. If the persons concerned are all of full age in undivided shares, they all become joint tenants upon this statutory trust. Thus, if land is conveyed to A, B, C and D in equal shares, then all four become joint tenants of the legal estate, and are entitled, equitably to the proceeds of the sale when the sale is held, and to the rents and profits until the sale is held.⁴ They need not sell at once, or indeed at any time, in view of their power to postpone the sale. Instead of sale, a *partition* of the land is also allowed.⁵ The trustees or personal representatives of the persons beneficially interested have also this right.⁶⁻⁷

There is no deadlock in the scheme of the English Act. Either the other tenants-in-common agree to purchase the share—in which case the trust for sale is terminated by a conveyance to those beneficiaries, or (if the trustees refuse to exercise their power) the beneficiary can apply to the court for a vesting or other order.⁸⁻⁹ It may also be mentioned that any “person interested” can apply for an order to compel the trustees to sell.¹⁰ No possibility of deadlock.

It remains to note that by section 90 of the Inclosure Act¹¹ 1845 power to make partition orders was conferred upon the Inclosure Commissioners. This power ultimately devolved upon the Minister of Agriculture and Fisheries, but this power was seldom used, and is believed to have been impliedly repealed by the provisions of the Law of Property Act, 1925.¹² Other statutory provisions in England.

To revert to the Law of Property Act,¹³ a legal estate is not now capable of subsisting or being created in an undivided share in land and in most cases it can now be created only so as to take effect behind a trust for sale. No legal estate in undivided share.

Thus, neither a joint tenancy nor a tenancy in common as known to the common law can now be held in England, except in the capacity of trustees. As a result of the passing of the Act of 1925, partition actions in England have been rendered unnecessary, and have become obsolete.¹⁶

1. L.P.A. 1925, s. 20(3); as amended by L.P.(A.) A., 1926, Sched.
2. Section 35, Law of Property Act, 1925.
3. Goodeve & Potter, *Modern Law of Real Property* (1929), page 395.
4. Section 34(2), Law of Property Act, 1925.
5. Section 28(3), Law of Property Act, 1925.
6. *Re Brooker Public Trustee v. Young*, (1934) Ch. 610.
7. As to chattels, see section 188, Law of Property Act, 1925.
8. Goodeve & Potter, *Modern Law of Real Property*, (1929), pages 402, 403.
9. See Snell, *Equity* (1966), page 247.
10. Section 3, Law of Property Act, 1925.
11. The Inclosure Act, 1845 (8 & 9 Vic. c. 118).
12. Halsbury, 3rd Ed., Vol. 32, page 346, para 544.
13. Section 106, Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20).
14. Halsbury, 3rd Ed., Vol. 32, page 329, para 514, page 338, para 529 and section 36 (4) of the Settled Land Act, 1925.
15. Sections 30, 34, 35 & 36, Law of Property Act, 1925.
16. Halsbury, 3rd Ed., Vol. 32, page 344, para 540.

Effect of section
34(2) L.P. Act
1925.

It is unnecessary to go into further details about the provisions of the 1925 Act. It is enough to add that section 34(2) of the Law of Property Act 1925 provides, in effect, that conveyance of land to any person in undivided share shall (where the persons are of full age) operate as if the land had vested in the grantees as joint tenants upon the "statutory trusts hereinafter mentioned". Under section 35 of that Act, such a trust is upon trust to sell the same and to possess the net proceeds of sale after payment of costs etc., upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the rights of the persons interested in the land.

Sections 23 to 26 and 28 make detailed provisions as to how the trust for sale is exercised, and how the property is to be managed until it is sold.¹ Unsold lands can be partitioned, or provision made for equality money under section 28(3) of the 1925 Act. Chattels can be partitioned under section 188.

If one of the tenants in common unreasonably refuses consent, then an order for sale can be obtained from the court, but the court would make such order only if it is satisfied that it is just and proper to do so, and may impose terms as to alternative accommodation.^{2,3}

Settled Land
Act, 1925.

Where the land is settled land, the matter is governed by detailed provisions in the Settled Land Act, 1925. Again, it is unnecessary to enter into any elaborate discussion thereof for the purposes of this Report.⁴ In practice, the legal fee simple is conveyed to trustees (who may or may not be the beneficiaries) upon an *express trust* for sale, the details of which are set out in full on the face of the document of settlement which would give all necessary or proper consequential directions.

Legislation in
England of 1964.

In 1964, legislation was enacted in England⁵ to remove certain doubts as to how far a surviving joint tenant could sell off his share.⁶ The details of this legislation are also not material for the present purpose.

1. See M. Lewis, "Statutory trusts for sale" (1940) 56 L.Q.R. 255.
2. *Bull v. Bull*, (1955) 1 A.E.R. 253, 256 (C.A.).
3. See also *Cook v. Cook*, (1962) Probate 235, (1962) 2 A.E.R. 811.
4. For a neat summing up of the points, see Stephen's Commentary on the Law of England (1950), Vol. 1, page 220.
5. The Law of Property (Joint Tenants) Act, 1964.
6. See Law Times (March 20, 1964), page 159.