

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 09.02.2018
Pronounced on: 11.05.2018

+ **O. REF. 2/2018 IN CS(OS) 1098/2005**

INDU SINGH AND ANR. Plaintiffs
 versus
PREM CHAUDHARY AND ORS. Defendants

Through: Sh. Y.P. Narula, Sr. Advocate with Ms. Tara Narula and Sh. Abhey Narula, Advocates, for Plaintiff No.2.
None for the defendants.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VALMIKI. J. MEHTA
HON'BLE MR. JUSTICE R.K. GAUBA

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MR. JUSTICE S. RAVINDRA BHAT

1. This judgment by the Full Bench is pursuant to a reference by a learned single judge, on two issues:

(i) When an order for sale of the property/properties is passed in a partition suit, whether such an order of sale is a final decree of partition or is just another preliminary decree passed after passing of the earlier preliminary decree declaring the shares of the parties in the property/properties of the partition suit.

(ii) On the answer to the aforesaid issue being given, a further consequential issue will have to be examined that if the order of sale is a final decree, then in such a case whether this final decree will be an "Instrument of Partition" as defined in Section 2(15) of the Indian Stamp Act, 1899 and which "Instrument of Partition" is required to be stamped as per Article 45 of Schedule I of the Stamp Act.

2. I have had the benefit of going through the judgment of the other two judges. I agree with the judgment authored by Valmiki. J. Mehta, J which elaborately discusses the various nuances of provisions of the Partition Act, the Civil Procedure Code (CPC) and

the Stamp Act as well as their interface with each other. I agree with the conclusions and most significantly, that by reason of Section 8 of the Partition Act, a determination or order that furthers the preliminary decree in a partition suit (by deciding if a property can be in fact divided by metes and bounds) amounts to a final decree, the rights under which are to be worked out by the parties concerned through an execution proceeding. Consequently, the plaintiff's contention that the suit has to be given a closure only and only if the parties are actually put to possession of their respective shares (in the case of partition of property) or after the conduct of auction or other sale process, is negated.

3. I however, append some additional reasons to arrive at the same conclusions. A repetition of the facts, which led to the reference to the Full Bench, or an outline of the statutory provisions, is unnecessary. At the same time, I am not convinced that the reference to the right of a joint owner who held a moiety as a statutory gap is justified. I say this because at the turn of the century, and till the mid twentieth century, a joint or undivided Hindu family was a stronger social and economic unit than it is now. Therefore, it would be fair to assume that disruption of such a unit was not thought to be a light matter; perhaps the lawmakers underlined the strength of the unit, by enjoining that to sue under the Partition Act, one had to possess a moiety. These observations are however, not essential to the main point of reference. The reasons for this concurrence are set out hereafter.

4. There is clear authority for the proposition that when disputants in a partition suit, enter into an agreement which is embodied in a compromise decree, that decree is to be treated as a final decree. This was so declared in *Renu Devi v. Mahendra Singh and Ors* AIR 2003 SC 1608 as well as in *Rachakonda Venkat Rao and Others v R. Satya Bai (Dead) by L.Rs. and Another* (2003) 7 SCC 452. In *Renu Devi (supra)*, the Supreme Court, after discussing the previous case law and the nature of the compromise which was embodied in a decree, observed as follows:

“A preliminary decree declares the rights or shares of parties to the partition. Once the shares have been declared and a further inquiry still remains to be done for actually partitioning the property and placing the parties in separate possession of divided property then such inquiry shall be held and pursuant to the result of further inquiry a final decree shall be

passed. A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree the rights of the parties are finally determined and a decree is passed in accordance with such determination, which is, the final decree. (See : CPC by Mulla Vol. 1, 1995 Edn., page21). The distinction between preliminary and final decree is this : a preliminary decree merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and conducted pursuant to the directions made in the preliminary decree which inquiry having been conducted and the rights of the parties finally determined a decree incorporating such determination needs to be drawn up which is the final decree.

In the case at hand, a perusal of the decree dated 13.2.1978 and the contents of the compromise application with the three schedules of properties annexed thereto shows that the property was partitioned by metes and bounds; not only the shares but the property actually falling to the share of each of the 3 groups were actually defined and given to the party entitled thereto. The decree dated 13.2.1978 demarcates the properties forming subject matter of partition by metes and bounds. For all practical purposes the decree dated 13.2.1978 was a final decree. Under order XX Rule 18 of the CPC it is not necessary to pass a preliminary decree; the Court may pass a preliminary decree if it is required. If the rights of the parties are finally determined and no further inquiry remains to be held for the purposes of completing the proceedings in partition then there is nothing in law which prevents the Court from passing a final decree in the very first instance. Often such are the cases which are based on compromise. The present one is such a case. However, still one of the parties sought for a final decree being drawn up. The Court and the parties acted under the misapprehension that the decree dated 13.2.1978 was a preliminary decree and therefore a final decree was needed to be drawn up. As we have already stated the final decree dated 24.5.1979 is nothing but a reproduction of the schedules contained in the preliminary decree dated 13.2.1978. The only difference is that the decree dated 24.5.1979 is engrossed on stamp papers which the decree dated 13.2.1978 was not.”

5. Earlier judgments on the issue are relevant and provide valuable insights. Thus, for instance in *Hasham Abbas Sayyad v. Usman Abbas Sayyad & Ors* (2007) 2 SCC 355, the Supreme Court noticed earlier relevant authorities on the point:

“Preliminary decree declares the rights and liabilities of the parties. However, in a given case a decree may be both preliminary and final.

There can be more than one final decrees. A decree may be partly preliminary and partly final. See Rachakonda Venkat Rao and Others v R. Satya Bai (Dead) by L.Rs. and Another [(2003) 7 SCC 452] A final decree proceeding may be initiated at any point of time. No limitation is provided therefor. However, what can be executed is a final decree, and not a preliminary decree, unless and until final decree is a part of the preliminary decree.

Order XXI of the Code of Civil Procedure, inter alia, provides that a property can be put to sale only in execution of a decree.

Rules 13 and 14 of Order XXVI, which are also relevant for the purpose, read as under :

"13. Commission to make partition of immovable property.- Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

14. Procedure of Commissioner.- (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think it."

The question came up for consideration before this Court in Shankar Balwant Lokhande (Dead) v Chandrakant Shankar Lokhande and Another (1995) 3 SCC 413], wherein it was opined :

"Both the decrees are in the same suit. Final decree may be said to become final in two ways: (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest court; (ii) when, as regards the court passing the decree, the same stands completely disposed of. It is in the latter sense the word "decree" is used in Section 2(2) of CPC. The appealability of the decree will, therefore, not affect its character as a final decree. The final decree merely carries into fulfilment the preliminary decree."

Taking note of the fact that a final decree proceeding is required to be drawn upon a stamped paper, it was observed :

"The crucial question for consideration is as to when the limitation begins to run for filing an application to pass final decree on stamped papers. There is no direct decision of this Court on this point. Therefore, after hearing counsel at length, we reserve the judgment in the appeal and independently made detailed examination. There is divergence of opinion in the High Courts on this question."

(Emphasis supplied)

6. Hasham Abbas Sayyad was followed by the decision in *Bikoba Deora Gaikwad and Ors. v. Hirabai Marutirao Ghorgare & Ors.* (2008) 8 SCC 198 reflects an identical thought process, which is that though preliminary decrees are final with respect to what they declare, a final decree is one which works out the rights of the parties and leaves the enforcement or effectuation of what is decided by it, through execution proceedings:

"A decision is said to be final when, so far as the Court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as res judicata between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees a preliminary decree and a final decree the decree which

would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to S. 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree.

13. The distinction between “a final decree” and “finality of a decree” is obvious enough to merit a detailed discussion. A decree whether preliminary or final is binding on the parties but the same does not mean that all decrees would be final decrees.

Section 2(2) of the Code clearly shows as to the nature of the decrees that the court may pass.

14. It is in the aforementioned context, the applicability of the provisions of Articles 136 and 137 of the Limitation Act may be noticed, which read as under:

Description of application Period of Time from which period Limitation begins to run

136. For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.

Twelve years [When] the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place:

Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

PART II--OTHER APPLICATIONS

137. Any other application for which no period of limitation is provided elsewhere in this division.

Three years When the right to apply accrues.

Article 136 would apply when an application for execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court is to be filed. An application for taking steps towards passing a final decree is not an execution application. The said provision, therefore, cannot have any application in respect thereof. Article 137 is a residuary provision which applies when no period of limitation is provided elsewhere in the Division. An application asking the court to perform its duty in terms of Section 54 of the Code can be filed at any point of time in a case where a right to apply accrues in a decree holder. Therefore, no period of limitation is to be prescribed as there is none.

This aspect of the matter has been considered in Shankar Balwant Lokhande (Dead) by LRs. v. Chandrakant Shankar Lokhande & Anr. (1995) 3 SCC 413 wherein it has been held.....

10. As found earlier, no executable final decree has been drawn working out the rights of the parties dividing the properties in terms of the shares declared in the preliminary decree. The preliminary decree had only declared the shares of the parties and properties were liable to be partitioned in accordance with those shares by a Commissioner to be appointed in this behalf. Admittedly, no Commissioner was appointed and no final decree had been passed relating to all.” “Such an interpretation is not permissible having regard to the object and scheme of the Indian Stamp Act, 1899. The Stamp Act is a fiscal measure enacted with an object to secure revenue for the State on certain classes of instruments. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of initial defect in the instrument Hindustan Steel Limited v Messers Dilip Construction Company [(1969) 1 SCC 597]}. Section 2 (14) of the Indian Stamp Act defines an 'instrument' as including every document by which any right or liability is, or purported to be created, transferred, limited, extended, extinguished or recorded. Section 2 (15) defines 'instrument of partition' as any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any revenue authority or any Civil Court and an award by an arbitrator directing

partition. Section 2 provides a list of instruments which shall be chargeable with duty of the amount indicated in Schedule I of the Indian Stamp Act. Article 45 of Schedule I prescribes the proper stamp duty payable in case of an instrument of partition. Section 33 provides for the impounding of the instrument not duly stamped and for examination of the instrument for ascertaining whether the instrument is duly stamped or not. Section 35 provides that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties, authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped. Section 40 (b) provides for payment of the proper duty, if the instrument impounded is not duly stamped. Section 42 (1) provides for certifying that proper duty has been paid on the impounded instrument. Sub-section (2) provides that after such certification the instrument shall be admissible in evidence, and may be registered, acted upon and authenticated as if it had been duly stamped.

7. The judgment in *Dr. Chiranji Lal (D) by LRs. v. Hari Das (D) By LRs.* (2005) 10 SCC 746 was rendered in a different context. The preliminary decree, which had declared the share of parties, was not acted upon and no final decree was sought. It was contended that since no period of limitation (to apply for a final decree) was provided, execution could be applied at any point of time, regard being had to the circumstance that embossing of stamp paper was a precondition. The Supreme Court negated this contention (albeit in the context of interpretation of the Limitation Act) and observed as follows:

“Such an interpretation is not permissible having regard to the object and scheme of the Indian Stamp Act, 1899. The Stamp Act is a fiscal measure enacted with an object to secure revenue for the State on certain classes of instruments. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of initial defect in the instrument Hindustan Steel Limited v Messers Dilip Construction Company [(1969) 1 SCC 597]}. Section 2 (14) of the Indian Stamp Act defines an 'instrument' as including every document by which any right or liability is, or purported to be created, transferred, limited, extended, extinguished or recorded. Section 2 (15) defines 'instrument of partition' as any instrument whereby co-owners of any property divide or agree to divide such

property in severalty, and includes also a final order for effecting a partition passed by any revenue authority or any Civil Court and an award by an arbitrator directing partition. Section 2 provides a list of instruments which shall be chargeable with duty of the amount indicated in Schedule I of the Indian Stamp Act. Article 45 of Schedule I prescribes the proper stamp duty payable in case of an instrument of partition. Section 33 provides for the impounding of the instrument not duly stamped and for examination of the instrument for ascertaining whether the instrument is duly stamped or not. Section 35 provides that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties, authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped. Section 40 (b) provides for payment of the proper duty, if the instrument impounded is not duly stamped. Section 42 (1) provides for certifying that proper duty has been paid on the impounded instrument. Sub-section (2) provides that after such certification the instrument shall be admissible in evidence, and may be registered, acted upon and authenticated as if it had been duly stamped.

24. A decree in a suit for partition declares the rights of the parties in the immovable properties and divides the shares by metes and bounds. Since a decree in a suit for partition creates rights and liabilities of the parties with respect to the immovable properties, it is considered as an instrument liable for the payment of stamp duty under the Indian Stamp Act. The object of the Stamp Act being securing the revenue for the State, the scheme of the Stamp Act provides that a decree of partition not duly stamped can be impounded and once the requisite stamp duty along with penalty, if any, is paid the decree can be acted upon.

*25. The engrossment of the final decree in a suit for partition would relate back to the date of the decree. The beginning of the period of limitation for executing such a decree cannot be made to depend upon date of the engrossment of such a decree on the stamp paper. The date of furnishing of stamp paper is an uncertain act, within the domain, purview and control of a party. No date or period is fixed for furnishing stamp papers. No rule has been shown to us requiring the court to call upon or give any time for furnishing of stamp paper. A party by his own act of not furnishing stamp paper cannot stop the running of period of limitation. None can take advantage of his own wrong. The proposition that period of limitation would remain suspended till stamp paper is furnished and decree engrossed thereupon and only thereafter the period of twelve years will begin to run would lead to absurdity. In *Yeshwant Deorao Deshmukh v. Walchand Ramchand Kothari* AIR 1951 SC 16) it was said that the payment of court fee on the amount found due was entirely in the*

power of the decree holder and there was nothing to prevent him from paying it then and there; it was a decree capable of execution from the very date it was passed.

26. Rules of limitation are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. As above-noted, there is no statutory provision prescribing a time limit for furnishing of the stamp paper for engrossing the decree or time limit for engrossment of the decree on stamp paper and there is no statutory obligation on the Court passing the decree to direct the parties to furnish the stamp paper for engrossing the decree. In the present case the Court has not passed an order directing the parties to furnish the stamp papers for the purpose of engrossing the decree. Merely because there is no direction by the Court to furnish the stamp papers for engrossing of the decree or there is no time limit fixed by law, does not mean that the party can furnish stamp papers at its sweet will and claim that the period of limitation provided under Article 136 of the Act would start only thereafter as and when the decree is engrossed thereupon. The starting of period of limitation for execution of a partition decree cannot be made contingent upon the engrossment of the decree on the stamp paper.”

These observations were applied in a later judgment, - *Bimal Kumar & Anr v Shakuntala Debi & Ors.* AIR 2012 SC 1586.

8. The above discussion points to considerable authority in favour of the proposition that in a partition suit whereas a preliminary decree finally determines the shares of parties, the final decree is when the court decides on the basis of the evidence led, whether and to what extent the partition of properties is to be effectuated by a sale. This determination is finally dispositive of the suit and is deemed to be a decree under Section 8 of the Partition Act. There may be myriad situations, entirely fact dependent, with infinite variations, such as cases involving multitude of properties, settlement of accounts or mesne profits for the interregnum and *pendent lite* period or periods, dispute over movables etc. that may require court intervention on a close “hands on” basis. This involvement however, necessarily is part of the execution process. The suit ends with the final decree that gives expression to the rights that crystallize in the preliminary decree. Any other interpretation would as correctly commented, by Justice Mehta, be straining the language of Section 8 by boggling the imagination and refusing to accept its plain and contextual meaning. The decree cannot be like a curate’s egg (a thing that intrinsically

cannot answer two disparate descriptions or perform contradictory functions), i.e. a decree for something and not a decree for another.

9. I am unpersuaded and do not agree with the view espoused by R.K. Gauba, J. *Dr. Chiranji Lal* (quoted supra) clearly states that an “instrument” – defined by Section 2 (14) includes “*every document by which any right or liability is, or purported to be created, transferred, limited, extended, extinguished or recorded*”; the Supreme Court ruled that Section 2 (15), which defines an *instrument of partition* “includes also a final order for effecting a partition passed by any revenue authority or any Civil Court and an award by an arbitrator directing partition.” This clear statement of law by the Supreme Court, forestalls any further debate as to whether documents that are involuntary or non-consequential and based on judicial determinations are indeed instruments of partition. Furthermore, the later discussion in *Chiranji Lal* also clarifies that the *executability of the decree is immediate*. This necessarily means that when the final order to sell the property or properties is made, the decree becomes executable; the postponement of such event by inaction of the party does not result in the limitation being suspended as it were. *Chiranji Lal* also alludes to the inaction of the party in engrossing the stamp duty not resulting in extension of time. This reference, with respect, means that if the party entitled to seek sale, through execution, unduly delays in approaching the court, by delaying affixing the applicable stamp duty, she or he runs the risk of running afoul of the provisions of law relating to limitation. All these observations, in the opinion of the court, mean that the decision of the court, results in finality and the decree that follows, bears the characteristic of a final decree. Such decree has to be engrossed with stamp paper of the appropriate value. Further proceedings by way of execution for effectuating the sale, are to be initiated by the party which seeks sale and division of the proceeds, in ultimate satisfaction of the decree.

10. For the above reasons, I concur with the views of Justice Valmiki. J. Mehta and do not agree with the views and opinion of Justice R.K. Gauba.

S. RAVINDRA BHAT
(JUDGE)

VALMIKI J. MEHTA, J :

1. To the Full Bench reference has been made to decide the issues:-
 - (i) When an order for sale of the property/properties is passed in a partition suit, whether such an order of sale is a final decree of partition or is just another preliminary decree passed after passing of the earlier preliminary decree declaring the shares of the parties in the property/properties of the partition suit.
 - (ii) On the answer to the aforesaid issue being given, a further consequential issue will have to be examined that if the order of sale is a final decree, then in such a case whether this final decree will be an “Instrument of Partition” as defined in Section 2(15) of the Indian Stamp Act, 1899 and which “Instrument of Partition” is required to be stamped as per Article 45 of the Schedule I of the Stamp Act.
 - (iii) I proceed to answer the reference.
2. The following provisions of law will be relevant to determine the issues called for decision by this Full Bench:-
 - (i) Section 2 Sub-Section (15) of the Indian Stamp Act:-

“Instrument of partition” means any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any revenue-authority or any Civil Court and an award by an arbitrator directing a partition;
 - (ii) Article 45, Schedule I of the Indian Stamp Act:-

“PARTITION-Instrument of as defined by Section 2(15). The same duty as a Bond (No. 15) for the amount of the value of the separated share or shares of the property
N.B.-The largest share remaining after the property is partitioned (or, if there are two or more shares of equal value and not smaller than any of the other shares, then one of such equal shares) shall be deemed to be that from which the other shares are separated:
PROVIDED always that-
(a) when an instrument of partition containing an agreement to divide property in severalty is executed and a partition is effected in pursuance of such agreement, the duty chargeable upon the instrument effecting such

partition shall be reduced by the amount of duty paid in respect of the first instrument, but shall not be less than eight annas;

(b) where land is held on revenue settlement for a period not exceeding thirty years and paying the full assessment, the value for the purpose of duty shall be calculated at not more than five times the annual revenue;

(c) where a final order for effecting a partition passed by any revenue-authority or any civil court, or an award by an arbitrator directing a partition, is stamped with the stamp required for an instrument of partition, and an instrument of partition in pursuance of such order or award is subsequently executed, the duty on such instrument shall not exceed eight annas.”

(iii) Order XX Rule 18 CPC:-

“18. Decree in Suit for partition of property or separate possession of a share therein.- *Where the court passes a decree for the partition of property or for the separate possession of a share therein, then,—*

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.”

(iv) Order XXVI Rule 14 CPC:-

“14. Procedure of Commissioner.- *(1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.*

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the court; and the

court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit."

(v) Sections 2 to 8 of the Partition Act:-

"2. Power of 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 of 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.

3. Procedure when sharer undertakes to buy.-

(1) If, in any case in which the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for sale, the Court shall 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 that behalf.

(2) If two or more shareholders severally apply for leave to buy as provided in sub-section (1), the Court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the Court.

(3) If no such shareholder is willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incident to the application or applications.

4. Partition suit by transferee of share in dwelling-house.-

(1) 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 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.

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.

5. Representation of parties under disability.-

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 authorized 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.

6. Reserved bidding and bidding by shareholders.-

(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 the bidding of the shareholder.

7. Procedure to be followed in case of sale.-

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;

(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 (14 of 1882) in respect of sales in execution of decrees.

8. Orders for sale to be deemed decrees.-

Any order for sale made by the Court under section 2, 3 or 4 shall be deemed to be as a decree within the meaning of section 2 of the Code of Civil Procedure, 1908."

- 3.(i) What is 'partition' is not defined either in the Partition Act or in the Stamp Act or in the Code of Civil Procedure. Normal dictionary meaning of the word 'partition'

is to divide i.e bring about the division of the property/properties. The expression 'partition' therefore is understood in common parlance as being in the nature of physical division of the property/properties, and which legally is called as partition by metes and bounds.

(ii)(A) The expression 'Partition' has a specific meaning so far as the traditional law of Joint Hindu Families or Hindu Undivided Families (HUF) is concerned. As per the Mitakshara School of Law of Joint Hindu Families, when a coparcener of a Hindu Undivided Family seeks partition, then on the communication of the intention to effect a partition, of the joint family properties, the shares of the coparceners in the joint family properties are crystallized/frozen at a particular percentage share. Till a Hindu Undivided Family remained joint, under Mitakshara Law, no one coparcener could have asserted or said that he was the owner of a specific share in the HUF properties. It is only on intention of the coparcener to partition the HUF properties being communicated to a Karta or any other coparcener in the HUF, that the shares of each of the coparceners of an HUF get crystallized as a particular percentage share in the HUF properties.

(ii)(B) The second stage of partition under Mitakshara Law, is partition by metes and bounds or physical partition of the joint family properties to give each coparcener a property or properties as per his share.

(iii) Under the Dayabhaga School of Law of Hindu Undivided Families, the expression 'partition' had a different meaning than the meaning of the expression 'partition' under the Mitakshara School of Law. Under the Dayabhaga Law partition meant partition by metes and bounds inasmuch as under the Dayabhaga Law the share of a coparcener in a Joint Family Properties was not a nebulous/fluctuating share, but was a specified fixed percentage share. Therefore when a coparcener in Dayabhaga School of Joint Hindu Families asked for partition, there did not arise the issue that on communication of the intention to partition the HUF properties that shares were crystallized because shares are already crystallized under the Dayabhaga Law, and in Dayabhaga School of Law therefore by the communication of the intention to partition, the same is to seek and effect a partition of the HUF properties by metes and bounds.

4(i). The meaning of 'partition', in one more sense, is to give a person his monetary value of the share in the joint properties. Before passing of the Partition Act 1893, the concept of partition only meant partition by metes and bounds or physical partition of the joint properties. In many cases on account of the fact that physical partition by metes and bounds was not possible, there hence resulted a stalemate, because neither the properties could be physically partitioned by metes and bounds nor could sale take place of the joint properties because there was no concept prevalent of partition having the effect of giving a person his monetary value share in the joint properties by selling the joint properties. Partition Act was enacted to remedy this failing. By the Partition Act it was provided for the first time that in case a joint property could not be physically partitioned by metes and bounds (including by applying the principle of owelty or equalisation) then in such a scenario the joint property could be sold. I may note that owelty means that when by physical partition a co-owner gets less or more physical property than falling to as per his percentage share in a joint property, then in such a case final partition is effected by, besides physically partitioning the property, in addition also awarding a monetary amount to a person who gets a lesser share of the property on partition than the monetary value equivalent of his share. The person who gets a share which is larger than his monetary value entitlement on partition becomes liable to pay a monetary amount to a person who gets a share lesser than is his monetary value entitlement of his share in the joint property/properties. Owelty principle is thus an equalisation principle.

(ii) Enactment of the Partition Act however did not provide a complete cure because an entitlement to sell the joint property/properties was only when more than one moiety or upwards of the shareholders agree that the joint property/properties are to be sold. Moiety means 50% or a half share. Therefore in a scenario where less than 50% of the joint owner(s) wanted an order of sale, then such an order of sale could not be passed. Therefore though the bringing into force of the Partition Act did remedy some shortcoming in the position of the partition law prevailing before the passing of the Partition Act by entitling the sale of the joint property/properties, yet even after passing of this Act there still remained a failing/shortcoming in the situation where if 50% or more

of the joint owners did not agree for sale then once again there was a stalemate because partition could not be effected of the joint property/properties either by physical partition by metes and bounds or by selling the joint property/properties and giving a monetary value from the sale proceeds of the joint property/properties to a co-owner as per his share percentage in the joint property/properties. We note that there is an aspect with respect to an order of sale under the Partition Act to be deemed to be a decree in terms of Section 8 of the Partition Act, and this aspect will be adverted to in detail hereinafter inasmuch as the provision of Section 8 of the Partition Act existing in this Act is the main reason for reference to this Full Bench.

5(i). The Partition Act was passed in the year 1893 and Code of Civil Procedure was passed later in the year 1908. There are two provisions of CPC which are relevant to the issues at hand, and which are the provisions of Order XX Rule 18 and Order XXVI Rule 14. These provisions have already been reproduced above.

(ii) A reference to Order XX Rule 18 CPC shows that properties of which partition take place are of two types. First type of properties are agricultural properties i.e those properties which pay land revenue to the Government. *Qua* such properties the provision of Sub-Rule (1) of Order XX Rule 18 CPC applies. Second type of properties are the properties in urban areas and with respect to partition of such properties, it is the provision of Sub-Rule (2) of Order XX Rule 18 which applies.

(iii) As per Order XX Rule 18 Sub-Rule (1) in a suit for partition there is only one decree which is passed and the ministerial act of physical division of joint property/properties is left to the Collector or a person deputed by the Collector as is provided in Section 54 CPC. Therefore with respect to partition suits of properties paying land revenue to the Government, after a decree was passed declaring the shares of the parties, then by the same decree the Collector or a person deputed by the Collector is appointed to bring about physical division of the properties in terms of the shares declared in the decree.

(iv) So far as urban immovable properties are concerned which are not the subject matter of Sub-Rule (1) of Order XX Rule 18 CPC, Sub-Rule (2) of Order XX Rule 18 CPC provides that where partition cannot be conveniently made without further enquiry, then first a preliminary decree is passed declaring shares/rights of the parties, and thereafter further directions as are required in the facts and circumstance of the each case are passed. Of course, even with respect to immovable properties which are subject matter of Sub-Rule (2) of Order XX Rule 18 CPC there can be cases where it may not be required to pass first only a preliminary decree, and that in certain cases a Court can pass both a preliminary and final decree by one judgment if the properties which are subject matter of the suit for partition are such that the Court can physically divide the joint properties in terms of the shares of the joint owners.

(v) Of course, the factum of physical division of the properties, whether under Sub-Rule (1) or under Sub-Rule (2) of Order XX Rule 18 CPC, the same would also be; where facts of a case so require; by also applying the principle of owelty, because surely and in many cases partition by metes and bounds does result in a person getting that physical share of the property/properties which will be less or more than the monetary value percentage share of that co-owner/joint owner in the properties. The principle of owelty (i.e an equalization amount) is found and clearly so specified under Order XXVI Rule 14 Sub-Rule (1), and this Sub-Rule (1) of Order XXVI Rule 14 will apply to partition of the properties which are subject matter of both Sub-Rule (1) and Sub-Rule (2) of Order XX Rule 18 CPC.

6.(i) At this stage it will be extremely relevant to note two important aspects.

(ii) First aspect is that while Sub-Rule (2) of Order XX Rule 18 CPC provides that a court may on account of the facts and circumstances as regards the properties which are subject matter of the suit for partition, find that straightaway a final decree for partition cannot be passed giving physical shares in the joint properties to the joint owners, then therefore in such cases, the court passes only a preliminary decree declaring the shares of the parties, and that after passing of the preliminary decree, a court has; as per the last line and set of words of Sub-Rule (2) of Order XX Rule 18 CPC; powers to pass “such further

directions as may be required". These words appearing at the end of the Sub-Rule (2) of Order XX Rule 18 CPC are very important and of great significance because these words in my opinion has removed the shortcoming which had still remained in spite of passing of the Partition Act as regards the situation when moiety or upwards of the shareholders did not want sale of the suit properties. With respect to properties which were not subject matter of payment of land revenue to the government, then with respect to such properties which are subject matter of Order XX Rule 18 Sub-Rule (2) CPC, court was given intendedly the power to pass such further directions as may be required, and such a wide expression therefore in my opinion will entitle a civil court to order for sale of the joint property/properties even if moiety or upwards of the shareholders do not want sale of the joint property/properties. This language of the last few words at the end of Order XX Rule 18 Sub-Rule (2) in my opinion becomes very important and relevant in today's age and date because a considerable number of immovable properties which are subject matter of suits for partition are properties which have been constructed many decades earlier and which is the next aspect which is being immediately adverted to hereinafter.

(iii) The second aspect is that over a period of time in urban areas the covered area of construction which is permissible on a plot has been steadily increasing. For example in Delhi previously on a plot ordinarily a ground floor, first floor and a barsati floor (part second floor) was only allowed to be constructed. Barsati floor means that the entire second floor is not allowed to be covered but the second floor which is called as a barsati floor is allowed to be only partly covered. The municipal law thereafter changed whereby almost the entire second floor was allowed to be covered. Thereafter, the municipal law has further changed and a third floor was allowed to be constructed, besides allowing construction of a basement on a property. Now in addition to a plot having a basement and four floors, in view of the scarcity of parking of vehicles in a city like Delhi on account of the existence of unending number of vehicles, stilt parking is also permitted to be made below the ground floor and above the basement floor. Since the ultimate object and the real intention of the joint properties being partitioned is to give a person his monetary value equivalent of his percentage share in the joint property/properties, and since now additional Floor Area Ratio (FAR)/covered area is

permissible, therefore in old constructed properties, simply by physically dividing the existing construction the same does not result in a person getting his monetary value of his percentage share in the joint property/properties. Partition therefore really in today's date and age in urban areas is a partition in terms of FAR/covered area, and once that is so, then on such FAR/covered area being available to a co-owner/joint owner then such a person may/would/could want to reconstruct for enjoying more constructed area falling to his share, and which will necessarily require bringing down the old construction and thereafter making fresh construction on the plot of basement plus four floors and stilt parking. Thus in very old constructed properties simply physically partitioning of such joint property/properties is not the answer, and the joint property/properties in many cases have necessarily to be sold so as to give a person his actual monetary share value in the joint property/properties. At this stage I would hasten to add that with respect to sale of a joint property, the entitlement of a co-owner in terms of Sections 3,4, 6 and 7 of the Partition Act come in, whereby on an order being passed of sale of a joint property, the sale is not necessarily and firstly by public auction/sale, because firstly in the sale proceedings, one or more co-owners can buy out the other co-owner/co-owners i.e rights of pre-emption.

(iv) Therefore in my opinion the words as found in the last line of Sub-Rule (2) of Order XX Rule 18 CPC would result in a position that as of today there no longer exists any gap or shortcoming or failing which would result in a stalemate if joint owner(s), having less than a 50% share, ask for his/their share by filing a suit for partition of the joint property/properties.

7. Let us now turn to the aspect as to when in a partition suit if an order of sale of the joint property/properties is made, then whether such an order is to be taken as a final decree, and whether this final decree of partition is an "Instrument of Partition" under Section 2(15) of the Stamp Act and thus required to be drawn on non-judicial stamp papers of the value/percentage as prescribed under Article 45 of Schedule I of the said Act.

8.(i) So far as the issue as to whether an order of sale is or is not a final decree of partition, the issue is no longer *res-integra* in view of the ratio of the judgment of the Supreme Court in the case of ***Hasham Abbas Sayyad Vs. Usman Abbas Sayyad and Others (2007) 2 SCC 355***. In this judgment the issue which was decided was as to whether an order of sale is to be passed after drawing up a final decree or before passing a final decree, and it has been held by the Supreme Court that sale proceedings are post the drawing up of a final decree and not before drawing up of a final decree. The relevant paras of this judgment are paras 2, 3, 12, 13 and 18 to 20 and which paras read as under:-

"2. The appellant, Respondent 1 and Respondent 2 are brothers. A suit for partition was filed by Respondent 1. A preliminary decree was passed on 16-3-1999. An application purported to be a special darkhast was filed by him on 29-11-1999. An Advocate Commissioner was appointed. He was of the opinion that the property was impartible. A proposal was mooted that the property be put on sale in between the co-sharers. The appellant accepted the Commissioner's report. He however filed an application for putting the said suit property on auction-sale and for equal distribution of the proceeds thereof amongst the co-sharers. An objection to the report of the said Advocate Commissioner was filed by the appellant. The court allowed the appellant to appoint an architect at his own cost. He, however, failed to comply with the said order. A sale proclamation was issued. The appellant expressed his intention to buy the said property at the valuation made by the government valuer. A valuation report was filed by the appellant on 4-5-2005 against which Respondent 1 filed an objection. The appellant was called upon to deposit 2/3rd of the amount stated in the valuation report. He failed to do so. On or about 21-11-2005, he filed an application expressing his willingness to deposit shares of Respondents 1 and 2. He also sought for permission to deposit an amount of Rs 2.5 lakhs. By an order dated 22-11-2005, the trial court held that since the property was put on auction-sale, the highest bid would be treated to be the best price of the suit property and there was no need for appointment of any valuer to ascertain the market price thereof. Another objection was filed by the appellant stating that in view of the facts and circumstances of the case, he should be allowed to buy the shares of other co-sharers. The said application was rejected by an order dated 14-12-2005. By an order dated 15-4-2006, the learned trial Judge held that it was not necessary to initiate a final decree proceeding and the said purported special darkhast filed by Respondent 1 was treated to be an application therefor. A writ petition filed by the appellant was dismissed by the High Court by reason of the impugned order.

3. The short question which, inter alia, arises for consideration is as to whether the property in suit could be put on auction-sale without initiating a formal final decree proceeding.

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12. The question came up for consideration before this Court in *Shankar Balwant Lokhande v. Chandrakant Shankar Lokhande* [(1995) 3 SCC 413] wherein it was opined: (SCC p. 416, para 3)

"Both the decrees are in the same suit. Final decree may be said to become final in two ways: (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest court; (ii) when, as regards the court passing the decree, the same stands completely disposed of. It is in the latter sense the word 'decree' is used in Section 2(2) CPC. The appealability of the decree will, therefore, not affect its character as a final decree. The final decree merely carries into fulfilment the preliminary decree."

13. Taking note of the fact that a final decree proceeding is required to be drawn upon a stamped paper, it was observed: (SCC p. 416, para 2)

"2. The crucial question for consideration is as to when the limitation begins to run for filing an application to pass final decree on stamped papers. There is no direct decision of this Court on this point. Therefore, after hearing counsel at length, we reserve the judgment in the appeal and independently made detailed examination. There is divergence of opinion in the High Courts on this question."

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18. We have referred to the aforementioned decisions to clear the air in relation to one aspect of the matter, namely, although final decree may be required to be **duly stamped**, or the same may not have anything to do for the purpose of computing the period of limitation, the preliminary decree as such cannot be put to execution.

19. Although, in regard to the period of limitation in execution of the final decree proceeding there are somewhat different views, but all decisions of this Court clearly state that it is the final decree proceeding which would be executable in nature. Without drawing a final decree proceeding, the court could not have put the property on auction-sale.

20. It is true that the house property was found to be an impartible one; but a preliminary decree having been passed, the valuation thereof and final allotment of the property could have been done only in a final decree proceeding. Only when final allotments were made or a determination is made that the property should be put on auction-sale, a final decree in respect thereof should have been passed. It is appealable. Only a final decree could be put to execution."

(emphasis added)

(ii) Therefore it is clear from the ratio of *Hasham Abbas's* case (*supra*) that sale of a property with respect to which a preliminary decree is already passed, will be in execution proceedings after preparing a final decree, and which final decree is passed when an order is made that the property is not capable of being partitioned (with or without Owelty) and has to be sold for dividing the net sale proceeds between the co-owners as per shares decided by the preliminary decree.

(iii) The issue as to whether when there is no physical partition by metes and bounds, and there is instead an order directing sale of the joint property/properties, then whether such an order of sale of the joint property/properties is a final decree or it is only a preliminary decree, though therefore stands concluded in view of the ratio laid down in the case of *Hasham Abbas (supra)*, however in deference to the arguments urged on behalf of the plaintiff and the judgments relied upon, the discussion hereinafter is recorded, especially because of the Reference Order referring to Section 8 of the Partition Act.

9. In our opinion, Section 8 of the Partition Act is determinative of this issue because an order of sale in terms of this provision has been specifically stated to be a deemed decree. To understand the meaning of an order of sale for being taken as a deemed decree under Section 8 of the Partition Act, it would be relevant to again take cross-reference to the discussion already given hereinabove that partition before the passing of the Partition Act was normally understood to be only of the nature of physical division of the joint properties. Sale of the joint properties and giving of the parties their monetary shares in the net sale proceeds of the joint properties was not envisaged till the Partition Act was passed. Further as stated above, even the Partition Act did not result in the shortcoming being fully addressed, and which shortcoming used to arise when less than moiety of shareholders wanted sale of joint property/properties, and to remedy such situation the relevant words in the last line of Order XX Rule 18 Sub-Rule (2) CPC came in. An order of sale of a joint property since therefore in the normal parlance of the meaning of the term 'partition' would not be a partition by metes and bounds division or

physical partition of the joint properties, it is only therefore that the order of sale although not being a direction of partition by metes and bounds of the joint property/properties, therefore it had to be provided by the legislature that the order of sale will be taken as a decree i.e final decree for partition i.e of partitioning of the joint properties. If an order for sale of a joint property was not to be taken as a final decree for partition, or a decree at all for that matter, or that the said decree was to be taken as only a preliminary decree in a suit for partition, then there was no reason why in Section 8 of the Partition Act it would not so have been so stated specifically by the legislature that an order of sale will only be a preliminary decree and not a final decree. It is relevant to note that a decree when is passed by a civil court, then such a decree declares the rights of the parties, but for enforcement of the rights granted under a final decree, if steps then have to be taken, then such steps are not steps prior to passing of the final decree, and that such steps or process is/are the steps or the process post the final decree i.e execution of the final decree. The declaration of rights therefore is upon the passing of a decree, and the enforcement of those rights declared by the decree is to be by execution proceedings. It has already been discussed above that declaration of rights of different co-sharers in joint properties as to how the joint properties are divided between the co-sharers, with one or more shares in one or more property or properties as a whole falling to one or more shareholders, will be a partition of the joint properties, and the fact that there has to take place enforcement of partition deed by one or more shareholders seeking their shares in one or more joint-properties by seeking the possession of a whole property or part of one or more joint-properties which has fallen to a share of that one or more co-sharers who is not in possession of whole or part of one or more properties, then in such scenario to seek possession is the act of enforcement of the terms of the partition deed, but the fact of the requirement existing of the need of enforcement, being an act to take place in future, the same however will not prevent the partition deed from being a partition deed as per Section 2(15) of the Stamp Act requiring it to be stamped as per Article 45 of the Schedule of the said Act. Therefore when a court passes a final decree for partition, the same will result in the similar position as found in a partition deed entered into outside the court, where the acts being required for enforcement of rights created can be acts to be

taken in future. Putting in other words that even in terms of a final decree passed thereby declaring specific shares of one or more co-sharers in one or more joint properties, there may still have to be taken steps by one or more co-sharers for enforcing their rights in the property/properties granted to them under a decree for partition, by seeking possession from the other co-sharers the physical shares of the properties or the property/properties which have fallen to the person who seeks to enforce his rights of possession as per the partition decree, but that merely because such further steps are required for enforcement would not mean that the decree for partition passed is not a final decree for partition.

10.(i) A contention was urged on behalf of the plaintiffs that an order of sale is not a final decree because in Section 8 of the Partition Act the order of sale is only a deemed decree i.e it is deemed to be a decree and therefore not an actual decree, and hence it was urged before us that an order of sale cannot be taken to be a final decree of partition falling within the Section 2(15) of the Stamp Act.

(ii) In the opinion of this Court this argument urged on behalf the plaintiffs is misconceived because what are the consequences of the expression being 'deemed decree', as to whether the expression will have to be taken with all consequences of deeming as actual or not, will necessarily depend upon the context in which a deeming provision is found in a statute because in some deeming provisions all consequences of deeming as being actual will follow, whereas in other cases deeming will not have all the consequence of treating deeming as actual. This is in fact clearly stated so in the judgment relied upon by the plaintiffs themselves in the case of **Ali M.K. and Others Vs. State of Kerala and Others (2003) 11 SCC 632**. Paras 14 to 16 of the judgment in the case of **Ali M.K. (supra)** read as under:-

"14. "Deemed". as used in statutory definitions "to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient device for reducing the verbiage of an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words 'deem' and 'deemed' when used in a statute thus simply state the effect or meaning which come matter of things has - the way in which it is to be adjudged; this need not import artificially or fiction; it may simply be statement of an undisputable conclusion"

15. When a thing is to be "deemed" something else, it is to be treated as that something else with the attendant consequences, but it is not that something else

"When a statute gives a definition and then adds that certain things shall be 'deemed' to be covered by the definition, it matters not whether without that addition the definition would have covered them or not":

16. Whether the word "deemed" when used in a statute established a conclusive or a rebuttable presumption depended upon the context.

"I ...regard its primary function as to bring in something which would otherwise be excluded"

"Deems" means "is of opinion" or "considers" or "decides" and there is no implication of steps to be taken before the opinion is formed or the decision is taken." (underlining added)

(iii) Therefore whether a deemed decree has all the consequences of a normal decree will depend upon the context in which the term deemed decree is found/used in Section 8 of the Partition Act, and as already discussed above, an order of sale being in substitution of an actual physical division of the properties which cannot take place in facts of particular cases, and thus effectively the order of sale being equal to a final decree for partition by metes and bounds, accordingly an order of sale will thus necessarily have to be taken as a final decree of partition.

(iv) We may in this regard note that Supreme Court in the judgment in the case of **Gurupad Khandappa Magdum Vs. Hirabai Khandappa Magdum and Ors. (1978) 3 SCC 383** while interpreting Section 6 of the Hindu Succession Act has held that when a deeming provision is created, one cannot permit one's imagination to boggle so as not to give full effect to the deeming provision and in this regard Supreme Court referred to the observations of the privy council in the case of **East End Dwellings Co. Ltd. v. Finsbury Borough Council, (1952) AC 109, 132 (1951) 2 All ER 587**. The relevant paras in the case of **Gurupad Khandappa Magdum (supra)** are paras 11, 12 and 13 and these paras read as under:-

"11. We see no justification for limiting the plaintiff's share to 1/24th by ignoring the 1/4th share which she would have obtained had there been a partition during her husband's life time between him and his two sons. We think that in overlooking that 1/4th share, one unwittingly permits one's imagination to boggle under the oppression of the reality that there was in

fact no partition between the plaintiff's husband and his sons. Whether a partition had actually taken place between the plaintiff's husband and his sons is beside the point for the purposes of Explanation 1. That Explanation compels the assumption of a fiction that in fact "a partition of the property had taken place", the point of time of the partition being the one immediately before the death of the person in whose property the heirs claim a share.

12. The fiction created by Explanation 1 has to be given its due and full effect as the fiction created by Section 18A(9)(b) of the Indian Income-tax Act, 1922, was given by this Court in Commissioner of Income-tax, Delhi v. S. Teja Singh. It was held in that case that the fiction that the failure to send an estimate of tax on income Under Section 18A(3) is to be deemed to be a failure to send a return, necessarily involves the fiction that a notice had been issued to the assessee Under Section 22 and that he had failed to comply with it. In an important aspect, the case before us is stronger in the matter of working out the fiction because in Teja Singh's case, a missing step had to be supplied which was not provided for by Section 18A(9)(b), namely, the issuance of a notice Under Section 22 and the failure to comply with that notice. Section 18A(9)(b) stopped at creating the fiction that when a person fails to send an estimate of tax on his income Under Section 18A(3) he shall be deemed to have failed to furnish a return of his income. The section did not provide further that in the circumstances therein stated, a notice Under Section 22 shall be deemed to have been issued and the notice shall be deemed not to have been complied with. These latter assumptions in regard to the issuance of the notice Under Section 22 and its non-compliance had to be made for the purpose of giving due and full effect to the fiction created by Section 18A(9)(b). In our case it is not necessary, for the purposes of working out the fiction, to assume and supply a missing link which is really what was meant by Lord Asquith in his famous passage in East End Dwellings Co. Ltd. v. Finsbury Borough Council. He said:

if you are bidden to treat an imaginary state of affairs as real, you must also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it; and if the statute says that you must imagine a certain state of affairs, it cannot be interpreted to mean that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

13. In order to ascertain the share of heirs in the property of a deceased coparcener it is necessary in the very nature of things, and as the very first step, to ascertain the share of the deceased in the coparcenary property. For, by doing that alone can one determine the extent of the claimant's share. Explanation 1 to Section 6 resorts to the simple expedient, undoubtedly fictional, that the interest of a Hindu Mitakshara coparcener "shall be deemed to be" the share in the property

that would have been allotted to him if a partition of that property had taken place immediately before his death. What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption, once made, is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the share of the deceased in the coparcenary property, one cannot go back on that assumption and ascertain the share of the heirs without reference to it. The assumption which the statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages. To make the assumption at the initial stage for the limited purpose of ascertaining the share of the deceased and then to ignore it for calculating the quantum of the share of the heirs is truly to permit one's imagination to boggle. All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the life time of the deceased. The allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion. It has to be treated and accepted as a concrete reality, something that cannot be recalled just as a share allotted to a coparcener in an actual partition cannot generally be recalled. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death, in addition to the share which he or she received or must be deemed to have received in the notional partition."

(underlining added)

11. We therefore hold that the expression 'deemed decree' found in Section 8 of the Partition Act is not to be interpreted that the order of sale which is a deemed decree as per Section 8 of the Partition Act is not a final decree under Section 2(2) CPC merely because steps of sale of the suit property/properties have yet to take place in future. It has to be held that an order of sale is a decree and a final decree under Section 2(2) CPC including for the reason that whether a deed of partition is entered into or a final decree for partition is passed, then no doubt in future steps will have to take place to enforce rights created either in the partition deed or in the decree for partition, but that only because such further steps have to take place in future for giving the co-owners/joint owners/co-sharers their rights which have come to them under the deed of partition/final

decree for partition, would not mean that a final decree of partition is not a final partition decree.

12.(i) On behalf of the plaintiffs it was argued that provision of Section 8 of the Partition Act should be interpreted by holding that object of enacting of Section 8 of the Partition Act was only to make the order of sale as an appealable order but as not to be a final decree for partition, and in this regard learned Senior Counsel for the plaintiffs has relied upon various judgments which we do not propose to refer to in detail inasmuch as none of the judgments except one deal with the issue at hand to decide as to whether an order of sale is or is not a final decree for partition. The one relevant judgment relied upon by the plaintiffs is the judgment of a learned Single Judge of Mumbai High Court in the case of **Taherbhai Abdulalli Vs. Nagindas Gokuldas Saraf & Ors., 1979 MhLJ 624**, and no doubt in para 13 of this judgment, it is stated that an order of sale is not a final decree, however we cannot agree with the observations made in para 13 of this judgment which are only generally conclusive observations without any reasons being given as to why an order of sale should not be taken as a final decree, and that the discussion, reasoning and conclusions given by us in the present judgment are completely absent in the judgment of learned Single Judge in the case of **Taherbhai Abdulalli (supra)**. Relevant para 13 of this judgment which is relied upon by the plaintiffs reads as under:-

“13. The order directing a sale may be a decree, but it cannot be a final decree, inasmuch as in all court sales, confirmation of the sale is necessary and until confirmation, therefore, the Court has power to direct a sale. So, that will be the last point of time before which an application could be made under Section 3.”

(ii) We would also like to note that what is argued on behalf of the plaintiffs that the only object of provision of Section 8 of the Partition Act was to make an order of sale as an appealable order but not a decree, is a completely misplaced and misconceived argument, because if that was the only intention of the legislature, then all that the legislature would have done was to specify under Section 8 of the Partition Act that an order of sale would be appealable, however on the contrary the legislature has not legislated that an order of sale is appealable and the legislature has in fact clearly, directly

and specifically provided under Section 8 that an order of sale is a decree. The fact that a decree is appealable is provided under Sections 96 and 100 CPC, will thus automatically make any decree passed as an appealable one, and therefore it does not stand to reason that order of sale is to be a deemed decree only to make the order directing sale as an appealable decree. Thus it cannot be successfully argued that Section 8 of the Partition Act when it provides for an order of sale to be a decree, then the order of sale was legislated to be a decree only for the purpose of making the order of sale as an appealable order. This argument of the plaintiffs thus has no merit and is rejected.

13. One more argument which was urged on behalf of the plaintiffs was that in the present case the order which was passed in the suit on 7.7.2008 being a compromise decree under Order XXIII Rule 3 CPC, therefore the Court should treat such compromise decrees as different from the decrees on merits which are passed by the Court, and that only decrees passed on merits should be held to be subject matter of Section 2(15) of the Stamp Act. We have however really failed to understand this argument because a decree as defined under Section 2(2) CPC is a final adjudication of rights of the parties in the suit and such final adjudication can take place either after contest resulting in a judgment being passed on merits by deciding respective contentions of the parties, or on the other hand there can be adjudication of rights which results in a decree even without decision on contest, and which position is when as per the consent of the parties a decree is passed. The fact that there is a consent decree however would not take away the fact that there is final adjudication of the rights of the parties, and which adjudication is also very much a decree as envisaged by Section 2(2) CPC. In our opinion therefore merely because a decree is a consent decree or a compromise decree would not mean that such a decree if it results in a final decree for partition dividing the properties of the co-sharers, yet this consent/compromise decree will not be a final decree for partition simply and only because the decree is a consent/compromise decree.

14.(i) Lastly we would like to refer to the arguments urged on behalf of the plaintiffs with reference to the observations made by the Supreme Court in the judgment in the case reported as *Shub Karan Bubna Vs. Sita Saran Bubna and Ors.*, (2009) 9

SCC 689. It is argued on behalf of the plaintiffs by placing reliance upon the observations made by the Supreme Court in this judgment that every suit for partition has three stages and even after a preliminary decree is passed yet a stage is envisaged before passing of the final decree, and that an order of a sale of the joint property is such a stage prior to execution proceedings, and the steps taken for sale fall in the stage after the passing of the preliminary decree but before the stage of the first decree. The relevant paras of the judgment in the case of **Shub Karan Bubna (supra)** are paras 5 to 30, and these paras read as under:-

“5. ‘Partition’ is a re-distribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them, into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty.

6. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. ‘Separation of share’ is a species of ‘partition’. When all co-owners get separated, it is a partition. Separation of share/s refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother.

7. In a suit for partition or separation of a share, the prayer is not only for declaration of plaintiff’s share in the suit properties, but also division of his share by metes and bounds. This involves three issues:

- (i) whether the person seeking division has a share or interest in the suit property/properties;
- (ii) whether he is entitled to the relief of division and separate possession; and
- (iii) how and in what manner, the property/properties should be divided by metes and bounds?

In a suit is for partition or separation of a share, the court at the first stage decides whether the plaintiff has a share in the suit property and whether he is entitled to division and separate possession. The decision on these two issues is exercise of a judicial function and results in first stage decision termed as ‘decree’ under Order 20 Rule 18(1) and termed as ‘preliminary decree’ under Order 20 Rule 18(2) of the Code. The

consequential division by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements, calculations and considering various permutations/combinations/alternatives of division is referred to the Collector under Rule 18(1) and is the subject matter of the final decree under Rule 18(2).

8. The question is whether the provisions of Limitation Act are inapplicable to an application for drawing up a final decree.

9. Rule 18 of Order 20 of the Code of Civil Procedure ('the Code' for short) deals with decrees in suits for partition or separate possession of a share therein which is extracted below:

xxxxx

xxxxx

xxxxx

10. The terms 'preliminary decree' and 'final decree' used in the said rule are defined in Explanation to Section 2(2) of the Code and reads thus:

“Explanation.- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.”

11. Section 54 of the Code dealing with partition of estate or separation of share, relevant for purposes of Rule 18(1) reads thus:

“54. Partition of estate or separation of share.- Where the decree is for the partition of an undivided estate assessed to the payment of revenue of the government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted sub-ordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.”

12. Rule 13 of Order 26 of the Code dealing with Commissions to make partition of immovable property, relevant for purposes of Rule 18(2) reads thus:

“13. Commission to make partition of immovable property.-Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by Section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.”

13. We may now turn to the provisions of the Limitation Act, 1963. Section 3 of the Act provides that subject to Sections 4 to 24, every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed. The term 'period of limitation' is defined as the period of limitation prescribed for any suit, appeal or application by the Schedule to the Act (vide Clause (j) of Section 2 of the Act). The term "prescribed period" is defined as the period of limitation computed in accordance with the provisions of the said Act.

14. *The Third Division of the Schedule to the said Act prescribes the periods of limitation for Applications. The Schedule does not contain any Article prescribing the limitation for an application for drawing up of a final decree. Article 136 prescribes the limitation for execution of any decree or order of civil court as 12 years when the decree or order becomes enforceable. Article 137 provides that for any other application for which no period of limitation is provided elsewhere in that division, the period of limitation is three years which would begin to run from the time when the right to apply accrues.*

15. *It is thus clear that every application which seeks to enforce a right or seeks a remedy or relief on the basis of any cause of action in a civil court, unless otherwise provided, will be subject to the law of limitation. But where an application does not invoke the jurisdiction of the court to grant any fresh relief based on a new cause of action, but merely reminds or requests the court to do its duty by completing the remaining part of the pending suit, there is no question of any limitation. Such an application in a suit which is already pending, which contains no fresh or new prayer for relief is not one to which Limitation Act, 1963 would apply.*

16. *These principles are evident from the provisions of the Code and the Limitation Act and also settled by a series of judgments of different High Court over the decades (see for example, Ramabai Govind v. Anant Daji, Abdul Kareem Sab v. Gowlivada S. Silar Saheb, A. Manjundappa v. Sonnappa and Ors. Sudarsan Panda and Ors. v. Laxmidhar Panda, Laxmi v. A. Sankappa Alwa). We may also draw support from the judgments of this Court in Phoolchand v. Gopal Lal, Hasham Abbas Sayyad v. Usman Abbas Sayyad and Ors. and Bikoba Deora Gaikwad v. Hirabai Marutirao Ghorgare.*

17. *Once a court passes a preliminary decree, it is the duty of the court to ensure that the matter is referred to the Collector or a Commissioner for division unless the parties themselves agree as to the manner of division. This duty in the normal course has to be performed by the court itself as a continuation of the preliminary decree. Sometimes either on account of the pendency of an appeal or other circumstances, the court passes the decree under Rule 18(1) or a preliminary decree under Rule 18(2) and the matter goes into storage to be revived only when an application is made by any of the parties, drawing its attention to the pending issue and the need for referring the matter either to the Collector or a Commissioner for actual division of the property. Be that as it may.*

18. *The following principles emerge from the above discussion regarding partition suits:*

18.1 *In regard to estates assessed to payment of revenue to the government (agricultural land), the court is required to pass only one decree declaring the rights of several parties interested in the suit property with a direction to the Collector (or his subordinate) to effect actual partition or separation in accordance with the declaration made by*

the court in regard to the shares of various parties and deliver the respective portions to them, in accordance with Section 54 of Code. Such entrustment to the Collector under law was for two reasons. First is that Revenue Authorities are more conversant with matters relating to agricultural lands. Second is to safeguard the interests of government in regard to revenue. (The second reason, which was very important in the 19th century and early 20th century when the Code was made, has now virtually lost its relevance, as revenue from agricultural lands is negligible). Where the Collector acts in terms of the decree, the matter does not come back to the court at all. The court will not interfere with the partitions by the Collector, except to the extent of any complaint of a third party affected thereby.

18.2 In regard to immovable properties (other than agricultural lands paying land revenue), that is buildings, plots etc. or movable properties:

(i) where the court can conveniently and without further enquiry make the division without the assistance of any Commissioner, or where parties agree upon the manner of division, the court will pass a single decree comprising the preliminary decree declaring the rights of several parties and also a final decree dividing the suit properties by metes and bounds.

(ii) where the division by metes and bounds cannot be made without further inquiry, the court will pass a preliminary decree declaring the rights of the parties interested in the property and give further directions as may be required to effect the division. In such cases, normally a Commissioner is appointed (usually an Engineer, Draughtsman, Architect, or Lawyer) to physically examine the property to be divided and suggest the manner of division. The court then hears the parties on the report, and passes a final decree for division by metes and bounds.

The function of making a partition or separation according to the rights declared by the preliminary decree, (in regard to non-agricultural immovable properties and movables) is entrusted to a Commissioner, as it involves inspection of the property and examination of various alternatives with reference to practical utility and site conditions. When the Commissioner gives his report as to the manner of division, the proposals contained in the report are considered by the court; and after hearing objections to the report, if any, the court passes a final decree whereby the relief sought in the suit is granted by separating the property by metes and bounds. It is also possible that if the property is incapable of proper division, the court may direct sale thereof and distribution of the proceeds as per the shares declared.

18.3 As the declaration of rights or shares is only the first stage in a suit for partition, a preliminary decree does not have the effect of disposing of the suit. The suit continues to be pending until partition, that is division by metes and bounds, takes place by passing a final decree. An application

requesting the court to take necessary steps to draw up a final decree effecting a division in terms of the preliminary decree, is neither an application for execution (falling under Article 136 of the Limitation Act) nor an application seeking a fresh relief (falling under Article 137 of Limitation Act). It is only a reminder to the court to do its duty to appoint a Commissioner, get a report, and draw a final decree in the pending suit so that the suit is taken to its logical conclusion.

19. The three decisions relied on by the petitioner (referred to in para 3 above) are not relevant for deciding the issue arising in this case. They all relate to suits for mortgage and not partition. There is a fundamental difference between mortgage suits and partition suits. In a preliminary decree in a mortgage suit (whether a decree for foreclosure under Rule 2 or a decree for sale under Rule 4 of Order 34 of the Code), the amount due is determined and declared and the time within which the amount has to be paid is also fixed and the consequence of non payment within the time stipulated is also specified. A preliminary decree in a mortgage suit decides all the issues and what is left out is only the action to be taken in the event of non payment of the amount. When the amount is not paid the plaintiff gets a right to seek a final decree for foreclosure or for sale.

20. On the other hand, in a partition suit the preliminary decrees only decide a part of the suit and therefore an application for passing a final decree is only an application in a pending suit, seeking further progress. In partition suits, there can be a preliminary decree followed by a final decree, or there can be a decree which is a combination of preliminary decree and final decree or there can be merely a single decree with certain further steps to be taken by the court. In fact several applications for final decree are permissible in a partition suit. A decree in a partition suit enures to the benefit of all the co-owners and therefore, it is sometimes said that there is really no judgment-debtor in a partition decree.

21. A preliminary decree for partition only identifies the properties to be subjected to partition, defines and declares the shares/rights of the parties. That part of the prayer relating to actual division by metes and bounds and allotment is left for being completed under the final decree proceedings. Thus the application for final decree as and when made is considered to be an application in a pending suit for granting the relief of division by metes and bounds.

22. Therefore, the concept of final decree in a partition suit is different from the concept of final decree in a mortgage suit. Consequently an application for a final decree in a mortgage suit is different from an application for final decree in partition suits.

A suggestion for debate and legislative action

23. The century old civil procedure contemplates judgments, decrees, preliminary decrees and final decrees and execution of decrees. They provide for a 'pause' between a decree and execution. A 'pause' has also

developed by practice between a preliminary decree and a final decree. The 'pause' is to enable the defendant to voluntarily comply with the decree or declaration contained in the preliminary decree. The ground reality is that defendants normally do not comply with decrees without the pursuance of an execution. In very few cases, the defendants in a partition suit, voluntarily divide the property on the passing of a preliminary decree. In very few cases, defendants in money suits, pay the decretal amount as per the decrees. Consequently, it is necessary to go to the second stage that is levy of execution, or applications for final decree followed by levy of execution in almost all cases.

24. *A litigant coming to court seeking relief is not interested in receiving a paper decree, when he succeeds in establishing his case. What he wants is relief. If it is a suit for money, he wants the money. If it is a suit for property, he wants the property. He naturally wonders why when he files a suit for recovery of money, he should first engage a lawyer and obtain a decree and then again engage a lawyer and execute the decree. Similarly, when he files a suit for partition, he wonders why he has to first secure a preliminary decree, then file an application and obtain a final decree and then file an execution to get the actual relief. The commonsensical query is: why not a continuous process? The litigant is perplexed as to why when a money decree is passed, the court does not fix the date for payment and if it is not paid, proceed with the execution; when a preliminary decree is passed in a partition suit, why the court does not forthwith fix a date for appointment of a Commissioner for division and make a final decree and deliver actual possession of his separated share. Why is it necessary for him to remind the court and approach the court at different stages?*

25. *Because of the artificial division of suits into preliminary decree proceedings, final decree proceedings and execution proceedings, many Trial judges tend to believe that adjudication of the right being the judicial function, they should concentrate on that part. Consequently, adequate importance is not given to the final decree proceedings and execution proceedings which are considered to be ministerial functions. The focus is on disposing of cases, rather than ensuring that the litigant gets the relief. But the focus should not only be on early disposal of cases, but also on early and easy securing of relief for which the party approaches the court. Even among lawyers, importance is given only to securing of a decree, not securing of relief. Many lawyers handle suits only till preliminary decree is made, then hand it over to their juniors to conduct the final decree proceedings and then give it to their clerks for conducting the execution proceedings.*

26. *Many a time, a party exhausts his finances and energy by the time he secures the preliminary decree and has neither the capacity nor the energy to pursue the matter to get the final relief. As a consequence, we have found cases where a suit is decreed or a preliminary decree is*

granted within a year or two, the final decree proceeding and execution takes decades for completion. This is an area which contributes to considerable delay and consequential loss of credibility of the civil justice system. Courts and Lawyers should give as much importance to final decree proceedings and executions, as they give to the main suits.

27. *In the present system, when preliminary decree for partition is passed, there is no guarantee that the plaintiff will see the fruits of the decree. The proverbial observation by the Privy Council is that the difficulties of a litigant begin when he obtains a decree. It is necessary to remember that success in a suit means nothing to a party unless he gets the relief. Therefore to be really meaningful and efficient, the scheme of the Code should enable a party not only to get a decree quickly, but also to get the relief quickly. This requires a conceptual change regarding civil litigation, so that the emphasis is not only on disposal of suits, but also on securing relief to the litigant.*

28. *We hope that the Law Commission and Parliament will bestow their attention on this issue and make appropriate recommendations/amendments so that the suit will be a continuous process from the stage of its initiation to the stage of securing actual relief.*

29. *The present system involving a proceeding for declaration of the right, a separate proceeding for quantification or ascertainment of relief, and another separate proceeding for enforcement of the decree to secure the relief, is outmoded and unsuited for present requirements. If there is a practice of assigning separate numbers for final decree proceedings that should be avoided. Issuing fresh notices to the defendants at each stage should also be avoided. The Code of Civil Procedure should provide for a continuous and seamless process from the stage of filing of suit to the stage of getting relief.*

30. *In money suits and other suits requiring a single decree, the process of suit should be a continuous process consisting of the first stage relating to determination of liability and then the second stage of execution and recovery, without any pause or stop or need for the plaintiff to initiate a separate proceedings for execution. In suits for partition and other suits involving declaration of the right and ascertainment/quantification of the relief, the process of the suit should be continuous, consisting of the first stage of determination and declaration of the right, second stage of ascertainment/division/quantification, **and the third stage of execution to give actual relief.**” (emphasis added)*

(ii) Aforesaid underlined portions of the judgment are those as relied upon by the plaintiffs, and the last line of para 30 is highlighted by this Court for making reference to the same in the subsequent paras of this judgment.

(iii) On behalf of the plaintiffs reliance is placed upon the observations made in paras 7, 17, 18.3 and 20 and 21 of the judgment in the case ***Shub Karan Bubna (supra)*** that it is held in this judgment that division by metes and bounds is only a ministerial act and that once the court passes a preliminary decree it is the duty of the court to ensure that parties get their shares on division of the properties, and therefore that it is only division by metes and bounds which results in a final decree, and that an order of sale which is passed on the property/properties being found not capable of division by metes and bounds will thus not be a final decree.

(iv) We are unable to agree with this argument urged on behalf of the plaintiffs because we do not find any observations of the Supreme Court in the case of ***Shub Karan Bubna (supra)*** which holds that an order of sale is not a final decree. There is not even a single line or a single observation of the Supreme Court in the case of ***Shub Karan Bubna (supra)*** that an order of sale, which is a deemed decree under Section 8 of the Partition Act, is only a preliminary decree and not a final decree in a partition suit. The law is that the observations which are made in a case have to be read in the context of facts of that case as held by the Supreme Court in the case of ***Padma Sundara Rao (Dead) and Others Vs. State of T.N. and Others (2002) 3 SCC 533*** and the relevant para of this judgment is para 9 which reads as under:-

*“9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington vs. British Railways Board* . Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.”*
(underlining added)

(v) The observations which are made by the Supreme Court in ***Shub Karan Bubna's*** case (***supra***) were essentially guided by the angst of the court as to how litigants in this country are harassed in partition suits because in many courts in many States after passing of the preliminary decree no dates are fixed and a party thereafter has to file an

application for seeking a final decree. In ***Shub Karan Bubna's*** case (*supra*) the issue which was decided by the Supreme Court was as to whether there was a limitation period for drawing up of a final decree after passing of the preliminary decree, and Supreme Court held that there is no such limitation period. It is for such reasons that the Supreme Court in different paras expressed its strong feelings as to how in partition suits there is unnecessary delay and that a successful plaintiff is not able to reap the benefits of the preliminary decree passed for partition holding such plaintiff entitle to a share in the joint properties. On account of such difficulties faced by litigants, the Supreme Court has suggested in terms of para 23 onwards of the judgment in ***Shub Karan Bubna's*** case (*supra*) that legislative changes are required so that litigants are not unnecessarily harassed and that there should be no requirement of separate/new proceedings being initiated as execution proceedings, and that execution proceedings must be only as continuation and extension of the suit and the decrees passed therein.

(vi) We would also like to note that in fact the argument urged on behalf of the plaintiffs would go against the observations made by the Supreme Court in para 30 of the judgment in the case of ***Shub Karan Bubna*** (*supra*) inasmuch as in para 30 the Supreme Court has clearly observed that there is indeed a stage of execution proceedings in partition suits for giving actual relief i.e execution proceedings are necessary for enforcing the reliefs granted by the final decree and once therefore execution proceedings are necessary and execution proceedings can only be of execution of a final decree, consequently the passing of a final decree is a *sine qua non* precondition for commencing of the execution proceedings, and that pursuant to such final decree there have still to be taken steps for enforcement of rights of the co-sharers with respect to the property/properties not in possession of co-sharers which are given to them under the final decree, and that such claims/rights would be enforced in execution proceedings. Therefore the very fact that in para 30 of its judgment Supreme Court has envisaged execution proceedings in partition suits, therefore the proceedings of sale which take place after passing of an order of sale which is a decree as per Section 8 of the Partition Act, such proceedings are really to enforce/execute through execution proceedings the rights given to the co-owners in the joint property/properties including by giving of

monetary value by sale of the joint property/properties pursuant to the order of sale passed under Section 8 of the Partition Act. No benefit therefore can be taken behalf of the plaintiffs of the observations of the Supreme Court in ***Shub Karan Bubna's*** case (*supra*), and which observations are not observations or ratio with regard to the issue as to whether an order of sale under Section 8 of the Partition Act is or is not a final decree in a partition suit since Supreme Court was not in any manner concerned, or nor has it at all decided in ***Shub Karan Bubna's*** case (*supra*), that whether or not order of sale passed under Section 8 of the Partition Act is or is not a final decree. Therefore the general observations made by the Supreme Court in ***Shub Karan Bubna's*** case (*supra*) would have no bearing for deciding the issue at hand.

15.(i) On behalf of the plaintiff it is then argued that an order of sale under Section 8 of the Partition Act though is a decree, but the same is only another preliminary decree, and that proceedings for sale of the co-owned property after passing an order under Section 8 of the Partition Act, are proceedings prior to passing of the final decree i.e proceedings of conducting the sale of the suit property are steps in aid to the final decree which would be passed after the sale of the property, and it is not that an order of sale is a final decree resulting that the sale proceedings have to take place in execution of the final decree. For so arguing on behalf of the plaintiff reliance is placed essentially upon the Division Bench judgment of this Court in the case of ***Sushil Kumar Gupta Vs. Smt. Prem Gupta & Ors.***2013 (135) DRJ 341 and the earlier Division Bench judgment of this Court in the case of ***K.N. Khanna Vs. B.K. Khanna*** 2000 (55) DRJ 544. The judgment in ***Sushil Kumar Gupta's*** case (*supra*) simply follows the ratio of the earlier judgment in the case of ***K.N. Khanna*** (*supra*). The aforesaid two judgments of two Division Bench judgments of this Court hold that proceedings which take place for sale of the property, after passing of the preliminary decree for partition, would not be steps post the final decree for execution but the procedure for sale of the property after passing of the preliminary decree are steps prior to drawing up of the final decree. The relevant paras of the judgment of the Division Bench in ***K.N. Khanna*** (*supra*) are paras, 40 and 41 and these paras read as under:-

“40. There is no manner of doubt that in a suit for partition after a preliminary decree is passed declaring rights, title or interest of the parties, which decree makes a provision for partition of the suit property by metes and bounds and of separate possession in terms of the rights declared under the said decree, which has to be treated as preliminary, further inquiry is required to be held to enable the Court to finally and conclusively determine rights of the parties by actually partitioning the said property by metes and bounds. In order to do so, usually the task is assigned to a Commissioner to suggest mode of partition, who usually suggests the mode and manner of dividing the property. On receipt of such a report and deciding objections of the parties, if any, the Court then proceeds to pass a final decree declaring the persons entitled to separate shares, which enable the parties thereafter to hold and enjoy the property separately. Such a division of the property has the effect of creation of an exclusive right of a person in that portion of the property, which falls to his share and extinguishes his right, title or interest in those portions, which fall the exclusive shares of the others. This decree of course would be covered by the definition of "instrument of partition", as defined in Clause (15) of Section 2 of Indian Stamp Act. "Instrument of partition" is defined therein to mean any instrument whereby co-owners of any property divide or agree to divide such property in severality, and include also a final order for effecting a partition passed by any Revenue Authority or any Civil Court and an award by an Arbitrator directing partition. In case partition is effected of a property even by an Arbitrator by his award, the same would fall in the definition of "instrument of partition". So also a decree of Civil Court affecting partition of the property would fall in the said definition and the same would be required to be stamped according to the provisions of Indian Stamp Act.

41. But it is not that every decree in a partition suit would be required to be drawn up on a stamp paper. Only those decrees will be required to be drawn up on a stamp paper, which divide any property in severality amongst co-owners. In the instant case neither by award made by C.K. Daphtary nor by order dated 15-4-1983 the property has been ordered to be divided or agreed to be divided in severality. Only a tentative arrangement was made for enjoying the property separately, which was only a temporary measure whereby the parties continued to be the joint owners of each and every part of the property though separately enjoying separate portions. The decree nowhere provided for separation or division of the property in severality since it was held that the property is incapable of being divided in two equal shares or that the division by metes and bounds was not possible. Therefore, the mode suggested was to sell the property and then divide sale proceeds in equal shares. Such an award or a decree would not come within the definition of "instrument of partition", pursuant to the said decree passed in the suit, in case the property is sold, the rights, title and interest of the appellant and the

respondents would come to an end, on sale deed being drawn and executed on a stamp paper, after the sale is confirmed by the Court. Only the said instrument of sale will be required to be stamped and thereafter got registered. Such a decree as was passed on 15-4-1983, is not required to be drawn on a stamp paper. Only such of the decrees are required to be drawn on a stamp paper, which allot and vest particular share in each co-sharer and not those decrees, which only make a provision for sale of the property. In later decrees only the instrument of sale would be required to be drawn on a stamp paper so as to vest exclusive rights in the property in favor of the auction purchaser.”

(ii) In our opinion the aforesaid observations run counter to the ratio of **Hasham Abbas's** case (*supra*) and would therefore have to be taken as overruled by the ratio of **Hasham Abbas's** case (*supra*). This Court would also with all humility independently disagree with the reasoning and conclusion given by the Division Bench in the case of **K.N. Khanna** (*supra*) inasmuch as the discussion, reasoning and conclusion do not deal with language of Section 2(15) of the Stamp Act as we have discussed above including of the said Section being in two parts and that with respect to both the parts of Section 2(15) of the Stamp Act (including of the second part which deals with a final decree of partition), there could have to take place further proceedings for enforcement of the shares given in one or more properties to the co-sharers in terms of the partition deed/decree for partition, but yet and merely because of the fact that further steps have to take place for enforcement of the rights under the partition deed/final decree of partition, that will not make the partition deed or the decree of partition not as a final partition and any less the subject matter of Section 2(15) of the Stamp Act. Once the deed of partition or the final decree of partition falls under Section 2(15) of the Stamp Act the same would also require non-judicial stamp duty in terms of Article 45 of the Schedule I of the Stamp Act, and which is an aspect discussed hereinafter.

(iii) Also we would like to respectfully state that the Division Bench in the case of **K.N. Khanna** (*supra*) case has wrongly co-related stamp duty payable on a sale deed with respect to a stamp duty payable on an Instrument of Partition which is subject matter of Section 2(15) of the Stamp Act, because stamp duty which is fixed on a sale deed is for a transfer of rights in a property, whereas the stamp duty which is fixed on an instrument of

partition, be it a deed of partition or a final decree of partition, is for declaring and determining the *inter se* rights of the co-sharers/joint owners in the joint or common properties which are subject matter of the deed of partition/final decree for partition. If a shareholder who is allotted a property of partition, when such a property would be sold, then the sale deed would have to bear a necessary non judicial stamp duty as per the Stamp Act but such non judicial stamp duty fixed on a sale deed cannot be confused with the stamp duty payable on the deed of partition pursuant to which a co-sharer/joint owner gets ownership of property or properties as per his share in terms of the partition deed or a final decree of partition. We therefore are of the opinion that the ratio of the judgment of the Division Bench of this Court in **K.N. Khanna's** case (*supra*) does not lay down the correct position of law, and would stand overruled in view of the discussion, reasoning and conclusions given in this present judgment.

16.(i) On the aspect of whether a final decree is an 'Instrument of Partition', the first part of Section 2(15) of the Stamp Act defining an 'Instrument of Partition' will be relevant to be noted for being compared, contrasted and understood with the language as found in the second part of Section 2(15) of the Stamp Act. Whereas the first part of Section 2(15) of the Stamp Act deals with a partition deed being entered into between the co-owners resulting in joint property/properties being divided by giving the properties or shares in the properties to different co-owners/joint owners (and such an act of entering into a partition deed being a consensual act of the co-owners/joint owners), the second part of Section 2(15) of the Stamp Act concerns itself with the situation when there is no agreement between the joint owners/co-owners of the joint property/properties as to how such properties have to be partitioned in terms of a partition deed, and the parties/co-owners thus approach a court or arbitrator for seeking partition, and in such proceedings a civil court or arbitrator passes a final decree for partitioning/dividing the joint property/properties between different joint owners/co-owners. (Reference hereafter to civil court will include an arbitrator.) A decree passed by a civil court is subject matter of second part of Section 2(15) of the Stamp Act as distinguished from a voluntary and consensual partition deed entered into between the co-owners. In other words, whereas the first part of Section 2(15) of the Stamp Act deals with an agreement voluntarily

entered into between the co-owners resulting in the joint property/properties being partitioned as stated in the partition deed, the second part of Section 2(15) of the Stamp Act deals with the situation/position that on account of parties not agreeing to partitioning of the joint property/properties by entering into a partition deed, therefore the civil court is approached and which divides the joint property/properties between the joint owners/co-owners by passing of a final decree of partition. However it needs to be noted that both the first and the second parts of Section 2(15) of the Stamp Act, with the first part dealing with partition effected in terms of an agreement (partition deed) between the parties and the second part being the court partitioning the joint property/properties by passing of a final decree of partition on account of lack of agreement between the co-owners/joint owners forcing one or more co-owners to approach the civil court seeking partition, are two parts with the same end result of finally dividing the joint property/properties between the co-owners/joint owners. Therefore, firstly it has to be held that what is the meaning of partition in the first part of Section 2(15) of the Stamp Act will also have to be meaning given to this expression of partition found in the second part of Section 2(15) of the Stamp Act.

(ii) In both the situations, firstly of whenever a partition deed is entered into or secondly of when a final decree of partition is passed by a civil court in a suit for partition, there would in many cases where there would exist a situation of existence of many shareholders and many properties, resulting in the position that one or more shareholders would have to get possession of whole or part of one or more properties from the one or more co-sharers and simultaneously one or more co-sharers would also have to give whole or part of joint properties with him/them to one or more of the other co-sharers who get such property/properties in physical possession of the other co-owners. When the case is of a partition deed being entered into which requires one or more co-owners to transfer possession of whole or part of one or more joint property/properties to one or more other co-owners, then this act of transferring possession of whole or part of joint property/properties is an act which has to take place after the entering into a deed of partition and in furtherance of the terms of the partition deed. In such cases a partition deed which is entered into is drawn up on a non-judicial

stamp paper of the value specified in Article 45 of Schedule I of the Stamp Act, and thereafter because a shareholder or shareholders fail to get their properties or physical shares in the joint properties on account of refusal by a coparcener to perform his obligations under the deed of partition, then the aggrieved shareholder or shareholders will approach the civil court by filing a suit to enforce his/their rights in terms of the partition deed. In the other situation where the partition effected is by means of passing of a final decree in a suit for partition then obviously it is in execution proceedings that this final decree is executed/enforced by one or more parties to the suit for such one or more co-owners to get possession of their respective shares in one or more joint properties of which they are not in possession because the properties in which such party/parties have got shares are in the possession of the other co-owners i.e execution proceedings have to be filed to take possession of the physical shares (in whole or part of one or more of the joint property/properties) which have fallen to the shares of such person(s) in the final decree for partition. Since a deed of partition has to be stamped as per Article 45 of Schedule I of the Stamp Act, therefore similarly a decree for partition which is passed by a civil court, which is of the same nature as the a partition deed, has also to be necessarily stamped as per Article 45 of Schedule I of the Stamp Act. This is clear, not only from the discussion given hereinabove, but even on a plain reading of both the parts of Section 2(15) of the Stamp Act. Putting it in other words, whether the document is a deed of partition or it is a decree of partition, both of the documents have to be stamped in accordance with Article 45 of the Schedule I of the Stamp Act and merely because further acts are required for enforcing rights under the partition deed or the final decree of partition, will not mean that such deed of partition or the final decree of partition is not an 'Instrument of Partition' as envisaged in Section 2(15) of the Stamp Act.

(iii) There is yet one more reason for holding that an order of sale is a final decree of partition being an 'Instrument of Partition' under Section 2(15) of the Stamp Act. This reason is that in the first part of the definition of 'Instrument of Partition' dealing with a Partition Deed entered into between the parties we find the words 'divide or agree to divide'. The meaning of the word 'divide' is different than the words 'agree to divide'. Whereas divide or actual division is to allot and give possession of a specific share of a

property or a property itself to a person, the words 'agree to divide' will relate to something to be done in the future. The partition deed by which parties only 'agree to divide' means that in future acts will have to take place for implementation or execution of the terms of the partition deed with respect to the property or properties falling to one or more shareholders. Thus even if physical possession is yet to be delivered in future after the partition deed is entered into but yet such a partition deed is an 'Instrument of Partition' as per Section 2(15) of the Stamp Act, then therefore is no reason to hold that a final decree of partition which is passed by a civil court which will require further implementation in execution for giving physical possession or giving a monetary value to a shareholder by selling the property, such a final decree will not be an 'Instrument of Partition'. In fact the observation in para 18 of *Hasham Abbas's* case (*supra*) supports this conclusion as in this para 18 it is clearly stated that a final decree of partition is required to be duly stamped.

17. We have therefore no doubt whatsoever that Section 2(15) of the Stamp Act will result in the requirement of non-judicial stamp duty being required to be paid in terms of Article 45 of Schedule I of the Stamp Act on a final decree of partition even though further acts after passing of the final decree are required to be taken for enforcement of the rights of the co-owners including of sale of the property/properties.

18. I therefore answer the reference by holding that order of sale which is passed in a partition suit is a final decree and that this final decree is a final order of partition under Section 2(15) of the Stamp Act with the consequence that such final order/decreed of partition will have to be stamped as per Article 45 of Schedule I of the Stamp Act. In proceedings for enforcement of rights under a final decree of partition, including of one or more co-sharers seeking possession of one or more joint properties; whether wholly or in part; the same will be by execution proceedings of the final decree of partition. The proceedings and steps for sale of the joint property/properties as ordered in terms of order passed under Section 8 of the Partition Act will be steps in execution of the final decree and would not be steps prior to the passing of the final decree. An order of sale passed under Section 8 of the Partition Act is not a preliminary decree but is a

final decree under Section 2(2) CPC as no further rights are required to be adjudicated but the declared rights only have to be enforced thereafter and which enforcement would be in execution proceedings of the final decree for partition being an order of sale of the joint property/properties.

VALMIKI J. MEHTA, J

MAY 11, 2018

R.K.GAUBA, J

1. The question of law referred to the larger bench for consideration and answer, based on the doubts expressed by the learned referral Judge as to the correctness of the law declared previously in the judgments of division benches of this court in cases reported as *K.N. Khanna v. B.K Khanna* 2000 (87) DLT 286(DB) and *Sushil Kumar Gupta v. Smt. Prem Gupta EFA (OS) No. 6/2012* decided on 31.01.2013, is formulated in (para 10 of) the referral order dated 27.11.2017 thus:-

“(W)hether proceedings for sale of the property can take place only in the execution proceedings of a final decree passed as per Section 8 of the Partition Act or that proceedings for the sale of the property are also proceedings prior to passing of a final decree in the suit. These issues acquire importance in view of the fact that Government revenue is involved in preparation of a final decree which is taken as an instrument of partition as per Section 2(15) of the Stamp Act. At the risk of repetition it is stated that the issue to be decided by the Full Bench would be as to whether a preliminary decree only decides the shares of the parties in the property or properties sought to be partitioned or that even after declaring shares of the parties as per a preliminary decree under Order XX Rule 18 CPC, whether the further steps taken after passing of such preliminary decree as regards the sale of the property/properties, whether would such steps be steps only prior to a final decree”.

2. In the separate opinion recorded by my esteemed learned brother Valmiki J. Mehta, J., the question of law has been re-cast thus:-

“... when an order for sale of the property/properties is passed in a partition suit, whether such an order of sale is a final decree of partition or is just another preliminary decree passed after passing of the earlier preliminary decree declaring the shares of the parties in the properties of the partition suit.”

3. The separate opinion penned by Valmiki. J. Mehta, J. (with which S. Ravindra Bhat, J. concurs by his separate opinion) proposes to answer the reference (as per draft which was circulated) by holding that:-

“... order of sale which is passed in a partition suit is a final decree and that this final decree is a final order of partition under Section 2(15) of the Stamp Act with the consequence that such final order/decreed of partition will have to be stamped as per Article 45 of Schedule I of the Stamp Act. In proceedings for enforcement of rights under a final decree of partition, including of one or more co-sharers seeking possession of one or more joint properties; whether wholly or in part; the same will be by execution proceedings of the final decree of partition. The proceedings and steps for sale of the joint property/properties as ordered in terms of order passed under Section 8 of the Partition Act will be steps in execution of the final decree and would not be steps prior to the passing of the final decree. An order of sale passed under Section 8 of the Partition Act is not a preliminary decree but is a final decree under Section 2(2) CPC as no further rights are required to be adjudicated but the declared rights only have to be enforced thereafter and which enforcement would be in execution proceedings of the final decree of partition being an order of sale of the joint property/properties.”

4. While answering the reference in above terms, the separate opinion seeks to overrule the decision in *K.N. Khanna* (supra) observing, *inter alia*, that it had been rendered overlooking the provision contained in Section 2(15) of Indian Stamp Act, 1899 and that merely because further steps have to be taken for enforcement of the shares will not make the partition deed or the decree of partition “any less”.

5. I agree with my learned brothers and, thus, join in the conclusion that an order of sale of property is a decree in the sense the sale can happen only in the execution proceedings. In fact, the law on this aspect is already settled. In *Hasham Abbas Sayyad Vs. Usman Abbas Sayyad & Ors*, (2007) 2 SCC 355, it has been held in unequivocal terms that a property can be put to sale only in execution of a decree and without “a final decree proceeding” being drawn, the court cannot put the property “on auction sale”,

similar view having also been taken in *Bikoba Deora Gaikwad and Ors. Vs. Hirabai Marutirao Ghorgare & Ors.*, (2008) 8 SCC 198. However, lest this be misconstrued or creates confusion, it has to be clarified that the order to sell the property so as to effect partition by distribution of sale proceeds is only a decree with finality [*Venkata Reddy vs. Pethi Reddy*, AIR 1963 SC 992; *Bikoba Deora Gaikwad Vs. Hirabai Marutirao Ghorgare & Ors.*, (2008) 8 SCC 198] and one that is executable but need not necessarily always be the last and final decree that disposes of the suit in entirety.

6. With respect, I am unable to agree with above quoted reasoning and conclusion regarding application of Section 2(15) Stamp Act, 1899 to the order of sale. In my view, the error lies in equating the order to sell the property with a partition deed and treating the decree directing sale of property as the decree (or instrument) of partition. I endeavour to give my reasons for this partial dissent hereinafter.

7. Though in the afore-mentioned separate opinion, the relevant statutory provisions of law have been quoted and development of law on the subject of litigation relating to partition has been traced at some length, I deem it proper to add meat to the matter by also taking note of the factual matrix from which the issues arise, since that, in my opinion, would aid and assist the Court in bearing in mind numerous possible contingencies that may come up and bring challenge before the Court for complete and effectual resolution of the dispute of such nature.

8. The civil suit on the file of proceedings relating to which the referral order was recorded was instituted in August, 2005 for the reliefs of declaration, partition, injunction – prohibitory and mandatory - and rendition of accounts. Though Municipal Corporation of Delhi (MCD) and North Delhi Power Limited (NDPL) were also initially impleaded as parties (third and fourth defendants respectively), they were later dropped from the fray. The prime reliefs sought concerned property no. 6/1 Roop Nagar, Delhi – 110007 (for short, “the Delhi property”), admittedly owned by late Shri Hardwari Lal.

9. The dispute for some time (after amendment of plaint on 18.10.2005) also related to another immovable property, i.e., No.1432, Sector 1, HUDA, Rohtak in Haryana (for short “the Rohtak property”), the claim in such regard was later abandoned on compromise brought before the court on 07.07.2008.

10. The private parties shown in the array at the beginning are described as successors-in-interest of the said late Shri Hardwari Lal. As per the pleadings, the first plaintiff (Ms. Indu Singh), the first defendant (Ms. Prem Chaudhary) and second defendant (Ms. Usha Chaudhary) are (were) daughters of late Shri Hardwari Lal and his wife Smt. Vidyavati, the second plaintiff (Ms. Deepshikha) being the grand-daughter of said late Sh. Hardwari Lal and his wife Smt. Vidyavati. The second defendant (a spinster) died on 08.06.2007 and her name stood deleted, her estate statedly devolving on remaining three persons as aforesaid.

11. It is not in dispute that late Shri Hardwari Lal and his wife Smt. Vidyavati died intestate in 1997 and 2002 respectively. They had four children including three daughters mentioned above and a son Krishna Chaudhary, who concededly had pre-deceased them, the second plaintiff being daughter of said son, she having married in 1981 and shifted to her matrimonial home. It was the case of the plaintiffs that the Delhi property comprises of a super-structure built upon a plot of land which was purchased by late Shri Hardwari Lal in 1954 from his own funds, he having developed it in a manner so as to provide four units, two each on the ground floor and first floor respectively, each comprising of two bed rooms, one kitchen and one bath room, the first plaintiff, the first defendant and the second defendant being in occupation of different portions of the said property, one unit (at ground floor) statedly lying vacant.

12. The Rohtak property is described as a residential property built over a plot of land admeasuring 210 square metres by late Shri Hardwari Lal. It appears that after the death of Shri Hardwari Lal, the Rohtak property was sold, for consideration, by the second defendant by executing and getting registered a sale deed dated 12.06.2000 in favour of fifth and sixth defendants (Dharam Singh & Amit Singh) - renumbered as third and fourth defendants respectively in terms of order dated 24.08.2006, on the strength of power of attorney dated 15.10.99 registered with Sub-Registrar, Rohtak.

13. It appears that by reply dated 19.07.2005 to the legal notice dated 11.07.2005 issued at the instance of the second plaintiff, the first defendant had revealed her claim that she had become the owner of the Delhi property, the title therein having been transferred in her favour by a Gift Deed executed on 10.07.2000 by late Smt. Vidyavati.

14. It was the case of the plaintiffs that after the death of Shri Hardwari Lal in 1997, his estate had devolved upon his wife, three daughters and daughter of the pre-deceased son to the extent of 1/5th each and further that Smt. Vidyavati had held the estate in fiduciary capacity and also could not have transferred any of the assets in the manner purported to have been done, the Gift Deed having been obtained by playing a fraud and exercise of undue influence. It was further the case of the plaintiffs that after the death of Smt. Vidyavati, the entire estate of late Shri Hardwari Lal had devolved in equal shares (1/4th each) in favour of the two plaintiffs and first two defendants.

15. As per the averments in the plaint, the estate left behind by Shri Hardwari Lal and Smt. Vidyavati, also included certain moveable properties, particulars whereof were set out in Annexure 'A' to the plaint, reference being made to certain bank accounts of Smt. Vidyavati and later of the second defendant (who subsequently died).

16. Thus, by the amended plaint (dated 18.10.2005), the plaintiffs, *inter alia*, prayed for declaration to the effect that the Gift Deed dated 10.07.2000 in respect of the Delhi property in favour of first defendant is void and for an order of cancellation of Sale Deed dated 12.06.2000 in respect of Rohtak property in favour of third and fourth defendants. Besides seeking other reliefs in the nature of injunction, the plaintiffs also sought decree of partition and rendition of accounts, the relevant prayer clauses reading as under:-

“(e). A decree for partition be passed with regard to property no. 6/1, Roop Nagar, Delhi-110007 and a Local Commissioner be appointed to divide the property by metes and bounds or in the alternative, by selling the same and dividing the sale proceeds thereof among the legal heirs of Shri Hardwari Lal/Smt. Vidyavati.

(f). A decree for Rendition of Account be also passed in favour of the Plaintiffs and against the Defendants with regard to the assets/Bank Accounts, which the Defendant no.1 has been operating and/or has been in control after the demise of the parents/grandparents of the plaintiffs.”

17. The suit was contested by the first and second defendants, they submitting their separate written statements, as also by the other defendants by their respective pleadings. Issues were framed on 14.11.2006 to address the questions, *inter alia*, as to whether gift deed dated 10.07.2000 had been obtained by exercise of undue influence and playing fraud or whether it had been got registered by impersonation; as to whether Smt.

Vidyavati was the absolute owner of the Delhi property or held it *benami* or in fiduciary capacity on behalf of her husband late Shri Hardwari Lal; as to whether the plaintiffs and the first two defendants are joint owners of the properties in dispute; as to whether the Delhi property can be partitioned by metes and bounds and, if so, the extent of share of each party.

18. The initial proceedings on the file of the civil suit would indicate efforts were made to resolve the dispute amicably through mediation but with no fruitful results. On 8.06.2007, the second defendant died. While the case was at the stage of evidence, the parties jointly moved an application under Order I Rule 10 of the Code of Civil Procedure, 1908 (CPC) on 30.04.2008 for impleading Mr. Amit Singh (son of the first plaintiff) as a party defendant (fifth defendant) which prayer was granted. At the same time, the parties informed the Court that they had resolved the dispute amicably.

19. Application under Order XXII Rule 4 CPC (IA No. 5588/2008) moved against the backdrop of death of second defendant on 08.06.2007 came up before the Court on 07.07.2008. The submission was that the second defendant, being unmarried, had left behind no legal heirs, she having been survived by the plaintiffs and the first defendant who were already on record and, thus, there was no need for any other party to be substituted as legal representative. There being no contest, the submissions were taken on record.

20. On 07.07.2008, the application under Order XXIII Rule 3 CPC (IA No. 5208/2008) also came up for consideration, it having been moved by the plaintiffs and supported by the first defendant as indeed by the fifth defendant Amit Singh (son of the first plaintiff). The terms of settlement as indicated in the said application would read thus:-

“5. The parties have arrived at a compromise the terms whereof are as under:-

(a) 6/1, Roop Nagar, Delhi

This property shall be divided in equal shares i.e. 1/3rd share each between the Plaintiff No.1, Plaintiff No.2 and Defendant No.1.

(b) 1432, Sector 1, HUDA, Rohtak, Haryana.

The said property already stand sold to Defendant No.5 and 6 and the Plaintiffs shall not claim any right in the said property.

6. As regards the bank account and other movable assets of Smt. Vidyavati and Ms. Usha Chowdhury, the same shall exclusively belong to Defendant No.1.

7. Plaintiff No.1 for her son and Defendant No.1 will clear the dues of water and electricity and for their respective portions and furnish proof thereof.

8. The Plaintiff No.1 and 2 have filed a criminal complaint with regard to property No.1432, Sector 1, HUDA, Rohtak, Haryana. The said Criminal complaint will be withdrawn as having being (sic) made due to misunderstanding between the parties.

9. The parties further agree that the property bearing No.6/1, Roop Nagar, Delhi is not capable of partition by metes and bounds and therefore they agree to sell the same and shall divide the sale proceeds thereof in equal shares as mentioned above. It is also agreed between the parties that each of the parties shall be entitled to find a buyer within a period of 6 months from the date of recording of compromise in the Court. In case of any disagreement on the sale price or other terms of the sale, the parties shall however be entitled to approach this Hon'ble Court for appointment of a Court Commissioner for carrying out the sale of the said property and for dividing the sale proceeds thereof as stated above. The parties further agree that the period of six months mentioned in this para can be mutually extended by the parties.

10. It is also agreed between the parties that the share of Mrs. Indu Singh (Plaintiff No.1) in the said immovable property shall be given to her son, Amit Singh as per her wish and who will be impleaded as a party to the present suit, before the preliminary decree is passed as per the compromise between the parties.

11. It is agreed between the parties that Plaintiff No.1 and her son Mr. Amit Singh and his family who is claiming possession through Plaintiff No.1, would vacate the portion of the property in their occupation as soon as the buyer of the property is finalized by the parties. The Defendant No.1 shall also vacate the premises under her occupation on or before the sale of the property is finalized.

12. it is also agreed between the parties that the sale deed shall be executed by Plaintiff Nos.1 and 2 and the defendant no.1 in favour of the buyer.

13. It is also agreed between the parties that Mr. Amit Singh and his family and the Defendant No.1 shall continue to reside and occupy their respective portion of the property till the said property is sold as stated above. It is also agreed between the parties that status quo with regard to the remaining portion of the property shall be maintained by the parties. The parties however, agree that the lock placed on the portion in occupation of Defendant No.2 before her death shall be opened so that Defendant No.1 has access to her movable assets lying therein. The same

shall be opened forthwith on making statements in the Court and keys handed over by the plaintiffs to defendant No.1 in the Court itself."

(emphasis supplied)

21. The learned single Judge, by her order dated 07.07.2008, accepted the prayer in the aforesaid application and passed "*a preliminary decree*" in the above terms directing a decree sheet to be drawn up accordingly, the keys of the portion mentioned in para 13 of the above-quoted terms to be handed over by the counsel for the plaintiffs to the counsel for the first defendant.

22. On 26.03.2009, on the application (IA No. 13509/2008) of the first plaintiff, the preliminary decree passed by consent on 07.07.2008 was modified but the said order was set aside by a division bench in FAO 143/2009, by judgment dated 30.11.2009. The judgment dated 30.11.2009 of the division bench, in turn, was challenged by special leave petition (Civil) No. 5998/2010 (SLP), which came up before the Supreme Court on 12th March, 2010 when the operation and implementation of the said order dated 30.11.2009 was stayed.

23. The above said SLP, taken out by the first plaintiff was decided by the Supreme Court by order dated 05.07.2013, the relevant and operative paras whereof, again by consent of the parties, would read thus:

"12. We are satisfied that the agreed terms are for the benefit of the parties. We are happy to note that both mother and son showed maturity for amicable resolution of the dispute.

13. We may note that according to the agreed terms now before this Court, clause 10 of the Compromise Terms, which has been noted above, is agreed to be substituted by the following: "That the share of Ms. Indu Singh in the said immovable property shall be divided between Indu Singh and her son Amit Singh in the ratio of 36.5% and 63.5% respectively" Similarly, clause 12 of the Compromise Terms is agreed to be substituted as follows:

"That the sale deed shall be executed by plaintiffs 1 and 2 and the defendant No. 1 in favour of the buyer. It is also agreed that the defendant Amit Singh will be the confirming party to the sale deed."

14. All other terms and conditions of the compromise, as extracted in the Preliminary Decree dated July 7, 2008, remain as it is without any alteration, modification or variation.

15. We direct that clauses 10 and 12 of the Compromise Terms in the preliminary decree shall now stand substituted by the clauses which have been reproduced in para 13 above. The order of the learned Single Judge dated March 26, 2009 and the order of the Division Bench dated November 30, 2009 stand modified accordingly.

15A. The High Court shall now proceed with the matter further appropriately.

16. Appeal is disposed of as above with no order as to costs.
(emphasis supplied)

24. The civil suit had earlier come up before the learned single judge on the original side of this court on 14.02.2013 when the stay against the operation of the order dated 30.11.2009 of the division bench was still in operation. The learned Judge noted that an application (IA No. 16585/2009) under Section 151 CPC filed by the second plaintiff was pending, the prayer in the application being for appointment of Court Commissioner for sale of the subject property (the Delhi property) and for division of the sale proceeds as per the compromise decree dated 07.07.2008. The learned Judge dismissed the application by his order dated 14.02.2013 observing that it was misconceived and further that :-

“The decree passed by this Court is a final one for partition of property no. 6/1, Roop Nagar, Delhi by sale and distribution of sale proceeds and once that decree attains finality, the remedy if any for implementation thereof is by applying for execution and not by way of application in the suit as has been preferred.”

(emphasis supplied)

25. The suit, however, continued to remain pending and was taken up again on 30.05.2014 in the context of another application (IA No. 11209/2014) moved in the wake of order dated 05.07.2013 of the Supreme Court, as referred to above, by the second plaintiff under Section 151 CPC with fresh prayer for appointment of Court Commissioner and for:

“specific directions with regard to the sale of the property at 6/1, Roop Nagar, Delhi and the sale proceeds so realized be divided as per the order dated 07.07.2008 read with order dated 05.07.2013 of the Hon'ble Supreme Court.”

(emphasis supplied)

26. By order dated 14.11.2014, passed on the above-said application, a retired district judge was appointed as Court Commissioner, the parties having been directed to inform him of the suitable buyer, the Court Commissioner thereupon to consider the offer of “highest price”. The case kept hanging fire at that stage with no meaningful progress made for sale of the property. On 08.02.2016, the learned single judge in *seisin* of the matter, recorded that the suit had been “disposed of on 07.07.2008 by a compromise decree”, the proceedings being undertaken in the file being “relief in the nature of execution proceedings”, the parties seeking further directions for selling the property by public auction and consequently “the suit” being retained in the Court. Certain further directions for attempt to sell the property were given, by order dated 16.03.2016, on the joint application (IA No. 25139/2015), the court having been informed that the parties had entered jointly into an agreement to sell with three persons (two real estate developers and an individual) for a total consideration of ₹27 crore, out of which ₹2.7 crore have been received as earnest money equally by co-sharers, the said other party intending to purchase having made defaults and consequently the earnest money having been forfeited, the agreement to sell being terminated.

27. By order dated 16.03.2006, the court issued notices to the agreement-purchasers but made it clear, upon their appearance on 22.04.2016, that the purpose of notice requiring their presence was only to inquire as to whether they were still interested in completing the transaction. At the instance of the said third party (the agreement-purchasers), the matter was adjourned on same dates, it having been indicated that further payments pursuant to such agreement would be made by deposit in the Court.

28. It is against the above backdrop that the matter was before the Court on 12.07.2016 when the following order was recorded:

“IA No.7970/2016 (of the plaintiffs no.1&2 and defendant no.1 for directions to the Court Commissioner to sell the property).

1. In this suit for partition of property no.6/1, Roop Nagar, Delhi – 110007, as far back as in 7th July, 2008 a preliminary decree for partition was passed in accordance with the compromise arrived at between the parties. As per the said compromise, the parties had inter alia agreed to sale of the property and for distribution of sale proceeds as provided therein.

2. Thereafter the proceedings have been pending though no steps for a final decree were taken by the parties. On the contrary the parties first attempted to sell the property themselves and thereafter applied to this Court for appointment of a Court Commissioner for sale of the property. However it appears that after the order dated 14th November, 2014 of appointment of Court Commissioner, the parties again tried to sell the property themselves but remained unsuccessful.
3. Now this application has been filed for directions to the Court Commissioner to sell the property.
4. What the plaintiffs are wanting this Court to do is to execute a preliminary decree and which the senior counsel for the plaintiffs/applicants is unable to explain, how is it possible in law. The only step which remains to be taken in this proceeding is passing of a final decree if so desired by the parties and the parties would be required to pay the requisite Stamp Duty on the said final decree and only thereafter the parties can, in accordance with the final decree, seek execution thereof. No execution as is sought to be effected, without passing of the final decree is possible.
5. On enquiry the senior counsel for the plaintiffs/applicants and the counsel for the defendant no.5 appearing on advance notice state that the final decree for partition in terms of the preliminary decree as modified by the Supreme Court vide order dated 5th July, 2013 be passed.
6. It is ordered accordingly. The parties to bear their own costs.
7. Decree sheet be prepared.
8. The Stamp Duty payable on the decree sheet be computed and informed to the parties to enable them to pay the same.
9. Only thereafter can the parties, if desire the assistance of the Court in executing the same, would be entitled to apply to this Court for execution.
10. The suit is disposed of.
11. The date of 5th September, 2016 fixed in the suit is cancelled.”

(emphasis supplied)

29. In the wake of the afore-mentioned order dated 12.07.2016, an application (IA No. 16233/2016) was jointly moved by the two plaintiffs and the first defendant seeking a direction to the registry to prepare a decree sheet as per the valuation given by the applicants. It appears that the registry had issued notice to the collector to submit a valuation report but there had been no compliance made thereto. The applicants sought to invoke the procedure prescribed in the Court Fees Act, 1870 as applicable to proceedings for probate or letters of administration. The prayer to that effect was declined by order dated 02.01.2017 but a direction was given for notice to be issued to Chief Controlling

Revenue Authority (CCRA)/Collector/Sub Divisional Magistrate (SDM) concerned for submission of the valuation report to the court within two weeks.

30. The record would show that, on 17.05.2017, valuation report in respect of the Delhi property was submitted by SDM, Civil Lines indicating it to be ₹ 12,66,14,000/- (Rupees Twelve Crore Sixty Six Lakhs Fourteen Thousand), as on 12.07.2016, it being based on circle rate dated 23.09.2013.

31. The parties then moved another application (IA No. 6541/2017) under Section 151 CPC seeking a direction to the Administrative Officer in the registry to draw up the decree in terms of the order dated 07.07.2008, as modified by the Hon'ble Supreme Court vide order dated 05.07.2013, "*without any requirement of deposit of stamp duty*", placing reliance in this context on ruling of this Court in *Sushil Kumar Gupta* (supra) and a decision of a learned single Judge of this Court in *Radhesh Singh vs. Vineet Singh & Ors. 214 (2014) DLT 305*, the averments being that the decree passed in the case "*is not a Partition Decree and is only a Decree of Declaration*", such decree "*not dividing the property by metes and bounds*", there being "*no division of the suit property*", the rights, title and interest of the parties in the property to be sold to "*come to an end on the sale deed being drawn and executed on a stamp paper*". The referral has come up in the context of such prayer of the parties.

32. The separate opinion penned by esteemed brother Valmiki J. Mehta, J. traces the history of law governing the suits for partition at great length taking note, *inter alia*, of not only the commonly understood meaning of the expression "*partition*" and as to how the joint properties held by Hindu Undivided Family (HUF) would be governed under the personal law, but also the absence of any statutory provision facilitating "*sale*" as the mode of partition till the enactment of the Partition Act, 1893 referring, in the same context, to the guidance provided by the Code of Civil Procedure, 1908 (CPC) by the provisions particularly contained in Order XX Rule 18 and Order XXVI Rule 14.

33. It may be noted here that the law envisages partition of property that may be an estate which is subject to payment of revenue to the government or one that may not be so subject to payment of revenue to the government. The issue of partition of the former category (*i.e.*, estate subject to payment of revenue to the government) is governed by a

separate procedure as provided in Section 54 read with Order XX Rule 18 (1) CPC and the issue under reference has no connection therewith. In the context of the second category (*i.e.*, property which is not assessed to the payment of revenue to the government), the provisions contained in CPC provide guidance through Order XX Rule 18(2) and two rules of Order XXVI.

34. Before grappling with the intricate questions involved, it would be advantageous to bear in mind the broad contours of a *lis* relating to “partition” and for this it is apt to quote Supreme Court in *Shub Karan Bubna v. Sita Saran Bubna*, (2009) 9 SCC 689 as under:

“5. “Partition” is a redistribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty.

6. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. “Separation of share” is a species of “partition”. When all co-owners get separated, it is a partition. Separation of share(s) refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother.”

(emphasis supplied)

35. Clearly, to “partition” means “to divide”; it is an act of cleaving or splitting what is one into more than one whereupon each separated part vests in different person.

36. The Supreme Court in *Shub Karan Bubna* (supra) lamented that the existing civil procedure providing for a “pause” between a “decree and execution”, wherein the stage of execution is generally “considered to be ministerial functions”, focuses on “disposal of cases” and not on “early and easy securement of relief” and suggested a debate for legislative action recording that there is a need for “a conceptual change” since a litigant

coming to the court “is not interested in receiving a paper decree when he succeeds in establishing his case” his expectation being to secure “relief”, observing thus:

“29. The present system involving a proceeding for declaration of the right, a separate proceeding for quantification or ascertainment of relief, and another separate proceeding for enforcement of the decree to secure the relief, is outmoded and unsuited for present requirements. If there is a practice of assigning separate numbers for final decree proceedings, that should be avoided. Issuing fresh notices to the defendants at each stage should also be avoided. The Code of Civil Procedure should provide for a continuous and seamless process from the stage of filing of suit to the stage of getting relief.

In money suits and other suits requiring a single decree, the process of suit should be a continuous process consisting of the first stage relating to determination of liability and then the second stage of execution and recovery, without any pause or stop or need for the plaintiff to initiate a separate proceedings for execution. In suits for partition and other suits involving declaration of the right and ascertainment/quantification of the relief, the process of the suit should be continuous, consisting of the first stage of determination and declaration of the right, second stage of ascertainment/division/quantification, and the third stage of execution to give actual relief.”

(emphasis supplied)

37. But then, the above views suggest reforms which have not yet been introduced by the legislature. The issues at hand need consideration for solutions to be found within the existing framework of law though in the particular context of suits for partition with an acute eye to ensure if the proposed answer to the reference would facilitate seamless process for the litigating parties right through to the stage of “relief” they seek and not add more “pauses”. Further, one of the crucial concerns indicated in the referral order is securing the interest of revenue. It needs to be reassured that the interest of revenue is protected by the proposed view rather than working to the contrary.

38. It is pertinent to mention here that prior to the enactment of Code of Civil Procedure, 1908, the procedure for civil litigation was governed by the Code of Civil Procedure, 1882 wherein the definition of the expression “decree”, shorn of what is unnecessary, rendered it “*the formal expression of an adjudication upon any right claimed, or defence set up, in a civil court when such adjudication, so far as regards the*

Court expressing it, decided the suit or appeal....”. The said Code (of 1882) contained a separate chapter (Chapter XXVI) on the subject “*Of Commissions*” which, in Part – D, made provision for issuance of “*Commission to make Partition*”, containing Section 396 which read thus:-

“396. Commission to make partition of nonrevenue-paying immoveable property. - In any suit in which the partition of immoveable property not paying revenue to Government appears to the Court to be necessary, the Court, after ascertaining the several parties interested in such property and their several rights therein, may issue a commission to such persons as it thinks fit to make a partition according to such rights.”

(emphasis supplied)

39. Since reference to another provision (Section 310) of the Code of Civil Procedure, 1882 would occur hereinafter, it may be noted that it pertained to the Chapter on Execution of Decrees in the context of sale of undivided immoveable property and read thus:-

“310. When the property sold in execution of a decree is a share of undivided immoveable property, and two or more persons of which one is a co-sharer, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the co-sharer.”

40. The Partition Act, 1893 was enacted “*to amend the law relating to partition*”, the Statement of Objects and Reasons, *inter alia*, stating thus:-

“Statement of Objects and Reasons
The present statutory law on the subject of partition, apart from various local laws dealing with the partition of land paying revenue to Government, is contained in sections 265 and 396 of the Code of Civil Procedure. Section 265 simply enacts that the partition or separation of a revenue-paying estate shall be made only by the Collector, and need not, therefore, be noticed further, as the present Bill leaves untouched all local laws dealing with the partition of such property. Section 396 lays down the procedure which should be adopted in the partition of lands not paying revenue to Government. That section, however, only authorises the court to divide the property, and in some exceptional cases where an equal division is not practicable to award a money compensation for the purpose of equalising the value of the shares. But as the law now stands, the court must give a share to each of the parties and cannot direct a sale and division of the proceeds in any case whatever. Instances, however, occasionally occur where there are inseparable 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 in this country to their landed possession, it is proposed to make the consent of 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 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, Civil Procedure Code. ...”

(emphasis supplied)

41. The relevant provisions of the Partition Act may be extracted to understand their import and effect:

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 of 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.

3. Procedure when sharer undertakes to buy.—

(1) If, in any case in which the court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the court shall 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 that behalf.

(2) If two or more shareholders severally apply for leave to buy as provided in sub-section (1), the court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the court.

(3) If no such shareholder is willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incident to the application or applications.

4. Partition suit by transferee of share in dwelling-house.—

(4) 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 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.

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.

(emphasis supplied)

42. As is clear from the Statement of Objects and Reasons quoted earlier, the Partition Act was never envisaged to be applied to all cases of partition of non-revenue paying estates. It was meant to have limited application to such cases where one or more of the shareholders controlling minimum one-half of the total interest (“*to the extent of one moiety or upwards*”) move the court (under Section 2) for “*sale of the property and distribution of the proceeds*”, it being the only possible method left, upon it being found that the property could not otherwise be “*reasonably or conveniently*” divided, such contingency obviously arising on account of division by “*metes and bounds*” being not possible in terms of Section 396 of CPC, 1882. The provision in Section 3 of Partition Act can be invoked only after the court has entertained a prayer for sale in terms of Section 2 and not otherwise. Read together, it is clear from the plain meaning of Sections 2 and 3 that the Partition Act cannot be invoked in case the shareholders interested in sale as the mode of division do not have control over minimum half or more of the total interest. The clause contained in Section 4 relates only to “*dwelling-house*” belonging to

“an undivided family”, where a third party (“not a member of such family”) has acquired interest of undivided share and “sues for partition”.

43. Section 8 of Partition Act reads thus:-

“8. Orders for sale to be deemed decrees. – 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, (14 of 1882).”

44. Noticeably, when the Partition Act came into being (in 1893), the Civil Procedure Code (1882) did not specifically provide for a decree to be “preliminary” or “final”, nor would the Partition Act qualify the words “deemed to be a decree” in any manner for it to be construed as the “final decree”. Thus, when Section 8, as quoted above, came on the statute book the legislature could not have intended it to mean that the deemed decree thereunder – say an order of sale of the property for division by distribution of proceeds – be taken as “final decree”.

45. The provision contained in Section 2(15) of the Indian Stamp Act, 1899 is at the heart of the controversy at hand. It defines the expression “instrument of partition” and would read thus:-

“15. "Instrument of partition" means any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any revenue-authority or any civil court and an award by an arbitrator directing a partition;...”

(emphasis supplied)

46. An instrument of partition, thus defined, is subject to levy of stamp duty chargeable in terms of the rates specified in the first schedule appended to the enactment, the entry No.45 being the relevant clause, it equating it to the “same duty as a Bond (No.15) for the amount of the value of the separated share or shares of the property”. The use of the words “in severalty” need not create any confusion inasmuch as in all cases of partition, whether sought by one of the several shareholders as against the rest or by each of the shareholders, there is an element of severance.

47. Deconstructing the definition of the expression “instrument of partition” as given in Section 2(15) of the Indian Stamp Act, 1899 makes it clear that a document of such nature may come into existence, broadly speaking, by two methods; first, an agreement

(or understanding or settlement, by whatever name called) reduced into writing by the co-owners of the property with the intent to “*divide or agree to divide*” such property “*in severalty*” and, second, as the end result of an adjudicatory process (by civil court or arbitrator or a revenue-authority) wherein the objective is “*for effecting a partition*”, it being essential that such end result of the adjudicatory process must be “*a final order*”. My esteemed brother, in his separate opinion, has brought out the difference between the two modes of bringing an “*instrument of partition*” into existence with great clarity and, therefore, I need not exert much labour on this exercise. For sake of convenience, the first of the above mentioned two modes (termed appropriately as “*a consensual act*”) may hereinafter be referred to as “*the partition deed*” and the second as the “*final order for effecting a partition*”. I only wish to flag here that the definition of the expression “*instrument of partition*” does not use the expression “*decree of partition*”. Noticeably, in the context of arbitration award, the provision uses the expression “*directing a partition*” which is markedly different from “*for effecting a partition*”. To my mind, one important question that would arise in this context is as to whether a “*final order*” of the civil court which is issued “*for effecting a partition*” is same as a “*decree of partition*”. I would answer this in negative. Reasons are many and elaborated hereinafter.

48. Though the separate opinion quotes some of the relevant statutory provisions contained in CPC (1908), it is necessary to extract them again here, along with one more, to the extent relevant, for facilitating the discussion that follows:-

“Section 2 (2): “decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.— A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when

such adjudication completely disposes of the suit. It may be partly preliminary and partly final;”

“Order XX Rule 18. Decree in suit for partition of property or separate possession of a share therein.— Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,—

(1) xxx

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.”

“Order XXVI Rule 13. Commission to make partition of immovable property.— Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by Section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.”

“Order XXVI Rule 14. Procedure of Commissioner.— (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorised thereto by the said order, award sums to be paid for the purpose of equalising the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.”

(emphasis supplied)

49. In my view, the deficiency in the law on partition as noticed, *inter alia*, in the scheme of Code of Civil Procedure, 1882 for partial removal of which the Partition Act,

1893 had been enacted, leaving out some grey area, stood overcome by the above provisions of the Code of Civil Procedure, 1908 (CPC) which have been in vogue ever since. As would be later highlighted in this opinion, *inter alia*, with guidance from the ruling of the Supreme Court in the *Shub Karan Bubna* (supra), a suit for partition cannot always possibly be decided in one go. The complete and effectual determination of the dispute necessitates passing of a series of orders beginning with first one which identifies the property (or estate) to be divided, the shareholders in such property and the extent of their respective shares. Such order though conclusively determining the rights of the parties vis-à-vis the subject property is more in the nature of a declaration and, unless the parties agree or the nature of property is such as makes it feasible for simultaneous physical division, does not by itself bring fruits of the partition to them. Since partition of the property would mean the shareholders being either put in physical (or notional) possession of their respective shares or by distribution of the proceeds in case of sale as per their respective percentage shares, mere declaration of rights by the first of the effective orders in such litigation is treated as “*a preliminary decree*”. The expression “*final decree*” means an adjudication that *completely disposes of the suit* and, therefore, in the context of suit for partition it would relate, generally speaking, to the final order whereby the property is divided and the respective shares (whether upon division by metes and bounds or by distribution of the sale proceeds) are ordered to be made available to each shareholder.

50. The afore-quoted provision of Order XX Rule 18(2) CPC confirms the above view of the matter. Thus, when the property is such as can be conveniently divided amongst the several shareholders, the court may pass a final decree even in the first instance, such final order (or judgment) being undoubtedly the “*instrument of partition*” attracting the stamp duty. But, if such partition or separation were not feasible, the court passes only “a preliminary decree” which has the effect merely of declaring the rights of several parties. One may add here that if the estate to be partitioned includes some properties which can be conveniently divided immediately and others which cannot be so divided, the first order of such nature may take the shape of being a decree that is “*partly final*” (vis-à-vis

the properties which are thereby divided) and “*partly preliminary*” (vis-à-vis such properties as cannot be immediately divided).

51. In *Shankar Balwant Lokhande v. Chandrakant Shankar Lokhande*, (1995) 3 SCC 413, in construing what is a final executable decree, the Supreme Court held:

“3. ... A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is final. ...”
(emphasis supplied)

52. In *Renu Devi Vs. Mahendra Singh and Ors*, AIR 2003 SC 1608, the Supreme Court clarified that there is nothing in law which prevents the court from passing a final decree in the very first instance. As observed earlier, in *Hasham Abbas Sayyad* (supra), the Supreme Court reiterated its earlier view in *Rachakonda Venkat Rao and Ors. vs. R. Satya Bai & Anr.*, (2003) 7 SCC 452 that there can be more than one final decree and further that a decree can be partly preliminary and partly final. In *Bikoba Deora Gaikwad* (supra), the Supreme Court observed thus :

“...No doubt, in suit which contemplate the making of two decrees a preliminary and a final decree the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it.

x x x

13. The distinction between “a final decree” and “finality of a decree” is obvious enough to merit a detailed discussion. A decree whether preliminary or final is binding on the parties but the same does not mean that all decrees would be final decree...”

(emphasis supplied)

53. The Supreme Court in *Shub Karan Bubna* (supra) was dealing with the objection of limitation raised with reference to an application for “*final decree*” for division of the suit property by metes and bounds after a preliminary decree had been passed declaring

the shares and, in that context, took an overview of the procedure governing the suits for partition, observing thus:

7. In a suit for partition or separation of a share, the prayer is not only for declaration of the plaintiff's share in the suit properties, but also division of his share by metes and bounds. This involves three issues:

(i) whether the person seeking division has a share or interest in the suit property/properties;

(ii) whether he is entitled to the relief of division and separate possession; and

(iii) how and in what manner, the property/properties should be divided by metes and bounds?

In a suit for partition or separation of a share, the court at the first stage decides whether the plaintiff has a share in the suit property and whether he is entitled to division and separate possession. The decision on these two issues is exercise of a judicial function and results in first stage decision termed as "decree" under Order 20 Rule 18(1) and termed as "preliminary decree" under Order 20 Rule 18(2) of the Code. The consequential division by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements, calculations and considering various permutations/combinations/alternatives of division is referred to the Collector under Rule 18(1) and is the subject-matter of the final decree under Rule 18(2).

17. Once a court passes a preliminary decree, it is the duty of the court to ensure that the matter is referred to the Collector or a Commissioner for division unless the parties themselves agree as to the manner of division. This duty in the normal course has to be performed by the court itself as a continuation of the preliminary decree. Sometimes either on account of the pendency of an appeal or other circumstances, the court passes the decree under Rule 18(1) or a preliminary decree under Rule 18(2) and the matter goes into storage to be revived only when an application is made by any of the parties, drawing its attention to the pending issue and the need for referring the matter either to the Collector or a Commissioner for actual division of the property. Be that as it may.

18. The following principles emerge from the above discussion regarding partition suits:

18.1. In regard to estates assessed to payment of revenue to the Government (agricultural land), the court is required to pass only one decree declaring the rights of several parties interested in the suit property with a direction to

the Collector (or his subordinate) to effect actual partition or separation in accordance with the declaration made by the court ...

18.2. In regard to immovable properties (other than agricultural lands paying land revenue), that is, buildings, plots, etc. or movable properties:

(i) where the court can conveniently and without further enquiry make the division without the assistance of any Commissioner, or where parties agree upon the manner of division, the court will pass a single decree comprising the preliminary decree declaring the rights of several parties and also a final decree dividing the suit properties by metes and bounds.

(ii) where the division by metes and bounds cannot be made without further inquiry, the court will pass a preliminary decree declaring the rights of the parties interested in the property and give further directions as may be required to effect the division. In such cases, normally a Commissioner is appointed (usually an engineer, draughtsman, architect, or lawyer) to physically examine the property to be divided and suggest the manner of division. The court then hears the parties on the report, and passes a final decree for division by metes and bounds.

The function of making a partition or separation according to the rights declared by the preliminary decree (in regard to non-agricultural immovable properties and movables) is entrusted to a Commissioner, as it involves inspection of the property and examination of various alternatives with reference to practical utility and site conditions. When the Commissioner gives his report as to the manner of division, the proposals contained in the report are considered by the court; and after hearing objections to the report, if any, the court passes a final decree whereby the relief sought in the suit is granted by separating the property by metes and bounds. It is also possible that if the property is incapable of proper division, the court may direct sale thereof and distribution of the proceeds as per the shares declared.

18.3. As the declaration of rights or shares is only the first stage in a suit for partition, a preliminary decree does not have the effect of disposing of the suit. The suit continues to be pending until partition, that is, division by metes and bounds takes place by passing a final decree. An application requesting the court to take necessary steps to draw up a final decree effecting a division in terms of the preliminary decree, is neither an application for execution (falling under Article 136 of the Limitation Act) nor an application seeking a fresh relief (falling under Article 137 of the Limitation Act). It is only a reminder to the court to do its duty to appoint a Commissioner, get a report, and draw a final decree in the pending suit so that the suit is taken to its logical conclusion

(emphasis supplied)

54. It is to be borne in mind that there can be more than one preliminary decree, or more than one final decree, in the same suit for partition. [*Rachakonda Venkat Rao and Ors.* (supra); *Hasham Abbas Sayyad* (supra)]. In this view, it would not be correct to say that each of the several final decrees in the suit for partition would be of such nature as reflects “*adjudication*” that “*completely*” disposes of the suit. After the preliminary decree is passed declaring the rights of the parties qua the estate to be divided, there may be several final decrees each dealing with separate part of the estate. It is only the last in such series of final decrees – whereafter nothing further remains to be adjudicated upon – which shall be the final decree whereby the suit is “*completely disposed of*”. Nothing turns, in my view, on the status of a decree being final decree as to the liability under the Stamp Act. Neither the definition of the expression “*instrument of partition*” nor the relevant entry in the first schedule appended to the said law uses the expression “*final decree*”. The said statute conceives of liability to pay stamp duty with reference to “*final order*” and not “*final decree*”. Whether or not a final decree in the suit for partition is the final order effecting the partition is a question of fact which has to be determined with reference to the disposition in the said decree.

55. Order XX Rule 18(2) CPC, by its last limb – “*and giving such further directions as may be required*” – confers on the civil court the widest possible discretion, power and jurisdiction to take all such measures as are necessary, in the wake of preliminary decree (which only declares the rights) for effecting the partition, the possible “*further directions*” that may be issued in such regard including what is permitted by Sections 2, 3 and 4 of the Partition Act in case such law is invoked or any other direction (in case Partition Act cannot be applied or its invocation does not lead to resolution). The issuance of commission under Order XXVI Rule 13 CPC, noticeably, is with the intent “*to make the partition or separation*”. Therefore, should the commissioner be able to “*divide the property*” - which would be by metes and bounds, his report, if accepted as fair, equitable and just, leads to the partition being effected by shares being allotted to the respective shareholders - the element of owelty being added, as envisaged in Order XXVI Rule 14(1) CPC. The order of the court confirming the report of the commissioner (may be with some variance) in terms of Order XXVI Rule 14 CPC leads to the final

determination of the rights of the parties by “*effecting a partition*” and being an order which is “final” would undoubtedly be an “instrument of partition” within the meaning of Section 2(15) of Indian Stamps Act, 1899 attracting the stamp duty. In such result of the litigation, the rights of the parties as to their respective shares in the property having been declared by the preliminary decree, the right to specific share earmarked by division of the property by metes and bounds stands determined and “*vested*” in each of them and, therefore, such order disposes of the suit (qua the particular property), it consequently being a decree that is final.

56. It must be clarified here that there may be a situation (like in the case from which the present reference has arisen) where some of the shareholders (or third parties - as seen again in the case from which reference has arisen – the son of the first plaintiff claims possessory rights) may be in physical possession of portions to which they may not be entitled in the final determination and consequently would be obliged to vacate or handover and may, for the interregnum, be answerable to claim for damages or *mesne profits*. Ideally, the final order dividing the property by metes and bounds would include directions covering obligations as also consequences flowing from defaults in their respect. But, if it does not, such decree would still not determine or completely dispose of the suit, the court being obliged to continue with the further inquiry in the suit. The measures, however, for putting a party so entitled in physical possession of the share allotted to him upon division of the property by metes and bounds or for recovery of damages (or *mesne profits*, etc.) would fall in the realm of execution.

57. But, situations do arise (as in the case from which the present reference has come) wherein the rights of the parties as to their respective shares have been declared by a preliminary decree, there being no possibility of division of the property by metes and bounds (effort having been made to that end through the commissioner), the conclusion that sale of the property and distribution of the proceeds is the only method for partition having been reached (may be by consensus amongst the parties), it being not possible (or being impermissible or there being no such move) for the parties to have resort to the provisions of the Partition Act, and there is virtually an impasse. The court, in such fact-situation ought not be helpless, not able to grant the decree of partition. The inherent

jurisdiction of the civil court to do complete justice, coupled with the authority vested in it by the concluding portion of Order XX Rule 18(2) CPC for “*giving such further directions as may be required*”, empowers it to direct sale of the property by the agency of the court and thereafter distribute the proceeds amongst the shareholders in accordance with their percentage shares. This is reinforced by the concluding part of Rule 14(3) of Order XXVI which permits the court rejecting the report of commissioner to “*either issue a new commission or make such order as it shall think fit*”. Such directions, however, would also not, by themselves, bring about the partition, the actual division and severance being merely a possibility in the future. In this view of the matter, in my opinion, the order of the court directing sale, though final, in itself is not an order “*effecting a partition*” and, therefore, cannot be treated as an “*instrument of partition*” within the meaning of Indian Stamp Act, 1899.

58. The question, however, would arise as to at what stage in such scenario as above the litigation would reach fruition. Necessarily, there has to be an order of the court where under the proceeds of the sale are directed to be apportioned which, in such state of things, would not be possible till the court is able to conduct a sale in accordance with law. Thus, the order directing the sale would be an *order in the nature of a decree which is to be executed but not the final order that effects the partition*.

59. There can be no dispute as to the fact that if the court orders sale as the mode for division, in exercise of its jurisdiction under general law, it would execute the direction (a decree) in accordance with Order XXI CPC. All proceedings for putting the property to sale would have to be carried out in terms of the provisions contained in Rules 66 to 96 of Order XXI CPC. It is not necessary in the present order to take detailed note of such provisions. Suffice it to note that for putting the property to sale in execution of the decree of the court, it is essential that steps are taken for it to be valued and generally the procedure of public auction is followed so that the best price is secured, the process of sale being not complete or rendered absolute till the court confirms it, the court having throughout overseen the process to ensure that it is free from irregularities or fraud. Similarly, if the order of sale has been granted under Partition Act, it being a decree under section 8, it is also executable but, for such purposes, the law refers to the procedure

prescribed in section 7, it preceded by section 6 which confers the right of reserved bidding and preferential right to bidding by shareholders. The procedure for sale under Partition Act is almost the same as (or not dissimilar to) the one applicable to sales in execution of decrees as enforced for “*original civil jurisdiction*” of specified High Courts or as “*prescribed in the Code of Civil Procedure*” for other jurisdictions. Relevant here it is to also note that in the same spirit as in which the Partition Act gives certain rights to the shareholders, a co-sharer of undivided immoveable property participating in the bid process in a court sale has also been conferred with a right to “*have preference*” by Rule 88 of Order XXI CPC.

60. Once the sale by the court through the procedure envisaged in Order XXI CPC is completed in terms of the decree directing such sale, the civil court will then pass all necessary orders distributing the sale proceeds amongst the shareholders and, in my opinion, it is such order which would be in the nature of “*a final order for effecting a partition*” and thus an “*instrument of partition*” on which the parties would be obliged to pay stamp duty before they lay hands on their respective shares.

61. The case may, however, also present a scenario where the parties make a prayer within the four corners of the Partition Act for sale to be directed under Section 2. An order of sale of the property and distribution of the proceeds under Section 2 of the Partition Act, 1893 being an order which the court even otherwise could reach, as discussed above, is a decree (as also specifically so “*deemed*” by Section 8) but for the same reasons as mentioned above, cannot be construed as the last and final order disposing of the suit since the fruits of partition are not forthcoming to the parties directly in the consequence thereof. It is not an order partitioning but only an order for sale so that there may be a partition.

62. An order of sale by the court through public auction, or by bidding process within the shareholders, does not invariably or always succeed. The case from which the present reference arises itself is an illustration – the parties even attempted to sell the property on their own but the intending purchaser, having paid the earnest money, statedly made defaults resulting in earnest money being forfeited giving rise to new conflicts and equities of third parties. Such order of sale under Section 2 of the Partition Act, though a

deemed decree, cannot be the final order of partition also for the added reason that an order under Section 3 is also similarly deemed to be a decree. If the order under Section 2 were to be the final decree disposing of the suit, there cannot be a further decree thereafter. The fact that there can possibly be another decree under Section 3 means simply that the order under Section 2 may be a final decree but not the final decree disposing of the suit, not the least the final order which is the instrument of partition. The law does not conceive of a final decree disposing of the case being rendered later a final decree in limited sense or a preliminary decree.

63. To put it simply, an order for sale of the property under Section 2 or Section 3 (or, for that matter, under Section 4) of the Partition Act, though deemed to be decree by virtue of Section 8, cannot be construed as an “instrument of partition” within the meaning of Section 2(15) of Indian Stamp Act, 1899 for the reasons that it is not the “final order” passed for “effecting a partition”, the division of property which would effect the partition being dependent upon the actual sale that is to follow. Needless to add, the sale of the property even in terms of directions under Section 2, 3 or 4 of the Partition Act would be carried out in accordance with the afore-quoted provisions of Order XXI and, therefore, in the realm of execution. Such execution would be of the deemed decree resulting from the order under the Partition Act. As under the general law, once the sale through court is completed, the distribution of sale proceeds amongst the shareholders would be carried out under an order of the court which would be the final order disposing of the suit and, therefore, the final decree. It is only such final order which has the result of “*effecting a partition*” and may consequently be the “*instrument of partition*” vis-à-vis the property and the suit in question, within the meaning of Section 2(15) of Indian Stamp Act, 1893 attracting the liability to pay the stamp duty.

64. It is clear from the observations of the Supreme Court in *Shub Karan Bubna* (supra) quoted earlier that it construed an order dividing the subject property “*by metes and bounds*” (whether or not on the report of commissioner) as the “*final decree*”. But where such division “*by metes and bounds*” be not possible, the power and jurisdiction of the court to “*direct sale ... and distribution of the proceeds as per the shares declared*” is also identified with reference to the provisions contained *inter alia* in Order XX Rule 18

(2) and Order XXVI Rule 14. Such order “*for sale*”, however, is not treated as “*a final order*” disposing of the suit. The reasons for Supreme Court stopping short of saying so are not difficult to conceive and some may be noticed hereinafter.

65. There is never a certainty that once the court passes an order of sale of the property to facilitate its partition by division of sale proceeds the sale would actually happen. There may be numerous reasons as to why the court may reach a dead-end in such endeavour. The property may be in possession of third parties inducted properly at some stage or unauthorisedly by some or other shareholder. It may have come under state of disrepair or dilapidation due to neglect by the share-holders on account of prolonged litigation or lack of sufficient resources, the share-holders themselves being not in sound financial position so as to buy out the share of others. Such investors or real estate dealers in the business as might otherwise be interested in purchase may feel reluctant due to possible conflicts on account of third party interests or uncertainty of court process or property being not vacant and available for immediate takeover. Those participating in auction-sale might treat it as a distress sale and not offer price that is “*more beneficial*”.

66. It is not necessary, at the same time, that the court having passed a preliminary decree declaring the rights of the parties and determining their respective shares and also having reached the conclusion that the property is not divisible by metes and bounds and, therefore, sale and distribution of sale-proceeds be the only method of partition and having passed a decree to such effect must also undertake and complete the task of sale, come what may. The court is obliged to continue with such process only if the parties, or any one of them, so request. The parties may not need the assistance of the court in further steps to effectuate the partition or division. They may proceed to sell the property to a third party on their own and divide the sale proceeds as per shares declared by the preliminary decree. One of the parties, with the consent of others, may purchase the share(s) of others paying to them the respective value / price satisfying their claims. One of the shareholders may abandon his share thereby reviving the feasibility of, or facilitating, the division of the property “*by metes and bounds*”. One of the parties may pass away and his interest may devolve on those remaining in the fray making it now possible to divide it by metes and bounds. If there were only two shareholders and one

dies mid-process – after order for sale – his estate having been inherited by the one surviving, the need for partition could come to an end. In such eventualities, the orders earlier passed declaring the rights and directing the sale (undoubtedly, both decrees) need not be put to execution through court and the fact that the stamp duty was not paid thereupon and further that it was not registered under section 17 of the Registration Act, 1908 would not render it anything less than a decree that is binding [*Radhesh Singh (supra)*].

67. There is no requirement in law for the parties to formally execute a document in the nature of partition deed. They may bring about the partition reflecting their intent by their conduct. A convenient illustration in this respect would be of a case where the co-owners of a property jointly execute a sale deed, getting it registered, thereby transferring their right, title and interest in favour of a third party, each receiving directly from the purchaser the consideration to the extent of their respective share. Though the document of sale transferring the title requires to be stamped and registered such liability is on account of it being a sale deed and not so as to treat it as an Instrument of Partition. Such sale may be effected outside the court process, even in the wake of a preliminary decree which declared the percentage shares of the parties.

68. Reference has come up in the separate opinion to the decision of the Supreme Court in *Dr. Chiranjilal (D) by LRs Vs. Hari Das (D) by LRS*, (2005) 10 SCC 746 and *Bimal Kumar and Anr. Vs. Shakuntala Debi & Ors.*, AIR 2012 SC 1586. With respect, I would say that the question as to whether the stamp duty liability would arise upon an order to sell the property for effecting the partition, did not arise in those cases, the division having been ordered by metes and bounds and not of sale proceeds. Interestingly, in *Dr. Chiranjilal* (*supra*), the Supreme Court also observed that “*there is no statutory obligation on the court passing the decree to direct the parties to furnish the stamp paper for engrossing the decree*”.

69. It is pertinent to note here the following observations of Supreme Court in *S. Sai Reddy v. S. Narayana Reddy*, (1991) 3 SCC 647, though in the context of Hindu Succession Act, 1956:

“A partition of the joint Hindu family can be effected by various modes, viz., by a family settlement, by a registered instrument of partition, by oral arrangement by the parties, or by a decree of the court. When a suit for partition is filed in a court, a preliminary decree is passed determining shares of the members of the family. The final decree follows, thereafter, allotting specific properties and directing the partition of the immovable properties by metes and bounds. Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. The preliminary decree which determines shares does not bring about the final partition. For, pending the final decree the shares themselves are liable to be varied on account of the intervening events. ... A preliminary decree which merely declares shares which are themselves liable to change does not bring about any irreversible situation.”

(emphasis supplied)

70. The contrarian view is based on the conclusion that an order of sale under sections 2 or 3 (or even section 4) of the Partition Act is final order disposing of the suit and, therefore, the final decree whereupon the suit gets completely disposed of. This conclusion, with respect, is based, in turn, on an erroneous assumption that the case has reached the decisive stage from where there can be no about-turn and further that the court having ordered sale has gathered all necessary facts and is now ready to distribute the shares. It has to be borne in mind that before the direction under section 2 for sale is complied with, the court would need to hold inquiry to ascertain “*the estimate*” of the value of the property from “*the parties*” and, thereafter, take steps to hold public auction to see to it that it fetches the highest possible price to achieve the objective of it being “*more beneficial for all the stakeholders*”. If an order under section 2 were to be treated as the final order disposing of the suit under section 8, it would render section 3 otiose which result is not permissible. If a shareholder can butt in with a request under section 3, while the process of execution in the wake of order for sale under section 2 is underway, the court is required to order an inquiry to ascertain the valuation of the share(s) of different stakeholders so that the interested shareholder may consider the “*offer*” to purchase the property at such “*price*”. There is no obligation in law, however, on any of the shareholders to participate by bidding in auction pursuant to order under section 2 or compulsorily purchase having made the request under section 3. If the shareholder who

initiated the request under section 3 were to back out, it would mean and have the effect that the order under section 3 – presumed to be the last and final decree disposing of the suit – ceases to be such decree and the previous order under section 2 (which had been supervened by order under section 3) reverts as the final decree. The possibility that the endeavour by the court to sell may not result in actual sale always exists. Such approach as above could lead to chaos.

71. There are more reasons why I am unable to subscribe to the views of my learned brothers in their separate opinions. If an order under section 2 (or sections 3 or 4) of Partition Act were to be treated as the final order and, therefore, an “*instrument of partition*”, the liability to pay stamp duty would have to be worked out in terms of Article 45 in first schedule of the Indian Stamp Act, 1899 which reads thus:

“Partition - Instrument of [as defined by s. 2(15)]. The same duty as a Bond (No. 15) for the amount of the value of the separated share or shares of the property

N.B.- The largest share remaining after the property is partitioned (or, if there are two or more shares of equal value and not smaller than any of the other shares, then one of such equal shares) shall be deemed to be that from which the other shares are separated:

PROVIDED always that-

(a) when an instrument of partition containing an agreement to divide property in severalty is executed and a partition is effected in pursuance of such agreement, the duty chargeable upon the instrument effecting such partition shall be reduced by the amount of duty paid in respect of the first instrument, but shall not be less than eight annas;

(b) where land is held on revenue settlement for a period not exceeding thirty years and paying the full assessment, the value for the purpose of duty shall be calculated at not more than five times the annual revenue;

(c) where a final order for effecting a partition passed by any revenue-authority or any civil court, or an award by an arbitrator directing a partition, is stamped with the stamp required for an instrument of partition, and an instrument of partition in pursuance of such order or award is subsequently executed, the duty on such instrument shall not exceed eight annas.”

(emphasis supplied)

72. The prescription for stamp duty for indemnity bond (Article 15) referred to above is in the form of a scale depending on the “*amount or value secured*”, the difference in

case of “*instrument of partition*” being that here “*the value of the separated share or shares*” controls the calculation, the “*largest share remaining after the property is partitioned*” being the benchmark. The last clause (c) of the proviso is relevant for present discussion. The portions highlighted above show that the law visualizes the possibility of an “*instrument of partition*” to be a document that is “*subsequently executed*” after, and “*in pursuance of*”, the “*final order for effecting a partition*”. The proviso indicates a different scale of calculation in such course being adopted by the parties but, by implication, acknowledges that the “*the final order*” need not invariably be the “*instrument of partition*”, the latter possibly be a document executed subsequent to the former.

73. It is impractical to expect parties to approach the revenue authority for calculation and payment of stamp duty at the in-between stage in the wake only of the order of sale under sections 2-4 of the Partition Act or, for that matter, under general power of the court in terms of Rule 18(2) of Order XX CPC. Particularly in case of Section 3 of Partition Act, the order of “*offer to sell*” to the requesting share holder – deemed decree under Section 8 – would come only after the court has ascertained the value and not before. Similar is the scheme of Section 4 where a non-shareholder has acquired interest. The payable revenue can be worked out only after value is ascertained. As held in the case of *Hasham Abbas Sayyad* (supra) (para 20) in a case where property is found to be an “*impartible one*”, a preliminary decree having been passed, “*the valuation thereof and final allotment of the property*” could have been done “*only in a final decree proceeding*” and further that “*only when final allotments were made or a determination is made that the property should be put on auction sale, a final decree in respect thereof should have been passed*”. It is clear that a decree which is to be treated as final upon an order for putting the property to auction sale cannot be passed unless there is a determination of its value. The reserved price even if determined represents tentative value which too can be varied, noticeably, in terms of power under Section 6(1) of the Partition Act – more than once. The real value would be the market value that would surface after the bidding process is finally put to rest. The insistence for stamp duty to be paid at reserved price

may entail loss to revenue rather than protecting its interest as is cited as one of the reasons for opposite viewpoint.

74. The case from which the reference has arisen buttresses the point very well. As noticed earlier, the report of the SDM valued the property at ₹12.66 Crores as against negotiated sale consideration of ₹27 Crores reported by parties.

75. There is yet another reason why the liability towards stamp duty cannot be enforced at the intermediate stage of only a direction “to sell” and that concerns the apportionment of liability towards revenue amongst the shareholders. Instances are galore of some shareholders being in possession or control of more than their percentage share in the joint property. Those ousted or in possession (or control) of less than their share are entitled at the time of distribution of sale proceeds (should property be eventually sold) for recompense of the loss they had been put to by being kept out, this by compelling those controlling larger share during the interregnum to proportionately account for *mesne profits* (or damages), in discharge of the obligation of the court to add the element of owelty (“award sums to be paid for the purpose of equalising the value of the shares”) in terms of Rule 14(1) of Order XX CPC. The final computations, including liability towards revenue, can be conveniently made only after property has been sold by which time the vacant possession of the property would have reached the hands of the auction-purchaser and the accounts towards user during litigation crystallized and rendered.

76. Besides the above, there is the question of fairness. It is not just to ask the parties to invest their resources by paying stamp duty at a stage and towards a transaction that may eventually not bring about partition. The order directing a property to be sold cannot be equated with the order selling the property. The journey from first order (to sell) to the last (actual sale) is long and full of uncertainties. It is only after the sale is complete that the division (or partition) is to happen. If the parties have been compelled to pay the stamp duty at the first point but the sale does not take place, they would stand illegitimately penalized with no immediate restitution. Further, if mid-course, the value or price (estimated or reserved) undergoes change (upwards or downwards), or if the need to sell itself is extinguished, the instrument would require to be revalued for computing

revenue, or be cancelled, leading to recovery of deficiency or refund of excess which would only further complicate the process.

77. The Supreme Court in *Shub Karan Bubna* (supra) cautioned against “pauses” in the existing civil procedure. In my considered opinion, the contrary view that final order of sale (deemed decree) be compulsorily stamped in terms of Section 2(15) read with Article 45 of the first schedule to the Stamp Act, as a pre-condition to execution of order to sell, would add to the pauses in the process since failure of the process of sale would create an even more vicious cycle.

78. I must note here that, even if the Partition Act is invoked, a decree of partition is passed only under Order XX Rule 18 CPC. As noted earlier, the Partition Act does not confer a general power to direct sale - its provisions apply in specified cases only. Even the sale pursuant to order passed on application under Partition Act is sale by public auction. An order of sale, deemed to be a decree, under Partition Act is appealable but denial of such order is not so appealable. An order of sale does not bring about actual division of the property or of its value. It is an order which has finality attached to it but, as observed earlier, is not such as may be treated to be irreversible. It cannot consequently be treated as the final order that divides the estate or be an instrument of partition.

79. So long as the process of sale is not completed in accordance with the procedure prescribed for it under the provisions for execution, the parties continue to be the co-owners of the property. Only the sale, when confirmed by the court, extinguishes their right in the property and it is the sale proceeds in hands and control of the court which then would be their joint property. The distribution of sale proceeds by the court, which happens naturally in post-sale proceedings, is what brings about actual partition. Therefore, it is the order of the court distributing the sale proceeds according to the percentage shares which is the final order conceived as the “Instrument of Partition” by section 2(15) of Indian Stamps Act, 1899. The court would be duty bound at the stage of such order effecting the partition, disposing of the suit, and so the final decree that disposes of the suit, to insist on payment of stamp duty before the parties are permitted to lay their hands on their respective shares of sale-proceeds.

80. In view of the above, I find no error in the view expressed by the division bench of this court in *K.N. Khanna vs. B.K Khanna*, 2000 (87) DLT 286(DB): (2000) 55 DRJ 544: 2000 SCC OnLine Del 512, in following words:

“43. There is no manner of doubt that in a suit for partition after a preliminary decree is passed declaring rights, title or interest of the parties, which decree makes a provision for partition of the suit property by metes and bounds and of separate possession in terms of the rights declared under the said decree, which has to be treated as preliminary, further inquiry is required to be held to enable the Court to finally and conclusively determine rights of the parties by actually partitioning the said property by metes and bounds. In order to do so, usually the task is assigned to a Commissioner to suggest mode of partition, who usually suggests the mode and manner of dividing the property. On receipt of such a report and deciding objections of the parties, if any, the Court then proceeds to pass a final decree declaring the persons entitled to separate shares, which enable the parties thereafter to hold and enjoy the property separately. Such a division of the property has the effect of creation of an exclusive right of a person in that portion of the property, which falls to his share and extinguishes his right, title or interest in those portions, which fall the exclusive shares of the others. This decree of course would be covered by the definition of “instrument of partition”, as defined in clause (15) of Section 2 of Indian Stamp Act. “Instrument of partition” is defined therein to mean any instrument whereby co-owners of any property divide or agree to divide such property in severality, and include also a final order for effecting a partition passed by any Revenue Authority or any Civil Court and an award by an Arbitrator directing partition. In case partition is effected of a property even by an Arbitrator by his award, the same would fall in the definition of “instrument of partition”. So also a decree of Civil Court affecting partition of the property would fall in the said definition and the same would be required to be stamped according to the provisions of Indian Stamp Act.

44. But it is not that every decree in a partition suit would be required to be drawn up on a stamp paper. Only those decrees will be required to be drawn up on a stamp paper, which divide any property in severality amongst co-owners. In the instant case neither by award made by C.K. Daphtary nor by order dated 15-4-1983 the property has been ordered to be divided or agreed to be divided in severality. Only a tentative arrangement was made for enjoying the property separately, which was only a temporary measure whereby the parties continued to be the joint owners of each and every part of the property though separately enjoying separate portions. The decree nowhere provided for separation or division

of the property in severality since it was held that the property is incapable of being divided in two equal shares or that the division by metes and bounds was not possible. Therefore, the mode suggested was to sell the property and then divide sale proceeds in equal shares. Such an award or a decree would not come within the definition of “instrument of partition”. Pursuant to the said decree passed in the suit, in case the property is sold, the rights, title and interest of the appellant and the respondents would come to an end, on sale deed being drawn and executed on a stamp paper, after the sale is confirmed by the Court. ...”

(emphasis supplied)

81. The above declaration of law was followed, and rightly so, by another division bench in *Sushil Kumar Gupta vs. Smt. Prem Gupta EFA (OS) No. 6/2012* decided on 31.01.2013.

82. For reasons elaborated earlier and summarized hereinafter, however, I find the last portion (of para 44) in the judgment in *K.N. Khanna* (supra), endorsed in (para 11 of) *Sushil Kumar Gupta* confusing, it appearing in following words:

“... Only such of the decrees are required to be drawn on a stamp paper, which allot and vest particular share in each co-sharer and not those decrees, which only make a provision for sale of the property. In later decrees only the instrument of sale would be required to be drawn on a stamp paper so as to vest exclusive rights in the property in favour of the auction purchaser.”

(emphasis supplied)

83. The liability to pay stamp duty on a sale deed is distinct from liability in respect of an instrument of partition. The discharge of the former cannot be treated as discharge of the latter. As is clear from the views expressed earlier, in the event of distribution of sale-proceeds being the mode of partition, the liability to pay stamp duty would arise when the court passes the final order dividing the consideration paid by the auction-purchaser in respect of actually concluded sale of property amongst the share-holders, such order being the instrument of partition, the proceeds being receivable (as per percentage shares) only after payment of stamp duty.

84. While there is nothing wrong in (first sentence of) above quoted conclusion in *K.N. Khanna* (supra) the use of the word “only” qualifying the words “the instrument of sale” in later part (second sentence) is misleading as it tends to indicate that if stamp duty

is paid on sale-deed, there is no obligation to pay such stamp duty on decree drawn up (later) to allot and vest particular share after sale of property. I would, thus, explain and clarify *K.N. Khanna* (supra) and *Sushil Kumar Gupta* (supra) to this limited extent, the articulation being susceptible to be misconstrued.

85. I answer the reference accordingly.

R.K.GAUBA, J

MAY 11, 2018

ORDER OF THE FULL BENCH (Per majority, R.K. Gauba, J, dissenting):

I. An order of sale passed under Section 8 of the Partition Act is a final decree in a partition suit, and all proceedings towards sale of the property which is subject matter of the final decree of partition, have to take place in execution proceedings of this final decree.

II. An order of sale in a partition suit passed under Section 8 of the Partition Act is an instrument of Partition under Section 2(15) of the Stamp Act and requires to be stamped in accordance with Article 45 of the Schedule thereof.

III. The judgments of this Court in the cases of *K.N. Khanna* 2000 (55) DRJ 544: 2000 (87) DLT 286 (DB) and *Sushil Kumar Gupta v. Smt. Prem Gupta and Ors.* 2013 (135) DRJ 341 (DB) are hereby overruled.

The reference is answered in the above terms. The suit is directed to be listed for further proceedings before the concerned court, on 16.07.2018, when parties shall be present.

**S. RAVINDRA BHAT
(JUDGE)**

**VALMIKI J. MEHTA
(JUDGE)**

**R.K. GAUBA
(JUDGE)**

MAY 11, 2018