Sikkim High Court Krishna Prasad And Ors. vs Shyam Narayan Prasad And Ors. on 15 May, 2006 Equivalent citations: AIR 2006 Sik 25 Author: A Subba Bench: A Subba JUDGMENT A.P. Subba, J. 1. This Appeal is directed against the Judgment and Decree dated 19th November, 2004 passed by the learned District Judge, Special Division-II, Sikkim in Title Appeal No. 2 of 2003, who had dismissed the suit by reversing decree dated 29th November, 2002 passed by the learned Civil Judge, East, in Civil Suit No. 10 of 2001 filed by the Appellants. Thus, the Plaintiffs who had filed the Civil Suit in the Court of the learned Civil Judge, East at Gangtok, and had obtained a decree in their favour, are now the Appellants in the present Second Appeal. 2. The following is the backdrop of the case between the parties: One Shri Gopalji Prasad, who is the common male ancestor of the parties, being the father of the Respondents and grandfather of the Appellant Nos. 1, 2 and 3 and great grand-father of the Appellant No. 4, owned movable and immovable properties in Sikkim, as well as outside. The properties so owned by him, were partitioned with his five sons in the year 1987, vide, partition deed executed on 31st July that year. In the partition, Shri Gopalji Prasad only retained some property for himself and the rest were all partitioned among his sons. Among the 5 sons, Shri Laxmi Prasad, Respondent No. 2, the eldest of the 5 sons got half portion of the two storied RCC building situated at Singtam Bazar, East Sikkim, while Shri Shyam Narayan Prasad, Respondent No. 1, the third son, got the business of shoes and manihari, under the name and style of M/s. North End Company at Old Market, Gangtok, being run in the rented premises of one Shri Gauri Shankar Prasad, one Tata truck bearing No. WGY-4634 already registered in his name and remaining half portion of the double storied RCC building at Singtam, the first half having fallen in the share of Laxmi Prasad, Respondent No. 2. 3. By an agreement dated 30th January, 1990, the two brothers, namely, Laxmi Prasad, (Defendant/Respondent No. 2) and Shyam Narayan Prasad, (Defendant/Respondent No. 1) exchanged the above properties which had fallen in their respective shares during the partition. Admittedly, the above exchange agreement was entered into between the two brothers, without the knowledge and consent of the present Appellants who are sons and grandson of Laxmi Prasad, (Respondent No. 2). However, upon coming to know of the said transaction in the year 1999, the sons of the Respondent No. 2, namely, Krishna Prasad, (Appellant No. 1), Sandeep Prasad, (Appellant No. 2), Raju Kumar, (Appellant No. 3) and Dilip Kumar Prasad (Respondent No. 3) filed objection in the mutation proceedings before the District Collector, East. Upon such objection, the District Collector kept the mutation proceedings in abeyance and thereafter, the Plaintiffs/Appellants filed the above said Civil Suit against Shri Shyam Narayan Prasad (Defendant/Respondent No. 1) and Shri Laxmi Prasad (Defendant/Respondent No. 2), claiming declaration that the suit property was an ancestral property of the Plaintiffs/Appellants and that, the alleged transaction of exchange entered into vide, document dated 30-1-1990, between the Defendant/Respondent No. 1 and the Defendant/Respondent No. 2 was void and illegal, and that the Respondent No. 1 had acquired no right title and interest over the suit property by virtue of the said document dated 30-1-1990

along with other consequential reliefs. 4. The case of the Plaintiffs/Appellants in the above Civil Suit was that, the suit property was an ancestral property, and all the Plaintiffs being members of the co-parcenary, along with their father the Defendant/Respondent No. 2, had equal share and right in it, and, as such, their father, the Defendant/Respondent No. 2 alone had no authority to transfer the suit property to the Defendant/Respondent No. 1 behind their back and without their consent. Since the illegal transaction of exchange between Defendant/Respondent No. 1 and Defendant/Respondent No. 2 had clouded their rights and title over the suit property, they had to approach the Court for the reliefs as already mentioned above. 5. Both the Defendants/Respondents filed separate written statements. 6. Defendant No. 1 in his written statement contended that the alleged deed dated 30-1-1990 was a deed of exchange between two brothers, i.e. he and the Defendant/Respondent No. 2 which was executed by them on mutual consent in the presence of Gopalji Prasad, their common male ancestor and the original owner of the properties. After the execution of the said agreement, the Plaintiff/Appellant No. 1 entered into possession of the business of M/s. North End Company in the Old Market at Gangtok and started running the same, while he took over liquor business at Singtam along with the two storied building situated there in which the business was being run, and became its owner. It is his further case that after he took over the possession of the building, he improved upon the same and raised the same to a four-storied building at a cost of more than six lakhs. It was his further case, that the present Plaintiffs had not raised any objection when the said transaction of exchange was entered into, nor the Defendant No. 1 had come forward for cancellation of the said document dated 30-1 -1990. Therefore, the claim of the Plaintiffs had become time barred and was liable to be dismissed. In his separate written statement, Shri Laxmi Prasad, Defendant/Respondent No. 2 did not deny that the Plaintiffs were the members of the co-parcenary of which he was the head, and claimed that being the Karta of the coparcenary, he had full right to transfer the liquor business of Singtam to Defendant No. 1. It was also not denied that he had executed the document of exchange. It was however contended by him that, he had agreed to exchange only his liquor business at Singtam, and not the RCC building in which the business was being run, with the shoe business under the name and style of M/s. North End Company, being run by the Defendant/Respondent No. 1 in the rented premises at Gangtok. According to him, he had signed the document in good faith, believing that the exchange was in respect of the said two businesses only, and not with respect to the RCC building at Singtam in which the liquor business was being run. It was asserted by him that, if he had come to know of the insertion of the RCC building at Singtam in the deed of exchange, he would not have signed the document. It was further contended by him that the shoe business of M/s. North End Company was being run in rented premises at Gangtok while the liquor shop at Singtam was being run by him in the RCC building, of which he had become the owner after he got it as his share in the partition. Since the shoe business of M/s. North End Company, being run in rented accommodation cannot be equated with the said RCC building at Singtam, there was no ques-

tion of his exchanging the liquor shop along with the building, with the shoe business of M/s. North End Company being run in a rented accommodation. It was his further case that, since rent was required to be paid by him to the owner of the premises where M/s. North End Company was running its shoe business at Gangtok, it was correspondingly agreed that the Defendant No. 1, Shyam Narayan Prasad will also pay rent for the premises where he would be running the exchanged liquor business at Singtam Bazar. As per the agreement, the rent so payable by him was to be kept by Shyam Narayan Prasad himself, to be adjusted against the cost of construction of additional stories of the said building. It was further agreed that, Shyam Narayan Prasad shall occupy the upper story of the building and rent payable by him shall also be utilized for the construction of the additional stories. Therefore, it was contended that the additional stories that were constructed over the said building were out of the rent proceeds payable to him by the Defendant No. 1. It was, accordingly contended by him that the document of exchange was void and liable to be cancelled, so far as it related to the RCC building mentioned in Schedule A of the plaint. 7. On the basis of the above pleadings, the learned Trial Judge framed the following issues: 1. Whether the agreement dated 30-1-90 is binding on parties and whether defendant No. 2 competent to execute the same? 2. Whether the exchange vide document dated 30-1 -90 was for the suit property? 3. Whether the suit property is ancestral property of the plaintiffs and whether the plaintiff have their respective shares in it? 4. Whether the plaintiff is entitled to any reliefs? 8. On a consideration of the materials on record, the learned Trial Court came to the finding that, agreement dated 30-1-1990 was executed between the Defendant Nos. 1 and 2 only for exchange of the business of liquor shop of Singtam with the business of shoe and manihari shop under the name and style of M/s. North End Company situated at Old Market Gangtok, and, as such, the deed of exchange was not in respect of the RCC building situated at Singtam. The learned Trial Court also came to the conclusion that the suit property was an ancestral property at the hands of the Defendant No. 2, and, as such, the Plaintiffs/Appellants being the sons and grandson of the Defendant No. 2, have their share in it. On the basis of these findings, the learned Trial Court decreed the suit of the Plaintiffs/Appellants and granted the reliefs in terms of the prayer made. 9. In the Appeal that was filed by the Defendants, the learned District Judge, Special Division – II on a consideration of the materials on record, came to the conclusion, that the suit properties being self acquired properties of Shri Gopalji Prasad, the question of the same being ancestral property at the hands of Laxmi Prasad (Defendant/Respondent No. 2) after the partition had taken place between the 5 sons of Shri Gopalji Prasad, would not arise. The learned Appellate Court was of the view that the RCC building at Singtam was also one of the properties included in the exchange between the two parties. It was also held that the provision of Section 53A of the Transfer of Property Act was attracted, and, as such, it comes to the aid of the Respondents. On the basis of these conclusions, the learned Appellate Court set aside the impugned Judgment/Decree dated 29-11-2002 passed by the learned Civil Judge, East in Civil Suit No. 10 of 2001. 10. Aggrieved by the above Judgment and Decree passed

by the Appellate Court, the Plaintiffs/Appellants have come up in the present Appeal. 11. At the time of admission of this Appeal, the following substantial questions of law were framed: 1. Whether the respondent No. 4, who is the grandson of respondent No. 2, has, as a coparcener, any right over the property alienated by respondent No. 2 in favour of respondent No. 1 by way of exchange. 2. Whether the decision of the 1st appellate Court, with regard to the nature of the property alienated by respondent No. 2 in favour of respondent No. 1 is based on no evidence, and whether in the facts and circumstances of the case, the principles of Section 53A of the Transfer of Property Act are attracted. 12. At the commencement of the hearing, Mr. A. Moulik, learned Senior Counsel, representing the Appellants, submitted that Appellant Nos. 1, 2 and 3 and Respondent No. 3 also have their claim to the property in dispute as coparceners with Respondent No. 2 and stand in the same footing as Respondent No. 4, and accordingly sought modification of the question of law framed at Serial No. 1 above. With the consent of the learned Counsel for the Respondents, the above questions of law at Sl. No. 1 was modified as follows: Whether the appellants and respondent No. 3 as coparceners with their father, Laxmi Prasad, (the respondent No. 2) have any right over the property alienated by respondent No. 2 in favour of respondent No. 1 by way of exchange. 13. At this point, it would be relevant to state that the respondent No. 1 raised a preliminary objection relating to bar of limitation by filing an application dated 8th April, 2005. The specific objection raised, was that, no documentary evidence supported the averment contained in paragraph 21 of the memorandum of appeal to the effect that the certified copy of the judgment and decree was made available to the appellants only on 7-12-2004. In answer to this, the appellants, in support of the averment that the certified copy was received by the appellants only on 7-12-2004, filed written reply duly annexing a certified copy of application dated 24-11-2004 filed in the Court of the learned District Judge, Special Division at Gangtok bearing the endorsement made by the copying section that the case records were received on 7-12-2004, and in view of this. the application was not pressed at the hearing. 14. Mr. A. Moulik, learned Senior Counsel assisted by Mr. N. G. Sherpa, learned Counsel for the appellants, Mr. B. Sharma, learned Senior Counsel assisted by Mr. D. B. Katwal, learned Counsel for respondent No. 1 and Mr. B. K. Gupta, learned Counsel for respondent Nos. 2 and 3 were heard. 15. Taking up the first question of law framed above, it may be noted that the fact that the appellants and respondents are members of the coparcenary is not in dispute. Even the learned appellate Court whose finding the learned Counsel for the appellant seeks to assail, has come to the conclusion that the parties constitute a coparcenary. However, what has been held by the learned appellate Court, is. that, the property in question, which came into the hands of Laxmi Prasad, respondent No. 2, by way of partition, became his separate property and the question of the same being ancestral property with regard to his sons, i.e., the appellants after the partition, does not arise. Assailing this conclusion of the learned appellate Court as a wrong conclusion, Mr. Moulik, the learned Counsel for the appellants submitted that, when partition was effected between Gopalji Prasad and his 5 sons, the appellant Nos. 1, 2 and 3 being the

sons of Laxmi Prasad, (respondent No. 2) and the appellant No. 4, being the grandson of respondent No. 2 were the coparceners along with their father, Shri Laxmi Prasad, and, as such, the property which came into the hands of Laxmi Prasad as his share in the partition became coparcenary property so far as they were concerned. According to the learned Counsel, when the dispute regarding alienation of the properties in question was in progress, the appellant No. 4, Master Shashank Prasad took birth in the family as the son of Krishna Prasad, (appellant No. 1) and became the member of the coparcenary having right over the coparcenary property. Thus, it is the contention of the learned Counsel for the appellants that the appellants and the respondents were members of the same coparcenary. 16. The question that needs to be determined is, whether the finding of the learned appellate Court that the property at the hands of Laxmi Prasad was not ancestral after the partition took place amongst his brothers is legally sound and sustainable. That, Mitakshara School of Hindu Law governs the parties to the suit is not in dispute. Since coparcenary under the Mitakshara School of Hindu Law consists of the original owner and his male heirs up to the four degrees, the contention of the learned Counsel is that, upon partition of the properties, Laxmi Prasad, respondent No. 2, Shyam Narayan Prasad, respondent No. 1 along with brothers became the owners of their respective shares along with their sons, grandsons and great grandsons up to the four degrees, if they had any, and if they had no issues, they would become owners of their respective shares in their own individual capacity. A perusal of the impugned judgment would show that the learned appellate Court has dealt with the issue in paragraph 48 of the judgment. As it appears from the judgment, Shri B. Sharma, learned Senior Counsel who had appeared on behalf of the appellants before that Court referred to an extract from the book 'Family Law' by Paras Dewan and the learned Court quoted the same as follows: 48. Learned Counsel Shri B. Sharma has relied on Paras Dewan for clarification, and extract is quoted here... No other proposition of Hindu Law is so well settled than that when a coparcener partitions from the joint family and takes away his share in respect of his own sons, son's son and son's son's son it still continue to joint family property but in respect of all others it will be his separate property. It may be illustrated thus : A coparcenary consists of A and his two sons B and C and if they partition the properties obtained by each will be his separate property. Even A's share will be his separate property in the sense that his sons B and C have no interest, no birth-right in it. But the moment any one of them gets a son his share will again become joint family property, this will be so even if A gets another son D: A and D will constitute a new coparcenary. 17. The application of the above principle of law along with the illustration to the facts of the case on hand has been dealt with in paragraph 49 of the impugned judgment as follows: 49. From the above illustration it is clear that in the instant case Gopalji Prasad had his self acquired properties which he divided equally amongst his five sons vide Exbt. P.5. The illustration above clearly indicates that once the properties are partitioned the properties obtained by each will be his separate property and the moment any one of them gets a son then the property becomes joint family property in so much as each separate property after the birth of a

son will constitute a new coparcenary. Thus, from the evidence of the parties it is seen that the properties are the self acquired properties of Gopalji Prasad and the question of the same being ancestral property once the partition has taken place does not arise. As may be noticed from the above extract taken from the book by Paras Dewan in paragraph 48, the proposition of law enumerated therein, and the illustration given to explain the law, is quite correct and no fault can be found with it. The learned appellate Court also purportedly tried to follow the same. However, it appears that the above principle of law along with the illustration given above have not been applied to the facts of the case at hand in true sense of the term. While the observation that, 'once the properties are partitioned, the properties obtained by each will be his separate property and the moment any one of them get a son, the property becomes joint family property, in so much as, each separate property after the birth of a son, will constitute a new coparcenary' appears to reflect a good grasp of the position of law, the next observation, that 'from the evidence of the parties it is seen that the properties are the self-acquired properties of Gopalji Prasad and the question of the same being ancestral property, once the partition has taken place, does not arise, is not only contrary to the correct legal principle, but is also quite contrary to what has been sought to be followed. It is the admitted position, that Gopalji Prasad is the common male ancestor of both the parties and both the parties except appellant No. 4 were in existence on the date of partition affected between Gopalji Prasad and his five sons. In this situation, it is not understandable as to how the ancestral property which came into the hands of Laxmi Prasad on partition, ceases to become ancestral property with regard to his sons, namely, Krishna Prasad-appellant No. 1, Dilip Prasad-respondent No. 3. Sandeep Kumar Prasad-appellant No. 2. Raju Kumar Prasad-appellant No. 3 and his grandson Master Shashank Prasad-appellant No. 4 who took birth later on. It is a settled position of Hindu Law that the share a coparcener gets on partition of his ancestral properties becomes a joint property with regard to his male lineal descendants up to the four degrees who take share in it by birth. The observation of the Apex Court in C. Krishna Prasad v. C.I.T., Bangalore . Para 8 which is quoted below, would make the point more than clear: The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issues. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. As regards other relations, it is separate property, and if the coparcener dies without leaving male issue, it passes to his heirs by succession. A person who for the time being is the sole surviving coparcener is entitled to dispose of the coparcenary properly as if it were his separate property. He may sell or mortgage the property without legal necessity or he may make a gift of it. If a son is subsequently born to him or adopted by him, the alienation, whether it is by way of sale, mortgage or gift will nevertheless stand, for a son cannot object to alienations made by his father before he was born or begotten. 18. In Bishnu Kumar Rai v. Mahendra Bir Lama , a Division Bench of this Court observed as follows: It is well established principle of law that, as under the Mitakshara Law, so under the Dayabhaga

Law, coparcenary property may consist of ancestral property or of joint acquisition, or of property thrown into the common stock, and accretions to such property. The essence of a coparcenary under the Mitakshara law is unity of ownership and on the other hand, essence of coparcenary under Dayabhaga Law is unity of possession. It is not unity of ownership at all. The ownership of the coparcenary property is not in the whole body of coparceners. Every coparcener takes a defined share in the property, and he is owner of that share. That share is defined immediately when inheritance falls in.... Therefore, in view of the legal position highlighted above, there is no doubt that the appellants and respondent No. 3 who are all male lineal descendants within the four degrees are members of the coparcenary with their father, Laxmi Prasad and since the property alienated by way of exchange by Laxmi Prasad is admittedly ancestral property, all of them have rights and interest over the same. The first question of law is accordingly answered. 19. Now, passing on to the next question of law framed above, it may be recalled that the conclusion of the learned appellate Court is that, the RCC building located at Singtam having been mentioned in the exchange deed, Ext. P2, was also one of the items which was intended to be transferred besides the two business and the next conclusion is that the respondents having entered into possession, pursuant to Ext. P2 they are entitled to the benefit of Section 53 -A of the Transfer of Property Act. The question is, whether the conclusions are in conformity with the existing legal provision and thus sustainable. 20. The pertinent points which arise and need determination for answering the above questions are, whether the exchange deed Ext. P2 is a legal instrument which requires to be registered under the law and what are the consequences that would follow, if the same is registered and also when the same is not registered. 21. It is the case of both the defendant/respondent Nos. 1 and 2, that the transfer of their ownership over their respective properties was done through a deed of exchange marked Ext. P2 and according to defendant No. 1, the properties so exchanged, consist of business and RCC building, whereas, according to defendant/respondent No. 2, it consists of only business. Even though the inclusion of the RCC building in Ext. P2 is thus, in dispute, the fact that the value of both the businesses exchanged and the RCC building, exceeds Rs. 100/- in value, is not disputed. The fact, which is not in dispute, has direct bearing on the question of registration of the document. 22. Section 118 of the Transfer of Property Act, which defines exchange, provides that, where either the properties in exchange are immovable or one of them is immovable, and the value of any one is Rs. 100/- or more, the provision of Section 54 of the Transfer of Property Act, relating to sale of immovable property would apply, and the exchange will require registration. Thus, the mode of transfer in case of exchange is the same as in the case of sales. It is, thus clear that in the case of exchange of property of the value of Rs. 100/- and above, the rules in Section 54 as to registration will apply. 23. Section 54 in clear terms; prescribes that, sale of tangible immovable property of the value of Rs. 100/- and above, must be effected by registered instrument. In the present case, however, the exchange deed is unregistered even though the value of the property exceeds the prescribed limit. Therefore, the next question that follows is, can

it be admitted in evidence and utilized for the purpose of proving, what was arranged and agreed between the parties vide, Ext. P2 ? 24. Law with regard to admissibility or non-admissibility of an unregistered document in evidence is well settled. Section 49 of the Registration Act, 1908 which provides for effect of non-registration of documents required to be registered and Section 91 of the Evidence Act which provides for exclusion of oral by documentary evidence, completely shut out all the terms of an unregistered deed compulsorily registrable. The Allahabad High Court in Ratanlal v. Hari Shankar following , has held that, if the term of family arrangement are reduced into writing its registration is necessary and an unregistered family arrangement cannot be looked into and any oral evidence on the basis of an unregistered family arrangement is barred by Section 91 of the Evidence Act. The following decisions throw further light on the issue: In Kuppuswami Goundan v. Chinnaswami Goundan AIR 1928 Mad 546, it has been held as follows: The moment an oral contract is reduced to writing it is not open to any of the parties thereafter to seek to prove the terms of the contract referring to the original oral agreement and Section 91, Evidence Act applies not only to cases where the contract is brought about or concluded by the writing, but also where the contract having been originally made by parol is subsequently, reduced in writing. When the parties reduce the terms of a contract to writing, it clearly indicates the contemplation of the parties that the terms would be reduced to a form where there could be no question at all as to what the terms were and the undoubted policy of the law is that, wherever parties have taken such precaution it is the document itself that must be produced and proved as evidence of the contract subject of course to any rules as to secondary evidence. (Emphasis supplied) In Mt. Dasodia v. Gaya Prasad AIR 1943 All 101, the Full Bench of the Allahabad High Court has held as follows: A binding family arrangement dealing with immovable property of the value of Rs. 100 or upwards can be made orally; but if the arrangement is reduced to the form of a document for the purpose of formally recording the arrangement and the document is not registered, the absence of registration will make the document inadmissible in evidence and is fatal to proof of the arrangement indicated in the document. (Emphasis supplied) To the same effect are the observations of Allahabad High Court in Mt. Jileba v. Mt. Parmesra where it has been held that "a family arrangement can be arrived at orally also; the law does not insist upon a document. But if the terms are settled orally and then they are reduced to writing. the writing must be deemed to be the actual compromise and not the oral settlement of the terms. If such document which ought to have been registered is not registered, the Registration Act would bar its being used in evidence and Section 92 of the Evidence Act would bar oral evidence being given to prove the terms of the compromise. (Emphasis supplied) Lastly, the following observation of the Hon'ble Supreme Court made in the context of admissibility of unregistered partition deed in Roshan Singh v. Zile Singh AIR 1988 SC 881 are also apposite: ... Section 17(1)(b) lays down that a document for which registration is compulsory should, by its own force, operate or purport to create or declare some right in immovable property... Two propositions must therefore flow. (1) A partition may be affected orally: but if

it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of a bargain, it will be necessary to register it. If it is not registered. Section 49 of the Act will prevent its being admitted in evidence. Secondly evidence of the factum of partition will not be admissible by reason of Section 91 of the Evidence Act. 1872. (Emphasis supplied) The above decisions, therefore, make it clear that the best evidence about the contents of a document is the document itself and as required by Section 91 of the Evidence Act, the document itself is to be produced to prove the contents of the document. But as provided by Section 49 of the Registration Act, any document, which is not registered as required under the law would be inadmissible in evidence and cannot therefore be produced and proved under Section 91 of the Evidence Act. From the position of law as discussed above, it would be manifestly clear that the deed of exchange Ext. P2 being an unregistered document is inadmissible in evidence, and, as such, it can neither be proved under Section 91 of the Evidence Act or any oral evidence can be given to prove its contents. It, therefore, follows that the conclusion arrived at by the learned appellate Court that the RCC building is one of the items of property intended to be transferred by the instrument Ext. P2, being based mainly on the recital of Ext. P2 without deciding its admissibility in evidence, is not legally sound and cannot be sustained. 25. Even though the above is sufficient to dispose of the issue, it would not be out of place to take note of other submissions made by the learned Counsel for the parties in this regard. It was also argued by Mr. B. Sharma, learned Senior Counsel for the defendant/respondent No. 1 that the parties had already entered into possession of the exchanged properties in the year 1989 itself, i.e., long before the execution of the agreement Ext. P2 thereby suggesting that Ex. P2 was nothing more than just a memorandum of a fait accompli which was not registrable under the law. Supporting his contention, Shri Sharma referred to the deposition of the appellants and submitted that the evidence on record was sufficient to prove that the parties had already entered into possession. It however appears that the theory put forward by the learned Counsel is not sound for the reason that the Ext. P2 is not in the nature of a memorandum of what had already been concluded and secondly, had it been so, the question of attestation by a witness and the question of applying for mutation of the properties in the name of respondent No. 1 in terms of Ext. P2 would not have arisen. That apart, the specific submission of Shri B. Sharma, learned Senior Counsel that the exchange deed Ext. P2 is a valid agreement executed in conformity with the provisions contained in Sections 2, 3 and 10 of the Indian Contract Act, and, therefore, the same is enforceable in the eye of law would go to show that the respondent No. 1 himself is treating Ext. P2 as a valid legal instrument. This is not all. The learned Counsel further sought to rely on Registration Rule of 1930, which according to him, postulate that the document of exchange need not be registered. The next following contention that assuming but not admitting that the Ext. P2 is a document which is required to be registered, even then such document can be validated on payment of fine as per the provision contained in Notification No. 2947G dated 22nd November, 1946 would further go to show

that the claim of the respondent No. 1 is based on the assumed validity of Ext. P2. It is thus clear from the above stand taken by the learned Counsel, that the Ext.P2 is not intended to be a mere memorandum of what had been agreed to between the parties, but it is a legal instrument purported to create or declare some right in immovable property. It is true that the Notification No. 2947G provides for validation of an unregistered document on payment of fine, but it to be noted that the defendant/respondent No. 1 has not taken any steps to avail of this provision in the trial Court as well as in the second appellate Court. The fact therefore remains that the Ext.P2 has been intended to be a document of exchange conferring valid title in respect of the properties exchanged to both the parties. It has already been noticed from the decisions cited above that a family arrangement can be arrived at orally also, but when the terms are settled orally and they are reduced into writing, it is the writing that must be treated as the actual compromise and not the oral settlement of the terms. It is thus further clear that documents such as Ex.P2 which deals with property worth Rs. 100/- and more must be registered, and if they are not registered the plain consequences that flow from it, is that, such document would not be admissible in evidence under Section 91 of the Evidence Act and no oral evidence can be given of its contents. Therefore, the net result of the above discussion is that, the decision of the first appellate Court that the RCC building is one of the items of property included in Ext.P2, having been based on a document, which is inadmissible in evidence, must be taken to be based on no evidence. 26. Further, even if the exchange deed Ext.P2 was to be taken as a valid document and admissible in evidence under Section 91 of the Evidence Act, the contention of Mr Moulik, the learned Counsel for the appellants is that the finding of the learned appellate Court that the RCC building is included as an item of property agreed to be transferred, is based on no evidence. 27. In order to appreciate the submission, it is necessary firstly to refer to the relevant paragraph of the impugned Judgment. The learned appellate Court in paragraph 46 of the Judgment has observed as follows: 46. From the evidence of the parties it is seen that Exht. P2 was prepared by Shyam Narayan and signed by Gopalji Prasad as well as Laxmi Prasad, according to them in good faith. Exht. P.2 also states that the liquor business and the building and the Manihari shop exchanged by Laxmi Prasad and Shyam Narayan respectively with each other. 28. The above observation goes to show that the learned appeal Court has relied on both oral evidence and the documentary evidence. While the oral evidence referred to by the learned appellate Court consists of the evidence of Gopalji Prasad (PW-2) and Laxmi Prasad (DW-2), the documentary evidence consists of the deed of exchange Ext.P2. It would be convenient to look into the oral evidence first. 29. Gopalji Prasad (PW-2), in his examination in chief, stated that he had signed Ext.P2 as a witness at the instance of his son, respondent No. 1, at a time when Laxmi Prasad, (respondent No. 2) his other son was not present. He also stated that Ex.P2 was not prepared and not executed in his presence, but it was brought to him by respondent No. 1 for his signature after its execution. Similarly, Laxmi Prasad, defendant No. 2, in his examination-in-chief, stated that, Shyam Narayan Prasad, respondent No. 1

approached him for exchanging the business of M/s. North End Company with his liquor shop at Singtam and, accordingly, they had exchanged their business only and consequently, he took over M/s. North End Company business at Gangtok while the respondent No. 1 went to Singtam and took over the liquor business at Singtam. He also stated that he never intended to include the RCC building at Singtam in the transaction of exchange. According to him, he signed the document in good faith thinking that the exchange was in regard to business only without going through the details of it. In his cross-examination, he said that he came to know that the RCC building was included in Ext. P2 by the defendant/respondent No. 1 for grabbing it from him only when the mutation proceedings were initiated at the instance of respondent No. 1. 30. As regards documentary evidence, the learned appellate Court in paragraph 50 of the impuged Judgment observed as follows: Secondly, on perusal of Ext.P2 it is clearly stated that– TO WHOMSOEVER IT MAY CONCERN This is for General Information that we the second party namely Shri Laxmi Prasad and the fourth party namely Shri Shyam Narayan Prasad mutually agreed to transfer each other share of property as per partition deed as follows: 1) Shri Laxmi Prasad transfer the liquor shop which is indicated as being run by his son and the building in which it existed to Shri Shyam Narayan Prasad. 2) Shri Shyam Narayan Prasad transfer M/s. North End Co. at old market, Gangtok the Shoe Manihari shop to Shri Laxmi Prasad. As such no one claims will be valid. Sd/- 1. Shri Laxmi Prasad dated 30-1 -90 (Revenue Stamp) Sd/- 2. Shri Shyam Narayan Prasad dated 30-1 -90 (Revenue Stamp) Witnesses :Sd/- Gopalji." After having extracted the above contents of Ex.P2, the learned appellate Court thought it appropriate to make the following observation: True the document is unregistered. The contents of the document speaks for itself and prima facie needs no interpretation. In the subsequent paragraphs, the learned appellate Court taking note of Section 118 of the Transfer of Property Act which defines exchange and Section 54 of the Transfer of Property Act which defines sale has observed that, registration is compulsory in case of sale of tangible immovable property of Rs. 100/-and above, and obviously taking note of the fact that Ex.P2 is not a registered document, further observed that the section of law quoted did not support the case of the appellants and then adverted to Section 53A of the Transfer of Property Act. We may deal with the relevance of Section 53A of the T. P. Act a little later. For the document it is sufficient to observe that the learned appellate Court relied on both the oral evidence as well as the documentary evidence for coming to the conclusion that the RCC building also stands transferred vide Ext.P2. The question is, whether the conclusion is well supported by the materials on record. 31. The above statements of the witnesses go to show that the document Ext.P2 lacks free consent of one of the parties to the agreement as required under Section 14 of the Contract Act. It is thus obvious that the evidence on the record does not support and prove the contents of Ext.P2. However, the learned appellate Court without a proper appreciation of the material evidence on record came to the conclusion that Ext.P2 also included the RCC building, merely on the basis of the recital in Ext.P2. It is evident from the observation made by the learned

appellate Court quoted above in paragraph 50 that the document Ext.P2, has been taken as a valid document, not open to challenge. It is no doubt, true that when the facts are fully set out in a document and are admitted, the parties opinion about the legal effect of those facts is of no consequence in construing it. In the present case, however, we are faced with a situation where one of the executants, namely, Laxmi Prasad, respondent No. 2 has taken a stand that what was intended to be exchanged was only the business and not the RCC building. The stand has thus a direct bearing on the contents and validity of Ext.P2. The only question, therefore, is, whether the document, Ext.P2 is in fact what it purports to be and whether any oral evidence can be allowed to show that the recitals in Ext.P2 did not incorporate the correct agreement as intended by the parties. 32. It is the submission of the learned Counsel for the appellants that, once a document is proved under Section 91 Evidence Act, the following next Section 92(1) permits the appellants to lead evidence to show that the intent and purport of the document, Ext.P2 was not to exchange the RCC building at all, and, therefore, the observation of the learned appellate Court that the contents of the document (Ext.P2) speaks for itself and prima facie needs no interpretation, is contrary to settled position of law. As already noted above, the learned appellate Court has proceeded on the "best evidence rule" in so far as the learned Court seems to have assumed that the best evidence about the contents of the document is the document itself, and since the very document in question has been produced and as the recital in it is clear, there is no question of looking into any evidence to contradict the same. Such approach of the learned appellate Court, to say the least, is quite contrary to the settled position of law that a fact which would invalidate a document, may be allowed to be proved under proviso (1) to Section 92 of the Evidence Act. Under this provision, it is open to a party to prove that he or she did not consent to the contract under dispute. It is to be noted that the above proviso (1) of Section 92, is an exception to the Rule contained in Section 92, which lays down that, when the terms of a contract grant or other disposition of property or any matter required by law to be in writing have been proved by evidence as laid down in Section 91, the parties to the contract or their legal representatives cannot be allowed to lead oral evidence for the purpose of contradicting, varying, additing to or subtracting from the terms of the contract. There would therefore be no bar in looking into the evidence adduced by the appellants to show that the agreed purport and intention of the parties to Ext.P2 is different from what is reflected therein. 33. The evidence adduced by the parties on this issue, has already been adverted to above. The case of the respondent No. 1 as would be clear from the pleadings of the parties, is that, the respondent No. 2 had transferred the RCC building to him vide Ext. P2. It was in support of such case of his, that he stated that they entered into the transaction mutually with the consent of Gopalji Prasad. This plea, however, does not find support from the evidence of Gopalji Prasad. Gopalji Prasad has clearly stated that the document was not executed in his presence and he had signed it subsequently, when the respondent No. 1 brought the document to him for his signature. 34. Therefore, the above materials on record throw sufficient doubt on the correct-

ness of the recital of Ext.P2. The evidence that has come on record, makes it more probable that, what was agreed to be exchanged was only the business and not the RCC building where the respondent No. 2 was running the liquor business. Therefore, the finding of the learned appellate Court that the RCC building must be held to have been included in the exchange on the basis of the recital in Ext.P2 above, cannot be sustained and it must be held that the conclusion is not supported by the evidence. 35. Another submission made by Shri B. Sharma, learned senior counsel, which is based on the assumption that the document Ext.P2 is correct and valid, is that the transfer of the RCC building in favour of the respondent No. 1 vide deed of exchange Ext. P2 was for legal necessity and as the Karta of a joint Hindu family is clothed with right to alienate property of joint family in case of necessity, the alienation in question is valid. The submission, no doubt, reflects the correct proposition of law in so far as the power of a Karta of a joint Hindu family to alienate joint family property in case of legal necessity is concerned. However, it is settled position of law that the burden to show that there was such legal necessity lies on the alienee and not on the person who alienates joint family property. The following is the legal position as summed up in Mulla's Hindu Law, Seventeenth Edition page 376 paragraph 44: 244. Burden of proof of necessity.– Where the manager of a joint Hindu family sells or mortgages joint family property, the purchaser or mortgagee is bound to inquire into the necessity for the sale or mortgage, and the burden lies on the purchaser or mortgagee to prove either that there was a legal necessity in fact, or that he made proper and bona fide enquiry as to the existence of such necessity and did ail that was reasonable to satisfy himself as to the exsistence of such necessity. It is, therefore, clear from the above legal position that a duty is cast on the alienee to enquire into the necessity and even if he fails to establish legal necessity, it will suffice if he shows that he made proper and and bona fide enquiry as to the existence of such necessity. Quoting the above paragraph from the tenth edition of the same book, a Division Bench of the High Court of Orissa in Manglu Meher v. Sukuru Meher has held that: ... What has to be judged broadly is whether for raising the amount for which legal necessity has been made out, the particular transaction by way of sale of the extent comprised therein was in fact reasonably necessary and prudent or whether the alienees were reasonably and honestly satisfied that it was so on a bona fide inquiry. 36. In the present case however, the defendant No. 1 who claims that the transfer of the property in question was done for legal necessity or for improvement of the property, has failed to discharge the duty of satisfying himself that there was legal necessity or that he had made a bona fide inquiry as to the existence of legal necessity. It is of course stated in the pleadings as well as in evidence that the respondent No. 2 was desirous of shifting his business from Singtam on account of the declining business prospects on the construction of a new bridge at Singtam, and it was for this reason that he had exchanged the business with the respondent No. 1. This alone however is not sufficient to show that he had discharged the duties cast on him and even if it is taken as sufficient discharge of such duties, the fact remains that it relates to only the business and not to the RCC building. 37. Therefore, even this ground raised

by the learned Counsel for the defendant/respondent No. 1 does not carry his case any far. 38. The next question that still remains to be answered is, whether the principles of Section 53A of the Transfer of Property Act are attracted and whether the respondent No. 1 is entitled to the benefit under this provision. 39. As already stated above, the learned Counsel for the respondent No. 1 has invoked the principles of part performance as embodied in Section 53A of the Transfer of Property Act and has claimed that even if Ext.P2 fails on account of non-registration of Ext.P2, he is entitled to protection under Section 53A of the Transfer of Property Act. It is submitted by Mr. B. Sharma, learned senior counsel, that the parties had acted upon the exchange deed, Ext.P2 after it was executed between them, inasmuch as, the plaintiff/appellants took possession of M/s. North End Company at Gangtok and the defendant/respondent No. 1 took possession of the shoe business and the RCC building at Singtam. Respondent No. 1 not only entered into possession of the property, but also added two more storeys to the existing building after he entered into possession. Hence, it was his submission that the respondent No. 1 having entered into possession consequent upon the execution of Ext.P2 was entitled to protection under Section 53A of the Transfer of Property Act. In his reply, Shri A. Moulik, learned senior counsel for the appellants, in the first place, pointed out that there was no pleading to this effect and since no such plea was taken, respondent No. 1 cannot get the protection of Section 53A of the T. P. Act. In the next place, he contended that a coparcener does not claim interest in the coparcenary property under any other coparcener. It is thus his further submission that in the present case, the appellants as well as respondent No. 3 being coparceners, had their independent right over the coparcenary property, and have never been claiming their right through their father, Laxmi Prasad. For these reasons, it was submitted that no protection under Section 53A can be available to the respondent No. 1, Shyam Narayan Prasad. 40. The learned appellate Court has dealt with the above issue in paragraphs 57 and 58 which are as follows: 57. An analysis of Section 53(A) Transfer of Property Act shows that there must be a contract to transfer immovable property (a) the contract must be for consideration, (b) it must be in writing (c) must be signed by the promisor or on his behalf and the contract must be such as to enable the Court to ascertain with reasonable certainly the terms of the contemplated transfer. 58. A perusal of the Exbt.P2 shows all the above to be satisfied. Laxmi Narayan has pursuant to the execution of Ext.P2 been in possession of the transferred properties. Paragraph 61 which is also relevant is to the following effect: 61... Exbt. P2 is clear and a motive cannot be implicated into the document... Wishing away the document by filing a suit also does not change what has already been written in the document... transferees has rights Under Section 53(A) Transfer of Property Act. 41. It is obvious from the above that the learned appellate Court has lost sight of the related law on this account also. That the learned appellate Court had not come to grips with the issue would be clear from the following. 42. It is the settled law that a defendant who intends to avail of the benefit of Section 53A of the Transfer of Property Act must plead in the written statement that he has taken possession of the property in part performance of a contract. It has been

held in Nigamnanda Patra v. Sarat Chandra Patra AIR 1998 Orissa 19 that a plea of part performance if not taken in the written statement, the same cannot be allowed to be raised in appeal. Referring to and relying on the decisions reported in (1983) 55 Cut LT 77 : 1996(1) Orissa LR 124, the learned Court has observed as follows: Scrutinised on the ambit of law enunciated above, when there is denial of contract, benefit as contemplated under Section 53-A of the Transfer of Property Act cannot be extended to defendants. Admittedly, the respondents have not pleaded part performance in their written statement, and for this reason, it will not be open for them to claim the benefit available under Section 53-A of the Transfer of Property Act. 43. Even if it were to be held that the plea raised in the written statement amounts in substance to plea of part performance the defendant cannot succeed on this issue. It is the admitted fact that the appellants are all male descendants and members of the coparcenary, and it goes without saying that they claim their right in the ancestral property independently and not through the owner, Laxmi Prasad. Thus, the appellants are not the persons claiming under the respondent No. 2, and it is obvious that the benefit of protection available under Section 53-A, T.P. Act cannot be extended to the respondent No. 1. 44. It is thus evident from the above, that from whatever angle the issue may be viewed, the conclusion is inescapable that the evidence on record does not prove the contents of the exchange deed, Ext.P2 and neither it can be treated as a valid document nor can oral evidence as regards its contents would be admissible. 45. Hence, for the foregoing reasons and observations, the appeal is allowed and the judgment and decree of the learned District Judge, Special Division-II are hereby set aside, thus affirming the judgment and decree dated 19th November, 2004 passed by the learned trial Court. 46. In the circumstances of the case, there shall be no order as to costs.