Karnataka High Court Tukaram vs Sambhaji And Others on 24 October, 1997 Equivalent citations: ILR 1998 KAR 681, 1998 (6) KarLJ 386 Bench: B S Rao JUDGMENT 1. R.S.A. No. 586 of 1994 has been filed by defendant 1 and R.S.A. No. 1030 of 1994 has been filed by defendants 2 to 5 against the judgment and decree passed in R.A. No. 27 of 1987 by the First Additional District Judge, Belgaum allowing cross-objections of the plaintiff and dismissing the appeal filed by the appellants confirming the judgment and decree dated 4-4-1987 passed in O.S. No. 271 of 1984 by the Principal Civil Judge, Belgaum and thus decreeing the suit of the plaintiff in entirety. 2. Heard the learned Counsel for the appellants in both the appeals and respondent I/plaintiff. 3. For convenience sake, appellant in R.S.A. No. 586 of 1994 is referred to as defendant 1 and the appellants in R.S.A. No. 1030 of 1994 are referred to as defendants 2 to 5. Respondent 1 as the plaintiff, respondents 2 to 10 as defendants 7 to 15, respondents 11 to 15 as defendants 2 to 6. 4. The facts of the case, briefly, stated are as follows: One Huvappa Nesarkar was the original propositus who died on 19-9-1969, leaving behind him his sons, defendant 1, Tukaram, defendant 7, Shivaji, defendant 8, Vasant, defendant 9, Appanna and plaintiff-Sambhaji. Tukaram is the eldest of all the brothers and the plaintiff is the youngest. The 1st defendant and defendants 7 to 9 are the brothers of the plaintiff. The suit schedule property is an agricultural land which was purchased by the deceased Huvappa out of joint family funds and out of his own earnings and from the nucleus of the funds. During the lifetime of Huvappa, defendant 1 and defendants 7 to 9 constituted joint family. Huvappa being the manager and kartha of the joint family along with his sons was cultivating all the agricultural lands belonging to joint family. Father of the plaintiff viz., Huvappa inherited some ancestral properties including agricultural lands after the death of plaintiffs grandfather. The ancestral properties in the hands of Huvappa were being cultivated jointly by him, defendant 1 and defendants 7 to 9 jointly. During the lifetime of Huvappa, he purchased the suit property in the name of the eldest son-defendant 1 under the impression that if all the agricultural lands stand in his name, perhaps provisions of Land Ceiling Act would be attracted and he would lose the lands. Under the advice of defendant 1, Huvappa purchased the suit land out of the joint family agricultural income. Even though the suit land stood in the name of defendant 1, it was cultivated jointly by all the coparceners viz., plaintiff, defendant 1 and defendants 7 to 9. After the death of Huvappa, plaintiff, defendant 1 and defendants 7 to 9 were cultivating the suit property and were in possession and enjoyment of the same. There is no partition in the joint family. 5. Plaintiff and other defendants learnt that defendant 1 created document alleged to be sale deed in the names of defendants 2 to 6 on 5-9-1984. Plaintiff and defendants 7 to 9 are not parties to the said sale deed which is not binding to the extent of interest of the plaintiff and defendants 7 to 9. Plaintiff filed the suit for partition and separate possession of the suit schedule property of his 1/5th share, for a declaration that the sale deed executed by defendant 1 in favour of defendants 2 to 6 is void and as such not binding on the interest of the plaintiff and defendants 2 to 9 and for mesne profits under Order 20, Rule 12, Civil Procedure Code. 6. Plaintiff, defendant 1 and defendants 7 to 9 are

brothers inter se, Defendant 1, Tukaram is the eldest brother, defendants 11 to 14 are sisters of the plaintiff. Defendant 15 appears to be the son of plaintiff's deceased sister. Defendant 10 is the mother of the plaintiff. Defendant 1, the eldest brother and defendants 2 to 6 filed written statements and contested the case and defendants 11 to 15 are the alienees. They have also contested the case. 7. On the pleadings of the parties the following issues were framed by the Trial Court: 1.Whether the plaintiff proves that the suit property was purchased by his father Huvappa in the name of defendant 1 and so the suit property is the joint family property of plaintiff, defendant 1 and defendants 7 to 9? 2.Whether defendant 1 proves that the suit property is his self-acquired property? 3.Whether the plaintiff proves that defendant 1 and defendants 7 to 9 are in joint possession of the suit property? 4.Whether the plaintiff is entitled to any share in the suit land? 5.Is the suit bad for non-joinder of necessary parties? 6.Is the suit bad for non-joinder of other joint family properties? 7.Whether the sale of the suit land is for legal necessity and is valid? 8.To what reliefs are the parties entitled to? 9.What order and decree? 8. The Trial Court, after examining the evidence and documents and hearing the arguments, answered the first issue in the affirmative and negatived the contention of the 1st defendant as his self-acquired property. The third issue, with respect to the joint possession of the suit property, was answered in the affirmative. The 7th issue, with respect to the legal necessity for selling up the property, was answered in the negative. The 6th issue, with respect to the point whether the suit was bad for non-joinder of other joint family properties, was answered by the Trial Court in the affirmative and it has been held the inclusion of all the joint family properties in the instant suit for partition was must and without bringing all the joint family properties into the hotchpot, the suit is not maintainable. The Trial Court passed the decree allowing the suit in part declaring that the sale deed executed by the 1st defendant in favour of defendants 2 to 6 in respect of the suit land is not binding on the plaintiff. The rest of the claim of the plaintiff including the relief of partition and separate possession was dismissed. 9. Aggrieved by the judgment and decree of the Trial Court, R.A. No. 271 of 1987 was filed by the 1st defendant-the eldest brother of the plaintiff and defendants 2 to 6 the alienees. In the said appeal, cross-objections were also filed by the plaintiff. After hearing the arguments of the learned Counsel for the parties, the I Appellate Court dismissed the appeal filed by defendants 1 to 6 and allowed the cross-objections filed by the plaintiff and modified the judgment and decree of the Trial Court declaring that the sale deed dated 5-9-1984 executed by defendant 1 is not binding on the plaintiff and decreed the suit of the plaintiff for 1/6th share in the suit schedule land with costs. Aggrieved by the said judgment and decree passed by the I Appellate Court, the 1st defendant has filed R.S.A. No. 586 of 1994 and defendants 2 to 6 the alienees have filed R.S.A, No. 1030 of 1994. 10. At the time of admission, the substantial questions of law in both the appeals raised are as follows:– 1. Whether the finding of the Courts below that the suit schedule property is the joint family property is vitiated when there is no indication in the evidence led by the plaintiff as to what was the income of the joint family of the parties and that the appellant

had any control or command over that income? 2. Whether the lower Appellate Court was justified in decreeing the suit for partial partition when the plaintiff had no special circumstances to file such suit for partial partition? 3. Whether the lower Appellate Court was justified in granting 1/6th share to the plaintiff without taking into consideration the share to which the sister and the mother of the plaintiff will be entitled to? 11. The learned Counsel for the appellant in R.S.A. No. 586 of 1994 filed application under Section 100(5), Civil Procedure Code to raise additional substantial questions of law as follows: 1. Whether the judgment of the First Appellate Court is vitiated for the reason that it did not form points for determination as required under Order 20, Rule 4(2) of Civil Procedure Code? 2. Whether the decisions of the Courts below are illegal as they have proceeded on matters not pleaded by plaintiff-respondent 1, in the plaint? 12. The learned Counsel for the appellant has strongly urged that as per the said provision of Order 20, Rule 4(2), Civil Procedure Code the judgments shall contain the concise statement of the case, the points for determination, the decision thereon and reasons for such decision. He has relied on the decision in Swaminathan Ambalam v P.K. Nagaraja Pillai, wherein it has been held that in appeal the Judge in a very short judgment dismissed the appeal agreeing with the decision of the Trial Court without framing any points for determination and applying his mind independently of the judgment of the Trial Court and without any discussion of the evidence, such a judgment is vitiated in its failure to state the points arising for determination and discuss the evidence on matters in controversy. The learned Counsel has also relied on the decision in Syed Haisanutla v Ahmad Beig, wherein it has been held that the judgment as laid down by the Civil Procedure Code though it might be an ex parte judgment, must contain a precis of the plaint and the points that arose for determination and it should also record the findings. It should also contain succinctly the summary of the discussion of the evidence and the effect of the documents in the suit. The Court should bear in mind that a heavy burden lies on the Court especially in matters where the defendants are ex parte. The Court cannot blindly decree the suit on the ground that the defendants are ex parte. In the decision in Assistant Commissioner, PHC Sub-Division, Tumkur and Another v K.N. Nagaraja, wherein it has been held that a substantial compliance with the requirements of Order 41, Rule 31 of Civil Procedure Code would be sufficient and a little deviation therefrom should not be a ground to set aside the entire judgment. Thus, where the appellate judge had drawn attention to the only question that arose for consideration and proceeded to discuss the evidence, it cannot be said that the judgment was vitiated for the reason that the judge had not formulated the points for his decision at the very commencement of the judgment. 13. In the present case on hand, the learned Judge in the first appeal during the course of the judgment formulated the points and also has given his findings after discussing the evidence placed on record and also has given the reasons. The contention of the learned Counsel for the appellant that the judgment does not disclose the nomenclature that the points for determination, findings and the reasons as such by itself cannot and the judgment itself is not in accordance with law as per the provisions of the Civil Procedure Code. That

contention of the learned Counsel for the appellant is not sound in view of the judgment passed by the I Appellate Court wherein it has been clearly stated that the points which are to be determined and also the findings thereon and also substantiating by reasons taking into consideration the documents both oral and documentary and also contentions of the parties. Even the second ground urged by the learned Counsel for the appellant that the Courts below have proceeded on matters not pleaded by the plaintiff in the plaint also cannot be held to be sound for the reason that in the pleading the plaintiff has contended that the suit schedule property is joint family property and in that regard oral evidence has been let in and the 1st defendant has contended that it is his self-acquired property and after discussing the evidence both the Courts have held that the suit schedule property is joint family property. Even on that score also, the argument of the learned Counsel for the appellant that both the Courts have proceeded on matters not pleaded by the plaintiff cannot be upheld. 14. The main contention of the learned Counsel for the appellants is that there is no indication in the evidence led by the plaintiff that the suit schedule property is joint family property as plaintiff has not let in evidence regarding the income of the joint family property and also the plaintiff has not placed sufficient material to show that the 1st defen- dant had control or command over the income of joint family properties of Huvappa Nesarkar, 1st defendant and defendants 7 to 9. 15. It is seriously contended by the learned Counsel for the appellant that Huvappa died on 19-6-1969, the appellant-defendant 1 purchased the suit property on 12-6-1972 for Rs. 10,000.00. Later sold the same to respondents 11 to 15 on 5-9-1984. The plaintiff filed the suit in O.S. 271 of 1984 before the Principal Civil Judge, Belgaum for declaration that the sale of the land dated 5-9-1984 is not binding on him and for partition of 1/5th share in the suit schedule property. The defence taken out by the 1st defendant is that the suit schedule property is the self-acquired property and it is the contention of the 1st defendant that he was staying separately as he could not pull on with his parents amicably. It has also been contended by the learned Counsel for the appellants that R.A. No. 27 of 1987 was filed against the findings of the Trial Court that the suit schedule property is not the self-acquired property of the 1st defendant and the defendants have not established legal necessity for selling the same. The plaintiff filed cross-objections against the finding given against him that the suit was not maintainable for partial partition. The cross-objection was upheld by the I Appellate Court about the maintainability of the suit with respect to the partial partition and also the I Appellate Court held that the suit schedule property is the joint family property. It has been seriously urged by the learned Counsel for the appellants when the suit schedule property was purchased by the 1st defendant, his father Huvappa was not alive and also the plaintiff has not shown, the 1st defendant out of the income of the joint family property purchased the suit schedule property and there was sufficient nucleus and income for the purchase of the same and further the 1st defendant had command and control over the income of the other joint family properties from which income he purchased the suit schedule property. It has been seriously urged by the learned Counsel for the appellant that the plaintiff has not stated

in his evidence that the 1st defendant was managing the affairs of the joint family properties on account of that income he purchased in his name. The learned Counsel for the appellant relied on the decision in Dandappa Rudrappa Hampali and Others v Renukappa and Others, wherein it has been held as under: "The initial burden is to establish the existence of some joint family property, capable of being the nucleus from which new property or asset could have been acquired; it is not sufficient to show that the joint family possessed some assets; it is necessary to prove that the assets of the joint family may have formed the nucleus from which the disputed assets, may have been acquired. Whether joint family assets could have formed the nucleus, again, depends upon their nature and relative value. Existence of such joint family property which could have formed the nucleus for the acquisition of new assets, by itself would not lead that the new assets acquired by any member of the family would be joint family property, because, such a member may not have control or command over the joint family assets. The idea is that the member who acquired the new assets may have utilised the joint family assets to acquire further assets; this is possible only if the said member was in a position to utilise the joint family asset to acquire further asset or assets. In the case of the manager of the joint family or any other member who was in management of the family affairs or in possession of sufficient joint family assets, it is likely that the joint family property or part thereof formed the nucleus from which he acquired other assets and in such a case burden will be on him to prove that the acquisition by him was without the aid of the joint family property. Ordinary presumption is that the eldest member"of the family is its manager; this presumption has to be rebutted by cogent evidence, to be adduced by the person who asserts that the family was being managed by a junior member. The initial burden to prove the existence of sufficient family property which could form a nucleus for other acquisition or for the business carried on by the brothers, is on the plaintiff. Existence of sufficient family asset so as to form a nucleus for further acquisition is a question of fact. Such a fact can be proved by direct evidence or circumstantial evidence. However, circumstantial evidence should be clear, unequivocal and clinching, as otherwise, there is every danger of the self-acquisitions of a person being lost to and other who claims a share in it, based on the past prosperity of the family". The learned Counsel for the appellant has also relied on the decision in Ramappa Basappa Palled v Smt. Basavva and Others, wherein it has been held that user of joint family assets makes acquisitions, joint family property – If no sufficient nucleus, acquirer of property though manager cannot be denied benefit of acquisition unless acquirer treated it as joint family property or other members participated – Sufficient nucleus and absence of any source of income of manager necessary –Emphasis on nucleus to apply presumption – If sufficient nucleus shown, burden shifts to kartha to prove self-acquisition – Circumstances to be examined by Court. 16. The Trial Court regarding the issue of the nature and acquisition of the suit schedule property has thoroughly discussed about the pleading of the parties and also the evidence adduced. It has also discussed that the admitted position is that Huvappa and his sons constituted joint family which was possessing the lands Sy. No. 1 measuring 7 acres 25 guntas, Sy. No.

350 measuring 1 acre 3 guntaS, R.S. No. 4 measuring 3 acres 2 guntas, Sy. No. 510 measuring 1 acre 7 guntas of Peeranwadi and R.S. No. 279 measuring 2 acres 28 guntas of Mache village and Sy. No. 71 measuring 2 acres 32 guntas of village Sulage. These landed properties have been described by defendant 1 in his written statement. It has been discussed by the Trial Court that the joint family was in possession of 18 acres 17 guntas of land at the time of agreement of sale Ex. P-1 in respect of the suit land. It has also discussed that the income of all these lands was the income of the joint family and the joint family was in a better position to part with the advance amount paid to the vendors under Ex. P-l and earlier to it also. It is also stated the lands as mentioned in paragraph 1 of the written statement were alleged to have been taken by the 1st defendant in the year 1971. The utilisation of these loan amounts at the time of execution of Ex. P-l or earlier to it is to be completely discarded as Ex. P-l is dated 24-1-1968, whereas the 1st defendant had taken loans in the year 1971, The 1st defendant has not shown his own independent income in the year 1968. On the other hand, it is the evidence of the 1st defendant that when he was joint along with his brothers and father he was cultivating the ancestral lands jointly. The Trial Court has also discussed about the payment of consideration to the vendors as per Ex. D-9 to D-13 on 3-5-1970, Rs. 1,000/-, on 4-8-1980 Rs. 2,000/-, on 8-6-1969 Rs. 1,000/-, on 27-3-1969 Rs. 1,200/- and on 15-5-1969 Rs. 1,800/-. All these payments have been shown in the name of defendant 1 executed by the vendors of the suit land. The sale agreement Ex. P-l is taken in the name of the 1st defendant. The receipts are also taken in the name of the 1st defendant. It is explained by the plaintiff that as the 1st defendant was the eldest son in the family, Huvappa, the father decided to take the documents of the sale transaction of the suit land in the name of defendant 1. This has been stated by the Trial Court as natural. The burden was on the 1st defendant to show that his independent and self income on the date of execution of Ex. 0-9 to D-13 as well as on the date of execution of Ex. P-l. The Trial Court has discussed the evidence placed on record and has stated that the amounts under Ex. D-9 to D-13 and under Ex. P-l was from the joint family funds and that was the only income available to Huvappa and his sons including defendant 1, The Trial Court has also discussed that the sale deed executed in respect of the suit land was marked as Ex. P-2-certified copy which is dated 12-6-1972. On the date of execution of the registered sale deed a sum of Rs. 400/- was collected and given to the vendor of Ex. P-2. That property was VPC 52. The 1st defendant in his evidence has admitted that VPC 52 of Ramdev Galli was of their ancestral property and was sold by the plaintiff and defendants 7 to 9. The Trial Court, after discussing both oral and documentary evidence and examining all the circumstances, has inferred that at the time of registration of Ex. P-2, the amount paid by defendant 1 to the vendors was out of the joint family funds. Further the Trial Court after discussing the evidence has held that the 1st defendant has failed to prove that he contracted hand loans from D.Ws. 2 and 3 and it has further held the 1st defendant has failed to prove that from his own earning he purchased the suit schedule property and it is his self-acquired property. After examining the evidence and also the circumstances of

the case, the Trial Court has held that the suit schedule property is the ancestral property and joint family property and also negatived the contention of the 1st defendant that it is his self acquired property. This finding of the Trial Court has been upheld by the I Appellate Court after discussing the evidence and also the contentions placed before the I Appellate Court by the respective Counsels. The finding given by the I Appellate Court with respect to the suit schedule property as joint family property is a question of fact and also the finding has been given after examining in detail the evidence placed on record by both the Trial Court as well as by the I Appellate Court. Under these circumstances, the finding which is a question of fact given by the two Courts below concurrently cannot be disturbed and does not call for interference in the second appeal. As seen from the discussion made and also the evidence placed on record, the finding of the Trial Court and the I Appellate Court holding that the suit schedule property is joint family property has to be upheld. 17. The main contention of the learned Counsel for the appellants is that as seen from the evidence there are other joint family properties belonging to the family and the present suit is filed by one of the coparcener unless all the properties have been included in the suit schedule, the present suit for partial partition is not maintainable. The learned Counsel for the appellants relied on the following rulings: (1) In the decision in Vemauarapadur Mallikarjuna Rao v Chatur-vedula Siva Sankara Prasad and Others, wherein it has been held that the question therefore is whether there are no cogent grounds for departing from the normal rule of general partition in the instant case. The plaintiff has not given any explanation or reason why he has not filed a suit for partition of all the joint family properties. He has only filed a suit for partition of the 'B' Schedule property. Further the relief asked for the allotment of 'A' Schedule property and a specified Vard share out of 'B' Schedule cannot be gone into since defendants 1 and 2 have interest in every square yard of 'B' Schedule property. Therefore, the suit for partial partition is not maintainable. (2) In the decision in Ramalinga Annavi and Another v Narayana Annavi and Others, it has been held that it is open to the members of a joint family to make a division and a severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as the properties of a joint undivided family. (3) In the decision in Kashinathsa Yamosa Kabadi v Narisingsa Bhaskarsa Kabadi, wherein it has been held that it is always open to the members of a joint Hindu Family to divide some properties of the family and to keep the remaining undivided. Such properties as are not partitioned can be divided later on – Such division is to be made consistently with the rules of Hindu Law. (4) In the decision in Sunil Kumar and Another v Ram Prakash and Others. In the said case it has been held – Hindu Law – Joint family – Mithakshara Law – Alienation of joint family property by karta –When permissible – Burden of proof to justify the alienation – Coparceners not entitled to seek permanent injunction restraining karta from making such alienation. (5) In the decision in Muniyappa v Ramaiak, it has been held as under:"The manager of a Joint Hindu Family is entitled to alienate the joint family property for joint family necessity or for the benefit of the estate, in certain circumstances. Whether the manager is the father or not, will not

make any difference. If such an alienation is made by the manager of the Joint Hindu Family of joint family property, the sale would bind not only his share in the property but the share of the other coparceners as well. No doubt, the other coparceners may be entitled to file a suit for partition and recover their share if the alienation was not for family necessity or for the benefit of the estate. The burden in such cases will also lie on the alienee to prove family necessity or the benefit to the estate to uphold the alienation by the manager. But that right of a coparcener does not affect competency of the manager to alienate the joint family property. When one such alienation is made, the alienee is entitled to be in possession of the property and right of any other coparcener is to sue for partition and recover possession of his share in the joint family properties. The sale being only voidable unless it is avoided by an action, the alienee is entitled to continue in possession. The position may be different if one coparcener alienates his share alone, but once the alienation is made by the manager of the property, it will be effective until it is properly avoided by the non-alienating coparcener by filing a suit for partition". (6) In the decision in Afsar Shaikh and Another v Soleman Bibi and Others, wherein it has been held that the effect of Sections 100 and 101 read together, is that a second appeal is competent only on the ground of an error in law or procedure, and not merely on the ground of an error on a question of fact. The High Court has no jurisdiction to entertain a second appeal on the"ground of an erroneous finding of fact, however, gross or inexcusable the error may seem to be". Section 103 enables the High Court in second appeal, where the evidence on record is sufficient to determine an issue of fact necessary for the disposal of the appeal only – (a) if the lower Appellate Court has determined that issue of fact, or (b) if it has determined that issue wrongly by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of Section 100. 18. In the present case on hand, it is seen and also it is admitted that the plaintiff, defendant 1 and defendants 7 to 15 are members of Joint Hindu Family. There is no partition by metes and bounds of the family properties. The present suit has been filed in respect of the suit land only. The other lands which are in Peeranvadi village, Mache and Su-lage have not been included in the suit schedule. The house properties are also not included which are admittedly the joint family properties. The learned Counsel for the appellants has relied upon the observations made in Mulla's Principles of Hindu Law – Sixteenth Edition dealing with rights of purchaser of coparcener's interest as per Section 261 at page 296. The learned Author has stated that non-alienating coparceners are entitled in Bombay and Madras and resolved to sue the purchaser for partition of the alienated property without bringing a suit for general partition. The learned Counsel for the appellant has relied on the decision in Vemauarapadur Mallikajuna Rao's case, supra, wherein it has been held that normally a suit instituted for partition should be one for partition of the entire joint family properties and all the interested co-sharers should be impleaded. The suit for partial partition of specified items can only be an exception. 19. It has been contended by the learned Counsel for the appellants that the finding of the I Appellate Court to the effect that the suit by one of the coparceners for partition with respect to one of the items of the

Joint Hindu Family property is maintainable in the special circumstances is not proper. During the course of the order, the I Appellate Court has observed that Section 261 of Mulla's Hindu Law, 15th Edn., at pages 351 and 352 makes it clear that non-alienating coparceners are entitled in Bombay, Madras and Allahabad to sue the purchaser for partition of the alienated property without bringing a suit for a general partition. In the present case on hand all the non-alienating coparceners have not filed the suit. The mere fact that the other non-alienating coparceners viz, defendants 7 to 9 did not join the plaintiff in filing the suit is not material. The right of non-alienating coparcener in Bombay area does not depend upon the whims and fancies of remaining non-alienating coparceners who for reasons best known to them, may not join the plaintiff in filing suit. Patna and Andhra Pradesh High Courts held that one of the several non-alienating coparceners cannot sue the purchaser for his own share of the alienated property. It has been observed by the I Appellate Court the law applicable in Bombay area does not prohibit the suit by one of the several non-alienating coparceners. The I Appellate Court considered the ruling in Khemchand Shankar Choud-hary and Another v Vishnu Hari Patil and Others, wherein it has been held that a purchaser can be impleaded even when decree for partition of agricultural lands is pending before the Collector for effecting partition. But it is not the case in the present suit. In Janardhan Jog v Srikrishna and Others, it is held that a partition suit should comprise of all the available properties, as far as possible. That decision has been distinguished by tbe I Appellate Court as that was not a case of non-alienating coparcener filing a suit for partition of alienated property. The view that has been taken by the I Appellate Court cannot be stated to be a correct one in the circumstances of the case. It is to be seen that the plaintiff, defendant 1 and defendants 7 to 15 are the members of Joint Hindu Family. There is no partition by metes and bounds of the family properties. The present suit is filed in respect of the suit land only. There are other lands in other villages and also other house properties which have not been included in the suit which are admittedly the joint family properties. It has been observed in Mulla's Hindu Law, 13th Edn. regarding the rights of purchaser of coparcener's interest. It has been stated that the non-alienating coparceners are entitled in Bombay, Madras and Allahabad to sue the purchaser for partition of the alienated property without bringing a suit for general partition. It is to be noted that in Vemavarapadur's case, supra, it has been held that normally a suit instituted for partition should be one for partition of the entire joint family properties and all the interested co-sharers should be impleaded. The suit for partition of specified items can only be an exception. In the present case on hand, the 1st defendant has alienated the suit land in favour of defendants 2 to 6. The 1st defendant is the member of the Joint Hindu Family, As already stated that the family has got other several lands and house properties which are the joint family properties. It has been contended by the learned Counsel for the alienees while allotting the share to defendant 1 in the family properties equitable rights of purchasers on partition has to be considered and those rights can be considered only when all the joint family properties are included in the suit for partition. Otherwise, it would be difficult to apply principles of equitable

partition. The inclusion of all the joint family properties in the instant suit for partition was necessary and without bringing all the joint family properties into the hotchpot, the suit for partition of the shares of the members of the joint family in one property which amounts to partial partition is not maintainable. This contention in the circumstances of the case, has force and the same has to be upheld. The reason being, the present suit has been filed by one of the non-alienating coparceners of the joint family property. The suit has been filed by the non-alienating coparcener with respect to the only property which has been alienated. This is not a suit for general partition. The contention of the alienees is to the effect that if the share of the plaintiff to be worked out if all the joint family properties had been included in the schedule then, at a partition, the share of the 1st defendant would have been worked out in order to give equitable relief to the alienees also as they have purchased the property by the 1st defendant. In that view of the matter, the present suit filed by the plaintiff without including all the joint family properties and which prejudices the rights of the alienees who have also been impleaded as parties to the suit, in the circumstances of the case, has to be held that the suit filed by the plaintiff for partial partition without including all the joint family properties is bad in law. The finding given by the Trial Court with respect to the sixth issue has to be maintained and the finding given by the I Appellate Court that the suit is maintainable without including all the joint family properties cannot be held to be proper in the circumstances of the case. Hence, the finding of the I Appellate Court holding that the suit of the plaintiff for partial partition is maintainable should be set aside and the finding of the Trial Court with respect to the sixth issue that the suit is bad for non-joinder of necessary properties to be included in the suit has to be upheld. 20. So far as working of the shares of the plaintiff and other members of the joint family, they have to be worked out in a properly constituted suit bringing all the properties into the hotchpot and equitable remedy should be worked out. The finding given by the I Appellate Court granting 1/6th share to the plaintiff also should be set aside in view of the finding that the suit of the plaintiff for partial partition is not maintainable and the working of the share should be worked out in a suit in which all the properties are joint family properties to be included. 21. In view of my above reasonings and findings, the judgment and decree of the I Appellate Court have to be set aside, so far as the right and interest of the plaintiff with respect to the suit schedule property and the alienees have not shown and proved that the alienation was made for the legal necessity and benefit of the family and the findings given by the Trial Court as well as by the I Appellate Court clearly pointed out that the alienation in favour of defendants 2 to 6 by the 1st defendant does not bind the share of the plaintiff has to be maintained. 22. In view of my above discussion, the appeals are allowed in part. Judgment and decree passed by the I Appellate Court in R.A. No. 27 of 1987 are set aside and those of the Trial Court in Original Suit No. 271 of 1984 are restored. The suit of the plaintiff is partly allowed declaring that the sale deed executed by the 1st defendant in favour of defendants 2 to 6 in respect of the suit land is not binding on the plaintiff. The rest of the suit of the plaintiff including the relief

of partition and separate possession and for mesne profits stands dismissed. In the circumstances of the case, parties to bear their own costs in these appeals.