

**K. Peramanayakam Pillai Vs. S.T. Sivaraman and anr.**

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**Court :** Chennai

**Decided On :** Mar-22-1951

**Reported in :** AIR1952Mad419; (1952)IMLJ308

**Judge :** Satyanarayana Rao, ;Panchapagesa Sastri, ;Viswanatha Sastri, ;Raghava Rao and ;Panchapakesa Ayyar, JJ.

**Acts :** Hindu Law; [Code of Civil Procedure \(CPC\), 1908](#); [Transfer of Property Act, 1882](#) - Sections 2, 3 and 44; Transfer of Property (Amendment) Act, 1929

**Appeal No. :** Second Appeal No. 2187 of 1947

**Appellant :** K. Peramanayakam Pillai

**Respondent :** S.T. Sivaraman and anr.

**Advocate for Def. :** K.V. Venkatasubramania Aiyar, ;K. Veeraswami and ;V.P.K. Nambiar, Advs.

**Advocate for Pet/Ap. :** T.M. Krishnaswami Aiyar, ;R. Sethurama Sastri and ;P. Boopathi, Advs.

**Judgement :**

1. The third defendant is the appellant in this second appeal. The facts are not seriously in dispute and are not complicated. The question raised is also a simple one, though the arguments before us ranged and covered a wider ground not strictly germane to the disposal of the case. The case itself was heard in the first instance by Panchapagesa Sastri J. who directed the papers to be placed before the Hon'ble the Chief Justice for the case to be heard either by a Bench or a Full Bench in view of the conflicting decisions relating to the method of adjusting the equities between the alienee and the non-alienating coparcener under a sale, part of the consideration of which was applied for purposes binding on the family. The case then came up for hearing before a Full Bench of three Judges who referred the case to a fuller Bench of five Judges. When the matter was referred to the Fuller Bench, the case itself and not any particular question was referred and therefore the scope of the hearing before the Full Bench was not restricted or confined to any particular question or questions. The case was argued ably on both sides for about six days and all the available authorities including the Hindu Law texts were placed before us.

2. The plaintiff is the son of the first defendant. The father sold under Ex. D. 1 dated the 28th November 1934 six acres 56 cents of land specified in Schedule II attached to the plaint for a consideration of Rs. 13,400 out of which, as has now been concurrently found by the Courts below, only a sum of Rs. 7,022 was applied for discharge of binding debts of the family. The father was adjudicated an insolvent in I. P. No. 17 of 1935, Sub-Court, Tirunelveli and the properties specified in Schedules 4 to 12 appended to the plaint were sold by the Official Receiver in whom the interest of the insolvent had vested by reason of the adjudication. The present suit was filed by the son on the 11th January 1945 impleading all the alienees of the father as well as the Official Receiver as defendants. The relief claimed in the suit is partition and separate possession of each item of property in each of the schedules 1 to 12 into two equal parts and for an allotment to him his share, one of

the parts in each item. The plaint proceeds on the footing that on the date of the action, the plaintiff and the first defendant were members of a Mitakshara joint family and that the alienations made, either by the first defendant or the Official Receiver, do not bind the plaintiff's interest in the family properties specified in Schedules 1 to 12 of the plaint.

The plaintiff examined on his side, the first defendant, his father as P. W. 1 who admitted in his evidence that he and the plaintiff were undivided on the date of the suit and that the properties were ancestral properties allotted to the father's share in a partition between himself and his elder brother in 1930. In this appeal we are concerned only with the alienation by the father in 1934 in favour of the third defendant of Schedule II properties. The plaintiff attacked the sale in favour of the third defendant alleging that it was neither for necessity nor for the benefit of the joint family and that it was an undersale. It has been found that the value of the properties conveyed under Ex. D. 1 was not Rs. 13,400 but Rs. 16,400 on the date of the sale and that the consideration from out of this sale was binding on the family only to the extent of Rs. 7022.

As a result of this finding, a preliminary decree for partition and recovery of possession of the plaintiff's half share in the properties comprised in Schedule II was granted in favour of the plaintiff without making any provision for the payment by the plaintiff of a proportionate share of the binding consideration. This decree was affirmed on appeal by the District Judge. Both the Courts, in rejecting the claim of the third defendant for a provision for payment by the plaintiff of a proportionate share of the binding consideration as a condition precedent for the recovery of a half share in the properties, followed '*Venkata Pathi v. Pappiah*', 51 Mad 824.

3. In this second appeal by the third defendant, there is no dispute regarding the decree which recognised the right of this third defendant to a half share of the properties conveyed under Ex. D. 1, as the plaintiff claimed in the suit itself to recover only a half share in the properties. The question debated is whether or not the third defendant is entitled to a conditional decree making it obligatory upon the plaintiff to pay a half share of the binding consideration before he is allowed to recover possession of his half share after partition of the properties by metes and bounds. The appellant invokes, in support of his contention, the decision of this Court in '*Vadivelam v. Natesam*', 37 Mad 435, while the respondent maintains that that case was wrongly decided and that the decision proceeded on an erroneous assumption of Hindu Law and should not therefore be followed and that the appellant is not entitled to any equity and his right is only to the half share admitted by the plaintiff.

In other words, learned counsel for the respondent stated the position he takes up as follows: The alienee from a coparcener of joint family property is entitled only to work out his rights by way of a general partition and is not entitled to claim to retain any specific item of property or a portion of it conveyed to him. Secondly, if without marshalling and a general partition, the alienee is allowed by the consent of the non-alienating coparcener to remain in possession of a share of the property alienated, any claim that he may have against the joint family in respect of the binding portion of the consideration must be regarded as satisfied '*pro tanto*' by the value of the property allowed to be kept by him. This, according to his contention, exhausts the entire equity which an alienee from a coparcener is entitled to under Hindu Law. Of course, during the progress of the arguments, he did not stick to this extreme contention.

4. Though the case itself may be disposed of on a narrow ground, as the arguments before us covered a larger ground, relating to the rights of the alienee from a member of a joint family, it is necessary to advert in this judgment to the whole topic and examine the basis of the equity which an alienee has, under Hindu Law, in respect of an alienation by a coparcener. The decisions dealing with the question of equities in favour of an alienee are not many, though they are not wholly reconcilable.

5. It is necessary to go back to the very foundation of the right of a coparcener to alienate his interest in the family property, in order to appreciate the later developments in the law relating to it. Apart from the inroads made by decisions into the strict view of the rights of members in a coparcenary in respect of the family properties, it may be stated that the joint undivided family is the normal feature where the law of Mitakshara

obtains. The joint family has a corporate character and a status of its own and can exist as a legal entity without owning joint family property. There is no presumption that the family owns joint property. The family can exist without property: vide 'Janakiram Chetti v. Nagamony Mudaliar', 49 Mad 98. It is open to the members by mutual consent to hold or own any of the properties of the family in severally without affecting their status as members of a joint family, but so long as the property continues undivided, there is a community of interest and unity of possession among all the members, with its consequent right to joint possession and joint enjoyment. Every coparcener has a proprietary right in the property of the family subject, however, to a similar right in others and in this respect, there is a fundamental difference between Mitakshara law and the Dayabhaga law.

The member of the family has no ascertained share in the property which is capable of being dealt with by him. The interest he possesses in the property is a fluctuating interest liable to be diminished by births in the family and equally liable to be increased by deaths. Each member by his birth acquires an interest in the property and the death of a member passes on his interest to the other members by survivorship.

As observed by Lord Westbury in the well known case of *Appovier v. Rama Subbaaiyan*, 11 Moo Ind App 75 PC: "According to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share.....but when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severally although the property itself has not been actually severed and divided." And later he pointed out the two-fold application of the word 'division': "There may be a division of right; and there may be a division of property." The division of right is brought about by division of the status of the family by methods known to law which have the effect of converting, to use an expression known to English law, a joint tenancy into a tenancy in common. The division of the right does not amount to a division of the property by metes and bounds. The unity of title under which the property is held by the family as a corporate unit is broken so as to bring about a severance of the right though not of the property. This indicates that the title to the joint property, i.e., jointness of the status of the family is one thing and the division of the property is separate and distinct. Of course, it is open to the members to divide a portion of the property without affecting the status of the family and confining the breaking up of the unity of title only to the extent of the property so divided.

Every coparcener is of course entitled to have the property divided by metes and bounds either by agreement or by suit or he may merely get his status as a member of the family severed so as to bring about a definition of his share in the property. Of course, this severance in status may be brought about by agreement or by a unilateral declaration of his to hold the property in severally in which case he would have undoubted right to alienate his ascertained share. Until a division either of the right or of the property takes place, a coparcener, according to the strict Hindu law, has no right to alienate his interest in the property except with the consent of the other coparceners. The power, however, of the father or the manager of a joint family to alienate the property of the family, not merely his share for purposes binding on the family, such as an existing necessity or benefit, has been recognised by the Mitakshara.

6. In Madras and Bombay, from early in the 19th century the rights of a coparcener, not being a father or a manager of the family, to alienate his interest in the family property began to be recognised and this was the first inroad upon the strict law of Mitakshara. This right of alienation by way of sale or mortgage was evolved and first recognised by Sir Thomas Strange in 1813 in '*Ramasami v. Seshachala*', Notes of Cases, Vol. II 234, (74) 1827 Edn. He was supported in that view by Mr. Ellis and also by Mr. Colebrooke. In Vol. I of Strange's Hindu Law, 1830 Edn., the rule is stated at page 202:

"In favour of a bona fide alienee of undivided property, where the sale or mortgage could not be sustained as

against the family, such amends as it could afford would be due, out of the share of him, with whom he had dealt (i.e. the alienee); and, for this purpose, a Court would be warranted in enforcing a partition."

Volume II of Strange's Hindu law, at page 349, 1830 Edn. contained a case where a member of a family disposed of a village belonging to the family. It was held that the sale was without authority, general or special, but in setting aside the sale on the ground of want of authority, it was pointed out that equity would require redress to be afforded to the purchaser by enforcing a partition of the whole or a sufficient portion of it, so as to make amends to the purchaser out of the vendor's share and that the sale was valid only so far as the seller's share in the property was concerned. The distinction between a gift of a coparcener's share and a sale or mortgage is noticed at page 433 of Vol. II (Strange's Hindu Law) and it was pointed out that in the case of gratuitous alienation, there is no kind of equity but in the case of a transfer for consideration, the injustice to the alienee may, however, be prevented by making the alienor repay the money or valuable consideration received by him and partitioning the property for the purpose of enforcing payment from his share.

The opinion of Colebrooke in support of the view of Sir Thomas Strange is to be found at page 344 Vol. II of Strange's Hindu Law where it is stated that the

"consent of the sharers, express or implied, is indispensable to a valid alienation of joint property, beyond the share of the actual alienor; & that an unauthorized alienation by one of the sharers is invalid, 'beyond the alienor's share', as against the alienee."

7. This takes us back to 1827 and 1830. In 1863, both the Madras and Bombay High Courts recognised the right. The decision of the Madras High Court is 'Viraswami Gramani v. Ayyaswami Gramani', 1 Mad H C R 471, by Scotland, C. J. and Bittleston, J. and in the course of the judgment, reference was made to the earlier decisions of 1853 and 1855 which decided that one of several coparceners may bind his own share by alienation and that it is liable for his individual debt. The opinion of Sir Thomas Strange and the decision in 'Ramaswami v. Seshaciiala', Notes of Cases, Vol. 2, 234; 1827 Edn., were referred to in the course of the arguments by Mr. Mayne. The decision arose out of a suit on the Original Side of this Court and related to two houses on the Chule Bazaar Road. The sale itself was an execution sale but in dealing with the execution sale, the Court had to consider the right of the coparcener to alienate his share and it is stated in the judgment that the purchaser, or execution creditor of the coparcener is entitled to the share to which, if a partition took place, the Coparcener himself would be individually entitled the amount of such share, of course, depending on the state of the family. To a similar effect is the decision of the Bombay High Court in 'Damodar Vithal v. Damodar Hari', 1 Bom H C R 182, about the same year.

In 1864 and 1868 there were two decisions of this Court in 'Peddamuthulaty v. Timma Reddy', 2 Mad H C R 270 and 'Rayacharlu v. Venkataramaniah', 4 Mad H C R 60. The decision in 'Viraswami Gramani v. Ayyaswami Gramani', 1 Mad H C R 471, was followed. In 'Peddamuthulaty v. Timma Reddy', 2 Mad H C R 270, the suit was by one of the three brothers, the eldest of an undivided family, for setting aside of a sale of family property made by the father and his third son. The sale of course was not binding on the non-alienating coparceners. The decree actually passed in that case was a declaration that the plaintiffs were entitled to a three-fifth share of land sued for, divided from that acquired by the defendant alienee and delivered to the plaintiffs. It was not even a suit for partition but was one to set aside the sale. The decision in 'Rayacharlu v. Venkataramaniah', 4 Mad H C R 60, arose out of a peculiar suit by the son for a declaration that after the death of the father, he was entitled to the whole of the ancestral property, moveable and immoveable, then in the possession of the father. Of course, such a declaration could not be granted but in the course of the judgment, the decisions above referred to were cited with approval. Westropp, C. J. in 1873 dealt with this question elaborately in 'Vasudev Bhat v. Venkatesh', 10 Bom H C R 139 and recognised the right of a coparcener to alienate his share in undivided property approving an earlier decision of that Court.

8. All these decisions, it must be observed, were before the decision of the Judicial Committee in 'Deendyal Lal v. Jagdeep NaRain Singh', 4 Ind App 247: (3 Cal 198 PC), which established for the first time that: "a purchaser

of an undivided share of property at an execution sale during the life of the debtor for his separate debt does acquire his share in such property with the power of ascertaining and realising it by partition." Sir James Colville who delivered the judgment in the case referred to the two decisions of the Madras High Court in 'Veeraswami Gramani v. Ayyaswami Gramani', 1 Mad HCR 471, and 'Palanivelappa Goundan v. Mannaru Naicken', 2 Mad H C R 416 and also the view of the Bombay High Court in Damodar Vithal v. Damodar Hari, 1 Bom H C R 182 and 'Trimbak Anant v. Gopal shet M. Mahadev, 1 Bom H C R

27.

It was there pointed out that:

"all these cases, however, affirm not merely the right of a judgment-creditor to seize and sell the interest of his debtor in a joint estate, but also the general right of one member of a joint family to dispose of his share in a joint estate by voluntary conveyance without the concurrence of his coparceners. This latter proposition is certainly opposed to several decisions of the Courts of Bengal."

The form of the decree granted by the Judicial Committee in that case is a declaration in favour of the purchaser at the execution sale, that he had acquired the share and interest of the judgment-debtor in the property and that he is entitled to take such proceedings as he shall be advised to have that share and Interest ascertained by partition. This decision, therefore, is important in two respects. It established for the first time the right of a creditor to seize the share of an undivided member at the family in execution for the satisfaction of the debt due by the member and this rule applies to all the Provinces -- and secondly it established that both in Madras and in Bombay a coparcener is entitled to alienate his share. The right of the alienee, however, is to work out his rights under the alienation by a suit for partition.

In 1874 there were two decisions of the Bombay High Court in 'Pandurang Anandrav v. Bhaskar Sadashiv, 11 Bom H C R 72 and 'Udaram Sitharam v. Ranu FanDuji', 11 Bom H C R 76. The first of these cases related to a voluntary alienation and the case is also important as it was decided by West and Nanabhai Haridas, JJ. who are undoubted authorities on Hindu law. This case is important as it lays down the principles and the manner in which the rights of a purchaser have to be worked out and the equities adjusted. This, in my opinion, is the first considered judgment on the rights of an alienee and his equities. The facts in that case were in 1848 two members of an undivided Hindu family mortgaged a portion of the joint family property. In due course, the mortgagee obtained a mortgage decree and brought to sale a portion of the mortgaged property on account of the right and interest of one of the mortgagors and the property was purchased by the plaintiff in the suit. The purchaser then instituted a suit against the third member of the undivided family for possession of the extent which he had purchased in the Court sale. Notwithstanding the fact that the purchase in Court auction was of a specific extent of property, it was held that the right of the purchaser was to sue for partition and not for recovery of possession of the extent purchased.

West, J. stated the position in the course of his judgment in these items:

"Whether Nilo (the mortgagor whose interest was sold) had any interest at all in the land in 1848, and if he had, what was the extent of that interest, are questions which, as there was other family property, do not admit of an answer without an inquiry into the extent and value of the joint property at large, the encumbrances resting on it, the members entitled to shares, and their respective aliquot portions. Nilo's share was not, supposing the family a united one, in any particular part of the estate, but in the estate as a whole, and could be ascertained only by taking a general account and making a distribution in accordance with its results.

In making such distribution without advertence to the claims or interests of any third party it might well happen that no part of the particular field now in dispute would be allotted to Nilo. But Nilo having affected to deal with this land as empowered to mortgage it, it would be only equitable that, 'ceteris paribus', his share should, if Bhaskar (the auction-purchaser) takes his place be so made up as to embrace wholly or so far as

possible the 20 guntas which Baskar has bought as his."

It was pointed out that without prejudice to the rights of the other members of the family, the 20 guntas purchased by Baskar may be allotted to him in the partition. This judgment, in my opinion, has laid down succinctly and clearly the manner in which the alienee has to work out his rights and that decision holds the field even now as will be shown later.

9. The next important landmark in this branch of the law is the decision of the Judicial Committee in 'Suraj Bensi v. Sheo Preshad', 6 Ind App 88: (5 Cal 148 P C). It is a decision under the Mitakshara law as it obtains in the province of Bengal and arose out of a suit by the sons, members of a joint family, against an execution purchaser of property sold in execution of a decree against the father. The prayer in the suit was that the purchasers should be restrained from obtaining delivery of possession and that the possession of the sons should be confirmed. The execution sale took place after the death of the father but by the time of the death of the father, the property was attached and even an order for sale of the property was made in execution of the decree. There were other questions considered by the Judicial Committee but one of the important questions for decision was whether by the death of the father the sons acquired the property by survivorship, thus putting an end to the rights of the Court auction-purchaser.

After referring to the decisions of the Madras and Bombay High Courts, Sir James Colville who delivered the judgment stated that it was settled law in Madras and Bombay that one coparcener may dispose of ancestral undivided estate even by private contract or conveyance to the extent of his own share and that it followed that such a share may be seized and sold in execution for his separate debt. It was recognised in that decision that such alienations, voluntary or compulsory, are inconsistent with the strict theory of joint undivided Hindu family and that the law in the two Presidencies, Madras and Bombay has been one of gradual growth. The rule is stated to have been

"founded upon the equity which a purchaser for value has, to be allowed to stand in his vendor's shoes and to work out his rights by means of partition."

Strange's Hindu Law was cited in support of this. It was held that the right of survivorship was defeated by the attachment and order for sale of the properties and that the auction-purchaser was entitled to the share of his judgment-debtor.

The actual decree made in that judgment was in favour of the plaintiffs confirming their possession with a declaration for the benefit of the auction-purchaser that he was entitled to the share of his judgment-debtor with a power of getting the extent of that share ascertained by means of a partition, the share which the judgment-debtor possessed in his lifetime. By this decision pronounced in 1878, therefore, it has been firmly established that in Madras and Bombay, a member of a joint family is entitled to dispose of his undivided interest either by contract or conveyance to the extent of his own share and that his share would be answerable for the personal debt during his lifetime and to make that share available for discharge of his debts after his death, there should be at least an attachment of that share during the lifetime of the judgment-debtor (coparcener) to defeat the claim of the right by survivorship by the other members.

The alienee had to face several difficulties in working out the right acquired by him under a conveyance by a member of the joint family and his path was not smooth. The right as stated by the Judicial Committee in 'Suraj Bensi v. Sheo Proshad', 6 Ind App 88: (5 Cal 148 P C), is to step into the shoes of the alienor and work out his rights in a suit for partition. Suppose after the alienation, another coparcener was born in the family. Is the alienee entitled to the share of his vendor as on the date of the alienation or is it liable to decrease by reason of the subsequent birth of a son before the suit for partition was instituted? The interest of a coparcener in the family properties is undoubtedly a fluctuating interest and so it was contended before the Full Bench in 'Rangasami v. Krishnayan', 14 Mad 408 F B, that the alienee's share is subject to a similar disability and a similar fluctuation. No coparcener had a right to a definite share in the family property until there was severance of the joint estate. It was held in 'Rangasami v. Krishnayan', 14 Mad 408 F B, which was

a case of a birth of a coparcener, that the share should be computed with reference to the date of the suit for partition instituted by the alienee.

As a corollary to this principle, two other questions were mooted before the Full Bench in 'Rangasami v. Krishnayyan', 14 Mad 408 F B. If the interest purchased is liable to diminution by births in the family subsequent to the alienation, was it liable also to increase when there was a diminution in the number of coparceners by deaths and is the alienee to lose the right altogether if by the date of the institution of the suit, his alienor died leaving no shoes to the alienee to step in? The opinion, though obiter, was expressed in that case that the alienee was not entitled to take advantage of the increase in the share by the diminution in the number of coparceners as what he bargained for was a specific share or a quantum of interest and not the vendor's coparcenary interest, such as it might be when the partition was effected. The Question as to what would happen if the alienor should die by the date of the suit, was answered by saying that the interest carved out by the sale vested in the purchaser at once and that the subsequent death of the alienor had not the effect of divesting what once vested. The rights under the sale should be worked out on the footing that the vendor was alive-when the purchaser made a demand for partition.

This opinion, though obiter, on both the hypothetical questions, does not appear altogether logical and sound. If what was conveyed to the alienee was the fluctuating interest of the coparcener in the family property, it should logically follow that if the interest should be diminished by subsequent births it should also increase by deaths. If, on the other hand, it became vested and fixed once for all on the date of the alienation so as not to defeat the rights of the alienee even if the alienor were to die, it must follow that the fraction of the interest which he had acquired under the purchase must be treated as once for all having been fixed on the date of the alienation. There is less reason to postpone the determination of that fraction to the date when the purchaser made a demand for partition.

10. The subject received an exhaustive and logical treatment in the illuminating judgment of Bashyam Ayyangar, J. in the Full Bench case in 'Ayyagiri Venkatramayya v. Ayyagiri Ramayya', 25 Mad 690. It arose out of a suit by a purchaser of an undivided moiety in two plots of land from one V, a member of an undivided family consisting of himself and his two nephews, brother's sons. The suit was instituted after the death of V, against the nephews for a general partition of the whole of the family properties and for an allotment of the alienor's share half the interest in the property and to recover the half share in the two plots conveyed to him by V. The objection raised by the nephews was that as the alienor died, the plaintiff's right based on equity was at an end.

The right of the purchaser is defined at p. 716 thus:

"The law as now settled is that the purchaser can enforce the sale only by a partition of the entire family property and if in such a partition the property sold can, with due regard to the interests of the other sharers, to the debts due by the family and to an equitable allocation of the various items of family property to the shares of the several coparceners, be wholly allotted to the vendor's share the purchaser will be entitled to the whole property which the vendor professed to convey to him."

The vendee's right is a transferable right and a vested present interest. By describing it as a vested interest it is not as if, as was considered in some decisions, that the learned Judge ignored the nature of the right which the transferee from a coparcener acquired under the transfer for, at page 710, the learned Judges adverts to the fact that the transfer

"is no doubt an equitable claim in the sense that he must be a transferee for value and in cases where the transfer relates to a specific portion of the family property, he has no legal right, any more than his transferor himself, to insist on that specific portion being allotted to the share of the vendor.

Being a purchaser for value, he will have an equity to have such portion or so much thereof as is practicable so allotted, if that can be done without prejudice to the interest of the other sharers. In any suit which may be

brought by him to enforce the sale, all the members of the family should be joined as parties in a partition suit, the subject-matter of the suit being the family property as it existed at the date of transfer. Such a suit may, at the option of the members of the family, assume the character of a family partition suit and a decree may be passed for partition, among all the members of the entire family property."

It must be observed that unless all the members agree to have a partition 'inter se', a suit by an alienee for a general partition is not analogous to a suit for partition in the technical sense in which it is understood under Hindu law as such a suit can be instituted only by an undivided member of the family and by no one else. It is said that the learned Judge proceeded on the assumption that the alienee became a co-tenant or, tenant-in-common as was assumed in 'Venkatachala Pillai v. Chinnaiya Mudaliar', 5 Mad H C R 166. The passage above extracted clearly indicates and dispels any doubt regarding the view of the learned Judge. He, on the other hand, pointed out that the view taken in 'Venkatachala Pillai v. Chinnaiya Mudaliar', 5 Mad H C R 166, that a purchaser can recover the share of the vendor by confining his suit for partition to the specific property sold to him has not been accepted in subsequent decisions Venkatrama v. Meena Labbai, 13 Mad 275 and 'Palani Konan v. Masa Konan', 20 Mad 243, in which the view of West J. in 'Pandurang Anandrav v. Bhaskar Shadashiv, 11 Bom H C R 72, was adopted. The learned Judge also pointed out on the basis of the decisions of the Privy Council in 'Deendayal Lal v. Jugdeep Narain Singh', 4 Ind App 247: (3 Cal 198 P C), and 'Suraj Bansi Koer v. Sheo Proshad Singh', 6 Ind App 88: (5 Cal 148 P C), that the share of the undivided member which was conveyed to the purchaser must be determined as on the date of the alienation and not as on the date when the suit for partition was filed by the purchaser. He also considered the decision in 'Rangasami v. Krishnayan', 14 Mad 408 F B and expressed the opinion that the actual decision in that case is opposed to principle and that there is nothing to support the contention that the interest conveyed by an undivided member will lapse to the family after the death of the alienor unless the purchaser instituted the suit before the alienor's death.

11. The question whether the mortgagee of a Hindu father is entitled to proceed against the share of a son subsequently born in the family property mortgaged by him, was referred to a Fuller Bench of five Judges in 'Chinnu Pillai v. Kalimuthu Chetti, 35 Mad 47, in view of the observations of Bashyam Aiyangar J. in 'Ayyagiri Venkataramayya v. Ayyagiri Ramayya', 25 Mad 690 F B, throwing doubts on the correctness of the decision in 'Rangasami V. Krishnayan', 14 Mad 408 P B. The case was heard by Sir Arnold White C. J., Benson, Munro, Sankaran Nair and Krishnaswami Ayyar JJ. but before the judgment was delivered, Krishnaswami Ayyar, J. resigned his office and became the law member. The case was, therefore, again heard by the four Judges excluding Mr. Krishnaswami Ayyar & the opinion prepared by Krishnaswami Aiyar was, under the direction of the Chief Justice, appended as a note to the judgment.

The learned Chief Justice, on the strength of the decision of the Judicial Committee in 'Suraj Bansi Koer v. Sheo Proshad Singh' 6 Ind App 88; (5 Cal 148 P C), and the decision of the Full Bench in 'Ayyagiri Venkataramayya v. Ayyagiri Ramayya', 25 Mad 680, of which he was also a member answered the question referred to the Full Bench holding that the quantum of the interest which vests in the alienee is not affected by subsequent changes in the number of coparceners. "As the doctrine is based on equity", observed Sankaran Nair, J. at page 56:

"it is more consistent with equitable principles to hold that the purchaser gets the share which his vendor was entitled to at the time of the alienation rather than that he gets a fluctuating share with the result that it will depreciate the value of the property and impart to the alienation the nature of a gambling transaction."

There was no doubt certain observations in the opinion of Mr. Krishnaswami Ayyar which are no longer good law. For example, he states that the "joint tenancy is destroyed by severance and an alienation by joint tenants affects a severance" on the analogy of the real property law in England. This view, however, was not expressed in the other judgments.

In his conclusion, however, Mr. Krishnaswami Ayyar agreed with the view of the other Judges. This decision is taken in this Court as having settled finally the law on the point and the question was not reopened in

'Dharma Rao v. Bapanayya', 1941-1 Mad L J 15. In the Full Bench decision in 'Baluswami Ayyar v. Lakshmana Iyer', 44 Mad 605, Kumaraswami Sastri, J. treated it as settling the law and all the decisions in which the decision in 'Chinnu Pillai v. Kalimuthan', 35 Mad 47, was followed were collected in the judgment in 'Dharma Rao v. Bapanayya', 1941-1 Mad L J 15. No doubt, a dissentient note was sounded by Jackson and Mockett, JJ. in 'Muthukumara Sathapathiar v. Sivanarayana Pillai', 56 Mad 534; but as pointed by the learned editor of Mayne's Hindu Law at page 494 in the foot-note, the decision in 'Muthukumara v. Sivanarayana Pillai', 56 Mad 534, is contrary to the Full Bench in 'Chinnu Pillai v. Kalimuthan', 35 Mad 47 and as a matter of fact, was not followed in later decisions in Madras. See also the observations of Wadsworth and Govindarajachari, JJ. in 'Krishnamurthy Iyer v. Nataraja Iyer', 1948-1 Mad L J 430 at page 434.

Leach, C. J. in 'Dharma Rao v. Bapan Ayya', 1941-1 Mad L J 15, refused to reopen the question on the ground that in numerous decisions extending over a period of 20 years (nearly 30 years) by that date, the decision in 'Chinnu Pillai v. Kalimuthu', 35 Mad 47, was accepted as settled law and there was no need for further consideration of that case as was thought by Jackson and Mockett, JJ. in 'Muthukumara v. Sivanarayana Pillai', 56 Mad 534. The decision in 'Rangasami v. Krishnayyan', 14 Mad 408, has always been treated as no longer good law after the decision in 'Chinnu Pillai v. Kali Muthu', 35 Mad 47. An attempt was made on behalf of the respondent by his learned Advocate to reopen the question but in view of the fact that the decision in 'Chinnu Pillai v. Kalimuthu', 35 Mad 47, was treated as having settled the law in this Presidency for so long a time and was followed in innumerable decisions, it would be wholly unjust and inequitable to reopen the question which might have the effect of unsettling titles already acquired. The principle of 'stare decisis' must be applied and we, therefore, were not inclined to reopen the question.

12. "A coparcener may alienate" as stated by Mayne in Section 386, page 487 of the latest edition,

"either his undivided share in the whole of the family property or his undivided share in certain specific family property or the whole of a specific item of the family property. In all these cases, the alienee does not acquire an interest in the property so as to become a tenant-in-common with the members of the family entitled to possession, but only an equity to stand in his vendor's shoes and to work out his rights by means of a partition."

Learned counsel for the respondent does not take exception to this statement of the law and to this definition of the right of the alienee, whether the alienation was of the entire interest of the alienor in the whole of the family property or whether it was confined to a share in a specific item or even extended to a whole of the specific item of the family property.

In fact, he himself relied on this position even at the commencement of the arguments in the case and relied very strongly on a decision of Horwill, J. In 'Subbiah v. Venkateswarlu', 1948-1 Mad L J 478, where at page 480, the learned Judge defined the right of an alienee of an Item of joint family property as a right to sue for a general partition and to ask that the item of property alienated to him, be allotted to the share of his alienor. As observed by me earlier in this judgment, this definition of the right was first made by West J. in 'Pandurang Anandrav v. Bhaskar Shadashiv', 11 Bom H C R 72 and followed in 'Venkatrama v. Meera Labbai', 13 Mad 275, and 'Palani Konan v. Masa Konan', 20 Mad 243 and other decisions.

13. No doubt, some of the Judges of this Court held the view that a purchaser of an undivided share of a member of a joint family became a tenant-in-common with the members of the family and was even entitled to possession along with them. This view was taken in 'Venkatachala Pillai v. Chinniya Mudaliar', 5 Mad H C R 166, by Benson and Sundara Aiyar JJ. in 'Subba Rao v. Ananthanarayana Ayyar', 23 Mad L J 64, by Krishnaswami Iyer J. in 'Chinnu Pillai v. Kalimuthu', 35 Mad 47 and by Sadasiva Iyer J. in 'Soundararajan v. Arunachalam Chetti', 39 Mad 159. If this view were to be accepted the alienee would be entitled to joint possession of the specific item of the property conveyed to him and would also be entitled to mesne profits from the date of alienation. But the preponderance of authority is in favour of the view that he does not become a tenant-in-common with the other coparceners. Sankaram Nair J. and Bakewell J. in 'Nanjaya Mudali

v. Shanmuga Mudalp, 38 Mad 684, considered the question and held that the alienee does not acquire any interest in the property and does not become a tenant-in-common as was held by Benson and Miller JJ. in 'Srinivasa Sundara "Thathachariar v. Krishnaswami Aiyangar', 15 Ind Cas 354 (Mad) and Benson and Sundara Aiyar JJ. in 'Subba Rao v. Ananthanarayana Ayyar', 23 Mad L J 64, following the opinion of Krishnaswami Aiyar J. in 'Chinnu Pillai v. Kalimuthu', 35 Mad 47, and the right of the alienee is defined as a right to institute a suit for partition and to have the property alienated set apart to the share of the alienating coparcener if it is possible to do it without injustice and prejudice to the other coparceners.

This, it is emphasised, is only 'an equity' and not a 'right'. If it is not possible to set apart property in the aforesaid manner, the only right of the alienee is to recover that property allotted to the vendor for his share though it may not be identical property alienated in his favour. This is on the principle of substitution and the earlier decisions beginning from 'Pandurang Anandrav v. Baskar Sadashiv, 11 Bom H C R 72, were referred to and followed. The same view was taken in 'Maharajah Of Bobbilli v. Venkataramanjulu Naidu', 39 Mad 265, by Wallis C. J. and Kumaraswami Sastri J. As the alienee is not a tenant-in-common he is not entitled to any mesne profits in respect of his share between the date of his purchase and the date of the institution of the suit for partition. The learned Judges in 'Balabadra Patro v. Khetra Doss', 31 Mad L J 275, followed these two decisions. See also 'Balasami Iyer v. Lakshmana Iyer', 44 Mad 605 and ' Subba Goundan v. Krishnamachari', 45 Mad 449.

14. From the foregoing review of the decisions it is abundantly clear that if the alienee wishes to enforce his rights whether he is a purchaser of the entirety of the interest of a coparcener in the joint family property or a purchaser of the interest of a coparcener in an item of property or even a purchaser of the whole of a specific item, his only right is to institute a suit for general partition, the object being to work out his equity as against the other non-alienating coparceners, subject to the burden which the alienor as a member of the coparcenary, has to bear along with the other coparceners and subject to an allotment of the property purchased, if possible, without prejudice to the rights of the other members of the family. Even if he is a purchaser of a specific item of property or even of the interest of a coparcener in a specific item, he cannot sue for recovery of possession of that item in its entirety or a share in that item alone after partition.

If the non-alienating coparcener institutes a suit for a general partition impeaching the validity and binding nature of an alienation made by the manager or the father and if it is found that the alienation is not supported by any necessity or is supported only by partial necessity the right of the alienee to step into the shoes of his alienor and work out his rights at least to the extent of his alienor's share, can be dealt with in such a comprehensive suit. Even if the alienation is by a coparcener other than the manager or the father, either of a specific item or interest in a specific item, if the alienee is impleaded as a party to such an action, his equity can be worked out and adjusted in that suit. It has been recognised in 'Chinna Sanyasi v. Suriya', 5 Mad 196, that a non-alienating coparcener may sue to recover his interest in a parcel of family property which was conveyed away by a coparcener to a purchaser.

In such a case, the coparcener has got the option of repudiating the transaction altogether and recovering the property from the alienee who was put in possession, for the benefit of the joint family -- see 'Subba Goundan v. Krishnamachari', 45 Mad 449, or he may elect to affirm the transaction and sue to recover possession of his share of the property after partition. In such a case, it is held that the suit is not liable to be dismissed on the ground that it is bad for partial partition. Where the member repudiates the transaction, he can recover the property only for the benefit of the joint family and the property when recovered continues to be joint family property. But what is the position if he affirms the transaction and sues only to recover his share?

In a case where the members of a family are two and two alone, the share so recovered would be the separate property of the plaintiff as held in 'Chinna Sanyasi v. Suria', 5 Mad 196, followed in 'Kadegan v. Peria Munusami', 13 Mad L J 477. If, however, there is more than one non-alienating coparcener, a suit to recover the share, in the property cannot be instituted by one alone without the concurrence of the coparceners who

should be impleaded either as plaintiffs or as defendants unless it be that the coparcener suing is the manager and head of the family. When there are more than one coparcener who did not join in the alienation, if the right of recovering possession of their share is to be exercised after affirming the transaction, it can be done only by all of them and not by any one of them. The property so recovered therefore would be the joint property of all the non-alienating coparceners. The question therefore of deciding the character and nature of the share recovered in such cases presents no difficulty.

15. In the case of an alienation by a member of the family of an item of property, the non-alienating coparcener may sue to recover possession of the property without admitting the right of the alienee to the alienor's share. It has been held in 'Subba Goundan v. Krishnamachari', 45 Mad 449, that if the alienation was by the father or manager of the property of the family in a suit instituted by the coparceners to recover possession of the property on the ground that it is not supported by necessity, the proper procedure is to decree to the plaintiffs recovery of possession of the entire property conveyed under the sale, to the alienee and it is not permissible to the alienee defendant in the suit to insist that his equity should be worked out in that very suit.

This strict view was not followed in two later cases 'Davud Beevi Ammal v. Radhakrishna Ayyar', 44 Mad L J 309 and 'Ramaswami Iyer v. Venkatarama Iyer', 46 Mad 815. In these two decisions the rule was not treated as an inflexible one and must be applied according to the circumstances of the case. If for example, there was only one surviving coparcener the plaintiff, and the property alienated was less than that of the alienor's share in the entire family properties at the time of the alienation, there is no necessity to drive the alienee to a separate suit and that the equities could be worked out even in that very suit. This view is based upon the observations of the Privy Council in 'Ramkishore Kedarnath v. Jainarayan Ramrachhpal', 40 Cal

966. The same view was adopted in 'Davud Beevi Ammal v. Radhakrishna Ayyar', 44 Mad L J 309, by a Bench.

A coparcener alienating his share of the property cannot escape from his liability to bear the common burden of debts and other obligations of the family. The liability, the alienee who steps into the shoes of the coparcener, has to bear is the proportionate burden, proportionate of course to the value of the property purchased by him. Of course, if once the sale is effected for discharge of the binding debts or for the necessity or benefit of the estate, the property in the hands of the alienee cannot be made once more liable for the obligations and other debts of the family. (Vide 'Sreeramulu v. Subbarami Reddi', ILR (1942) Mad 738 (FB). So far, the principles of law are well settled and present no difficulty.

16. The more difficult question, however, is when a father or manager of a family alienates an item or whole of the family property purporting to be for the benefit or necessity of the estate or in the case of the father for his antecedent debts. If the alienation is ultimately found to be supported by partial necessity or benefit, what are the rights of the alienee in such a case in respect of that portion of the consideration which has been applied for purposes binding on the family? It is always difficult for the father or manager of the family to sell exactly that extent of property which is sufficient to meet the particular necessity. Some margin, therefore, has to be allowed and if a large part of the consideration for the sale or mortgage has been applied for purposes binding on the family and if the alienee acts in good faith and it can be shown that the sale was justified by legal necessity, the sale may be upheld in its entirety.

It is not always easy to fix the proportion of the consideration which must be established to justify the sale in such circumstances. It is a question which must be decided on the facts of each case. This has been established by a number of decisions of the Judicial Committee and also of the High Courts in India beginning with 'Sri Krishnadas v. Nathuram', 49 All 149 (PC), which are found collected and referred to in the foot-note at p. 468 of Mayne's Hindu Law (latest edition).

17. If, however, the binding portion of the consideration is very much less, what are the equities of the alienee in such circumstances? If the suit instituted is one for partition either by the alienee or by a coparcener impeaching the alienation, the equities of the alienee will be adjusted in that suit. The entire item sold may be

allotted, if it does not otherwise prejudice the rights of the coparceners, to the share of the manager or the father who alienated the property and the burden discharged from and out of the consideration may be adjusted between the father or manager on the one hand and the other coparceners on the other as the debts due by the family have to be considered in such an action as pointed out by Bashyam Ayyangar, J, in 'Ayyagiri Venkathamayya v. Ayyagiri Ramayya', 25 Mad 690 (PB) at page 716.

The alienee may also get the share of his alienor allotted to him with a direction that the other coparceners should pay to the alienee their proportionate share of the burden. All this flows from the right which an alienee acquires under the conveyance in his favour, viz., a right to institute a suit for general partition and to have, if possible, the particular property allotted to the share of his alienor in the partition with due regard, of course, to the interests of the other sharers and the debts duo by the family. This equity, it is not disputed, is the only equity which the alienee is entitled to in such circumstances and has been established by the decisions which have been considered so far. The latest case is the decision in 'Krishnamurthi Iyer v. Nataraja Iyer'. 1948-1 Mad LJ 430 at page 434, by Wads worth and Govindarajachari, JJ.

18. Two situations, however, may arise. The coparcener disputing the alienation may institute a suit for partition claiming, as in the present case, a half share in the alienated item thereby admitting the right of the alienee to the other half belonging to the alienor. As the suit is for a general partition in which the debts and liabilities have to be adjusted, even in such an action the corparceners disputing the alienation may be made liable to pay to the alienee the proportionate part of their liability which has been discharged from the consideration for the sale. I am, of course, assuming in such cases, that there is no further complication that the property was undersold by the manager or the father. Even if it is established, in such a case, that in fact the consideration for the sale was grossly inadequate, there is no reason for not allowing the alienee to retain possession of the share of the alienor which is admitted by the very frame of the suit.

It makes no difference, in my opinion even if the frame of the suit was for a general partition without the qualification, viz., that the coparcener impeaching the transaction admits the right of the alienee to the extent of the alienor's share. The alienor himself in such a contingency cannot get rid of his own act in underselling the property and there is no reason or justification for permitting a third party like a coparcener to impeach the transaction on the ground that it was undersold so long as the share of the alienor bears the proportionate share of the common burden which, of course, is to be met by the alienee who stands in the shoes of the alienor. It is the undoubted right of a coparcener under Hindu law to alienate for consideration his interest in the property, but it is not open to him to make a gift of it as the very foundation of the alienee's equity is the payment of consideration.

In the present case, the plaintiff expressly claimed recovery of possession after partition of a half share in the properties annexed to the schedule and the suit was framed as one for partition under Hindu law on the basis that the family was joint till the date of the institution of the suit. During the father's insolvency, the other debts of the family must have been wiped out, at any rate, there is no evidence in this case that there are any debts of the family which remained undischarged. The only burden is that which was discharged out of the consideration for the sale. There is no doubt a finding of the Courts below that the consideration for the sale was not adequate and was more. But that does not, in my opinion, make any difference and would not in any way affect the adjustment of equities in the case.

For the entire consideration that the third defendant paid, he gets only the father's half share in the property in Schedule II, i.e., half out of the extent of six acres 56 cents, i.e., for the sum of Rs. 13,400. The common burden is Rs. 7022. Out of this, the share of the plain-tiff, there being no other coparceners, is Rs. 3511. As the case is not complicated by the existence of other debts which have to be taken into consideration, as no difficulty arises even in allotting the share of the first defendant to the alienee, the third defendant and as the plaintiff himself had admitted by the plaint and recognised the right of the third defendant to a half share, there is no reason for refusing to the third defendant the relief that the plaintiff should, as a condition precedent for recovery of possession of his half share, be made to pay his quota of the common burden of

which he had the benefit from and out of the consideration for the sale, viz., the sum of Rs. 3511.

The whole argument of the respondent throughout was that the alienee is not entitled to get any equity except in a suit for general partition, perhaps over-looking the fact that the present suit is one of such description and that it is impossible for the plaintiff to get out of his pleadings and the evidence he adduced in the case. Strictly speaking, therefore, the question which was debated before us, viz., whether '*Vadivelam v. Natesam*', 37 Mad 435, was correctly decided or whether the view in '*Venkatapathi v. Pappiah*', 51 Mad 824, should be applied as did the lower Courts does not arise for consideration but as the point was fully argued and considerable time was spent in considering the correctness of these decisions, particularly as the matter was placed before this Bench for a consideration of this particular question, it is not proper that I should refrain from considering it.

The difficulty presented by that and the other decisions is whether in a suit instituted by a coparcener or coparceners for recovery of his or their share in an item of property alienated by the manager or the father purporting to be for legal necessity impeaching the transaction as not binding on them, if it is found that a portion of the consideration was applied for discharging a common burden, the alienee could insist that the coparcener or coparceners should not be allowed to recover their interest in the property without paying their share of the common burden as a condition precedent for recovery of possession. I am not complicating the case by assuming that the sale was for an inadequate consideration as I propose to deal with that situation separately though I have already expressed my opinion about it in the earlier part of this judgment.

19. *Subramania Ayyar and Boddam, JJ. in 'Marappa Goundan v. Rangaswami Goundan'*, 23 Mad 89, aimed at a simple rule to meet such a situation and held that: "If the vendee wishes to stand by a sale which is valid only partially, such as the present he must be content with the vendor's share but that if he wishes to repudiate the transaction altogether, his remedy is only against the vendor in a suit for the return of the price paid, on the ground that the consideration for the payment failed. This view will, on the one hand, avoid now all necessity for enquiry, into matters alluded to before and on the other, tend to act as a check on a disposition on the part of speculative persons to enter with some coparceners into transactions calculated to affect the rights of other coparceners who are not parties thereto."

20. That was a suit for ejectment of the purchaser of certain lands belonging to a joint family consisting of the father and two sons, the plaintiffs. The alienation was by the father and it did not comprise all the properties of the family. The object of the alienation was for the discharge of a debt of Rs. 120 secured by a mortgage on the land and for discharge of sundry debts incurred by the father from the vendee. It was found that the only consideration paid was Rs. 120 for the discharge of the mortgage debt. The suit itself was instituted after a long delay amounting to nearly 12 years after the alienation. The suit was decreed on appeal for two-thirds share of the plaintiffs without making them liable to contribute proportionately to the common burden. The contention of the defendant before the High Court was that as a sum of Rs. 120 went to discharge a mortgage debt, the plaintiffs should be made liable to pay Rs. 80 i.e., two-thirds of Rs. 120. The contention was rejected by the learned Judges.

In the first place, it was held that the alienee was a volunteer and was not entitled to claim reimbursement. If under the conveyance the alienee had acquired an interest in the property, whatever may be the quantity of that interest it is difficult to treat him as a volunteer. The decision in '*Sivaganga Zamindar v. Lakshmanna*', 9 Mad 188, which was relied on by the learned Judges in support of the view taken by them proceeded on the footing that the Zamindari which was sold was ancestral property and 'the Court sale conveyed to the purchaser only the life interest of the Zamindar and that the Court sale passed to the purchaser nothing more than the life interest of the Zamindar which terminated on his death. The purchaser in the Court sale bought only the late Zamindar's interest whatever that was for the money which he advanced as purchase money. There was, therefore, no basis for making the son liable to reimburse the purchaser the amount of the money which was applied for discharging the father's debt.

In my view, therefore, the purchaser in 'Marappa Goundan v. Rangasami goundan', 23 Mad 89, was not a mere volunteer and the principle of 'Sivaganga Zamindar v. Lakshmanna', 9 Mad 188, has no application. The learned Judges then adverted to the practical inconvenience that would result in accepting the contention of the defendant. It was conceded that the sale was valid to the extent of the vendor's share. But it was argued that if the share was really worth the whole of the amount paid by the vendee as the price, why should he be allowed to get anything more? If, on the other hand, the share was worth less than the price paid, the vendee was not entitled to insist on a charge for more than the difference between the real value of the share which he had purchased and the price paid,

The inconvenience indicated was that the Court in such a case would have to embark upon an inquiry regarding the valuation of the property, which it was pointed out, was not always capable of easy or even satisfactory settlement. It is for this reason that the learned Judges aimed at simplification of the law though it results in injustice to the purchaser. The real value of the property even if it is deemed relevant for adjusting the equities of the alienee, is not difficult to ascertain and Courts are very often called upon to decide questions of valuation of property for various purposes such as the Land Acquisition Act, for court-fees and other purposes. This difficulty therefore, should not have been allowed to stand in view of doing justice to the alienee.

But is the question of valuation really relevant if it is once conceded that a coparcener is entitled to sell his interest in the property for value though he cannot make a gift of it? The question even of the adequacy of consideration for such a sale is, in my opinion, not relevant. The non-alienating coparcener, who impugns the sale, is not entitled to dispute the adequacy of consideration for the sale of the alienor's interest so long as the alienation for value is not a device to defeat the right of the coparceners to get the property by survivorship, if during the lifetime of the alienating coparcener that right was not put an end to. The price to be paid for the share alienated is a matter entirely between the purchaser and the vendor and a third party is not entitled to question its adequacy. Nor is the reason that if the price paid was equal to the real value of the share, the purchaser should not get the benefit of the proportionate share of the common burden discharged from the consideration, tenable.

The alienee stepping into the shoes of the alienor is undoubtedly bound to bear the common burden of the family proportionate to the extent of the value of the share he purchased since an undivided member of a family cannot escape from his liability to bear the obligations binding on the family. But If, at his expense and at the expense of the alienee, the undivided member impeaching the transaction had derived benefit, there is no justification for allowing him to retain the benefit without returning it to the person justly entitled to it.

If once an inroad into the strict theory of joint family has been allowed and the alienee's right based on equity is recognised by law, there is no reason for not applying that equity in an equitable manner so as to adjust the rights of all parties in a just manner. Simplicity, no doubt, in evolving a principle of law is good as an ideal but it should not be achieved at the expense of justice and equity. For these reasons, it is difficult to accept the decision in 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89, as laying down the law correctly.

21. The decision in 'Rottala Ranganatham Chetti v. Ramasami Chetti, 27 Mad 162, turned on the peculiar facts of that case. Simplifying the facts of the case and stating them in so far as they are relevant to the present discussion, it was a case where the joint family consisted of a father and two sons. The father conveyed to the first defendant under a sale-deed property for a sum of Rs. 1000 in discharge of an antecedent debt of his which was due to the first defendant. The property, it was found, was of the value of Rs. 11000 on the date of the conveyance and the father, it was stated in the sale-deed, was induced to sell the property for a low consideration in view of the fact that the first defendant rendered considerable assistance to the father in prior litigations relating to the family properties.

The learned Judges who decided the case, Benson, Bashyam Ayyangar and Moore, JJ. treated the conveyance as one for value to the extent of Rs. 1000 and a conveyance by way of a gift to the extent of Rs. 10,000 of the

property conveyed. In view of the principle of Hindu Law that a gift by an undivided member of his share or part thereof is void 'in toto', it is not open to an undivided member to evade the principle by purporting to make an alienation for value which is grossly inadequate and inequitable. In such a case, it would be inconsistent with the principle of Hindu Law, even to recognise the conveyance as good to the extent of the alienor's share. As the sum of Rs. 1000 was applied for discharge of the antecedent debt of the father, the only relief which the first defendant in the case was entitled to according to the learned Judges, was to have an equitable charge over the whole of the property for return of the amount with interest.

According to my understanding of this judgment, it proceeded entirely on the footing that the conveyance was only a gift and not alienation for value to any extent. Bashyam Ayyangar, J. who was a party to the decision in 'Ayyagiri Venkataramayya v. Ayyagiri Ramayya', 25 Mad 690, also took part in this case and it cannot be reasonably assumed that in this case the learned Judge intended to go behind the principles enunciated by him so clearly and cogently in the earlier decision. This case, therefore, is not an authority on the question as to the manner and the mode in which the equities of an alienee have to be worked out in a case where the consideration for a sale or mortgage is only partly binding on the joint family.

22. I now come to the decision in 'Vadivelam v. Natesam', 37 mad 435 which has been made the target of a severe attack by the learned counsel for the respondent. The facts were very simple. The joint family consisted of an uncle and a nephew. The uncle sold certain lands belonging to the family for a sum of Rs. 500 which, it was not disputed was the real value of the property at the time. Out of this consideration, Rs. 250/- was applied for discharge of debts borrowed for the purposes of the family. The nephew instituted the suit to recover one half share of the lands conveyed under the sale-deed by his uncle, thereby admitting that the sale was valid to the extent of his uncle's half as he was undoubtedly entitled to alienate his own share for value. The question raised in the appeal was whether the plaintiff should be made liable to any extent for the binding portion of the consideration.

Two extreme contentions were urged. Mr. Seshagiri Ayyar for the appellant urged that the entire amount of Rs. 250 which was found to be binding must be treated as a charge on the plaintiff's share of the property. While Mr. Natesa Iyer for the plaintiff contended that the uncle should be treated as having sold his interest in the property only for the binding portion of the consideration. These two extreme contentions were rejected by the learned Judges Sundara Iyer and Sadasiva Ayyar, JJ. They formulated at page 437 the principle applicable to such cases in these words:

"According to accepted equitable principles, in the absence of anything appearing to the contrary the consideration for the sale must be distributed over the whole of the property sold in proportion to the value of each part. On this principle the whole of Rs. 500/- must be distributed over the shares belonging to the plaintiff and Chinnappa (the uncle) respectively.

There is no ground for supposing that one portion of the consideration was allocated to a particular half share and the other portion to the other half share. The valid portion of the consideration as well as the invalid portion must be distributed over each of the half shares of the plaintiff and Chinnappa respectively."

23. Applying this principle, the result was that the plaintiff was bound to pay one half of Rs. 250/- held binding on the family, that is to say as a condition precedent for recovery of possession of the half share claimed by the plaintiff in the suit, he should pay Rs. 125. This principle so enunciated by the learned Judges, in my opinion, accords with equity and justice. The decision in 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89, was also considered by the learned Judges who dissented from the view of Subramania Ayyar, J. in that case.

It was pointed out at page 438, after quoting the passage from the judgment of Subramania Ayyar, J. in which he pointed out the practical inconveniences, as follows:

"The whole of this reasoning proceeds on the assumption that when a coparcener sells his share as well as

the share of other members the other coparceners are entitled to raise the question as to what is the real value of the share of the alienor. It cannot be doubted that a coparcener is entitled to part with his own share in any family property for any consideration he pleases. It is equally clear that as between the vendor and the vendee in the absence of any contract to the contrary the consideration for a sale will be apportioned between all the items of the property sold in case of dispute. There seems to be no reason for allowing the alienor's coparceners to ask the Court to adopt any other principle."

24. The argument that the valuation was not capable of easy or satisfactory settlement, was rejected on the ground that as the right of a coparcener to sell his interest was recognised, the equities must be adjusted in the best manner possible and that the remedy indicated by Subramania Ayyar J. in 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89, may in very many cases be altogether useless as the alienor may not have any interest in the family properties. The above passage from the judgment had been, if I may say so with respect misunderstood and it is this misconception of his that was responsible for the severe criticism by the learned counsel for the respondent. The learned advocate in the first place, argued that the view of the learned Judges was entirely coloured and is based upon the view now held to be untenable, that an alienee from an undivided member of a family becomes a tenant-in-common by reason of his purchase.

No doubt, this view was shared by Sadasiva Ayyar, J. in a later case already referred to. But on a careful perusal of the judgment, it is impossible to accept the contention and to hold that the decision was based upon such an erroneous assumption. The sentence in the above passage recognising the right of a coparcener to part with his share in the family property for consideration is stated to be the justification in support of that contention. That proposition itself, as it stands, cannot be taken exception to. The decisions reviewed in this judgment beginning from 1813 have firmly established the right of a coparcener to alienate his interest in the undivided property for value and that right was accepted by the Judicial Committee in more than one case. The use of the expression "his own share" does not indicate or convey the idea that the learned Judges were treating either the alienor or the alienee as a tenant-in-common with the other members of the family.

No doubt, it may not be strictly accurate to describe the interest of a coparcener in an undivided family as "his share", because, as pointed out in this judgment and by the Privy Council in 'Appover v. Rama Subbaayyan', 11 Moo Ind App 75 no coparcener has a defined share in the property until there is a partition. But this expression was used by several eminent Judges and also by the Judicial Committee as meaning the interest of the coparcener in the undivided property. The learned Judges in enunciating the principle, were not stating and were not called upon to state the limitations under which the power to alienate is to be exercised and enforced. One of such important qualifications is that such a transfer would not result in exempting the property from bearing the proportionate share of the common burden whether the property is in the hands of the alienor or in the hands of his alienee.

The consideration of the question by the learned Judges did not necessitate the stating of the qualification of the rule as they were not dealing with all the principles governing the adjustment of the equities of an alienee. The decision, in my opinion, steers clear of all the difficulties and recognises the equities of all parties and gives effect to them. The rule is simple and capable of easy application without causing hardship to either the alienee or the non-alienating coparceners.

25. It is unnecessary to drive the alienee to a further suit when the coparcener challenging the alienation had elected to treat the alienation as valid to the extent of the alienor's share. If really there is any difficulty, it was up to the person challenging the alienation to institute a suit for general partition which is wider in its scope and in which all the rights of the parties could be adjusted and provision for debts could be made as pointed out by the Privy Council in 'Sat Narain v. Sri Kishen Das', 17 Lah G44, approving the decisions of this Court on the point.

26. This decision was followed by Wallis J. in 'Seetharam Naidu v. Balakrishna Naidu', 26 Mad L J 604, in

preference to the decision in 'Mar Appa Goundan v. Rangaswami Goundan', 23 Mad 89, and by Sadasiva Aiyar and Spencer JJ. in 'Subbaiya v. Thulasi, 1914 Mad W N 16, and was applied without referring to it in 'Muthu Krishna Naidu v. Konaji', 1917 Mad W N 273, by Sadasiva Ayyar and Spencer JJ. Jackson J. sitting as a single Judge applied this decision in 'Adinarayana Reddi v. Subbaraya Reddi', AIR 1927 Mad 1116, where he also observed that the manager was entitled to sell his own share for what he likes and stated that the point to keep in view in working out equities is that the Courts always held the vendor to his sale and "are not in the least concerned with the merits of his bargain".

This, if I may say so with respect, is a correct statement of the law. Though in the latest edition of Mayne's Hindu Law, this decision is not referred to but only the later decisions which followed it, in the edition by Coutts Trotter J. at page 514, it was accepted as laying down the law correctly and it was also noticed by Trevelyan on Hindu Law 1929 Edn., at page 322. This decision was also noticed by the Privy Council in 'Masit Ullah v. Damodar Prasad', 48 AIR 518, but on the facts of the case before their Lordships of the Judicial Committee, the necessity to apply or consider the correctness of that decision did not arise. The Bombay and Nagpur High Courts have followed the principle, in 'Vadivelam v. Natesam', 37 Mad 435. Vide 'Madhavrao Ganpat v. Shankar Hari', AIR 1943 Bom 278 and 'Suraj Mal v. Bapurao', AIR 1929 Nag 311 following 'Radhakishan v. Bisam Singh', AIR 1927 Nag 379.

27. It remains to consider the decision of Kumaraswami Sastri and Ramesam JJ. in 'Venkatapathi v. Pappia', 51 Mad 824 in which the judgment of the Court was delivered by Ramesam J. It arose out of a suit by a minor plaintiff to set aside a deed for sale executed by his father in favour of the first defendant. The consideration stated in the sale-deed was Rs. 600. The vendee was also a near relation of the plaintiff's father. At the time of the sale, the plaintiff's grand-father was alive. Therefore the plaintiff's father's share on the date of the alienation could only be a quarter. It was found that the property, on the date of the sale, was really worth Rs. 2000 and that the vendee did not pay the entire consideration but paid only a sum of Rs. 400 for discharge of the binding obligations of the family.

It was held by Ramesam J. that regarding the sale as a sale of the father's share, the share was really worth Rs. 500 and that the consideration of Rs. 400 paid under the document was not grossly inadequate so as to treat the transaction as one of gift within the principle in 'Rottala Ranganathan Chetti v. Pulicat Ramasami Chetti', 27 Mad 162. The learned Judges, therefore, were prepared to allow the alienee to retain a quarter share of the property but the further question that had not been decided was whether the alienee was entitled to ask the plaintiff to refund any portion of the consideration paid which was undoubtedly found to be binding, viz., the sum of Rs. 400. The decisions in 'Marappa Goundan v. Rangasami Goundan', 23 Mad 89; 'Rottala Ranganathan v. Ramasami Chetti', 27 Mad 162 and 'Vadivelam v. Natesam', 37 Mad 435, were considered by the learned Judge, Ramesam J.

The proposition enunciated in 'Vadivelam v. Natesam', 37 Mad 435, that

"It cannot be doubted that a coparcener is entitled to part with his own share in any family property for any consideration he pleases."

was taken exception to by the learned Judge. He seems to think that the principle so stated would apply only where the vendor is a divided member and that where he is still a member of the joint family, the proposition conflicts with the statement of law in 'Rottala Ranganathan Chetti v. Pulicat Ramasami Chetti, 27 Mad 102. It is difficult to follow and accept this criticism. The decisions in this High Court and of the Judicial Committee have clearly established that a coparcener governed by the Mitakshara Law is entitled to part with his interest in any family property. As regards the consideration for such a transfer so long as the vendor and purchaser agree and fix the price it is not open to a third party to canvass its adequacy or its fairness.

It is, therefore, wrong in my opinion, to state that a member of an undivided family cannot, so long as he is undivided, alienate his share. If the emphasis, however, is on the statement, "for any consideration he pleases" and what was meant was that by adopting the device of stating some nominal consideration a

coparcener cannot make a gift so as to defeat the right of survivorship of other members, it can no doubt be accepted. I think this is what the learned Judge meant when he added that the principle so stated conflicts with the decision in 'Rottala Ranganathan Chetti v. Pulicat Ramasami Chetti', 27 Mad 162. I do think that the learned Judges in 'Vadivelam v. Natesam', 37 Mad 435, when they stated the law in those terms intended to encourage gifts in the cloak of an unreal or nominal consideration.

In the sentence at page 830:

"The result would be if the consideration is distributed over all the shares and if we then try to uphold the sale even as regards the alienor's share, the sale, of that share should (sic) be for a grossly inadequate consideration,"

in my opinion, the word "not" is omitted after the word "should" and before the words "be for a grossly inadequate consideration", in which case the sentence will mean that if the alienor's share is not undersold, the sale may be upheld. But then in the next sentence, the learned Judge seems to think that as the real value of the father's one fourth share was Rs. 500 and as the alienee paid only Rs. 400, 1/4th of the binding consideration being Rs. 100 and the sale of the one-fourth share was therefore for an inadequate consideration and therefore it should not be upheld on the principle laid down in 'Ranganathan Chetti v. Ramasami Chetti, 27 Mad 162.

At page 829 the learned Judge found that the sale could not be regarded as for a grossly inadequate consideration and

"As practically effecting a gift of his share and there is no objection to upholding the sale as one of the father's share only."

This seems to conflict with the view stated In the next page, 830, but then in the next sentence the learned Judge states:

"In such a case the only equity that can be worked out in favour of the vendee would be to uphold the sale of the alienor's share and to allot the whole of the consideration as consideration for that share."

In this sentence, in my opinion, the learned Judge has in view the sum of Rs. 400 which was found to be the binding consideration and the equity suggested is that the burden should be thrown entirely upon the alienor and the alienee, for in the succeeding sentence, he added that if the value was less than the alienor's share, no further equity in favour of the vendee arose while if it was more, a charge may be given for the excess over the share of the coparceners. It is rather difficult to follow the reasoning of the learned Judge, but throughout the discussion, he seems to have been considering not the real value of the property but only the binding consideration for at page 831, in the second sentence, he stated that "when the consideration is so allotted, if it is grossly inadequate compared with the value of the alienor's share, it may be that the sale cannot be upheld, even for his share". It is unnecessary to pursue the consideration of the judgment further as the learned Judge has summarised his conclusions in three propositions at pages 831-832.

These propositions again are not very clear and intelligible. The case before them was treated as falling under the second of the above propositions, as the vendor's share was worth Rs. 500 and the consideration proved was only Rs. 400 i.e., the binding consideration. The first of the three possible cases, enumerated by the learned Judge does not present any difficulty, as it is based on 'Ranganathan Chetti v. Ramasami Chetti', 27 Mad 162, which proceeds on the conclusion that the alienation in question was really a gift and not a transfer for consideration. In the second of the three cases, the learned Judge seems to have had in mind the binding consideration when he speaks of the whole consideration and so also in the case of proposition No. 3 at page 832.

The effect of propositions 2 and 3 is to throw the entire burden on the alienor and alienee and to benefit the coparcener or coparceners --impugning the transaction as not binding though they derived the benefit from

the consideration paid to the extent it was applied for discharging a binding debt. So long as the alienation is by an undivided coparcener or where the father or the manager purports to transfer for a binding necessity or benefit but only a partial necessity was established, his transfer is not for a grossly inadequate consideration and is not a cloak or a device really to make a gift though under the guise of an alienation for consideration, there is no justification or reason to canvass the adequacy and fairness of the price paid by the purchaser to the alienor. If from the consideration paid under a transaction by the father or manager a portion of it had been utilised for discharging a common burden, there is no justification for throwing the entire burden upon the father or the manager and to allow the other coparcener to escape free from the liability.

As the property is equally distributed, the burden on the property must also be distributed in the same manner. This is in consonance with the principles of equity and justice. In my opinion '*Venkatapathi v. Pappia*', 51 Mad 824, has been wrongly decided and must be overruled as well as the decision in '*Marappa Goundan v. Rangasami Goundan*', 23 Mad

89. The law is correctly stated in '*Vadivelam v. Natesam*', 37 Mad 435, and must be followed.

28. Before I deal with the other branch of the arguments of the learned counsel for the respondent, it is necessary to advert to another question which arises incidentally. In '*Venkatarama v. Meera Labbai*', 13 Mad 275 and '*Balabadra Patro v. Khetra Doss*', 31 Mad L J 275, it was decided by this Court that Section 44 of the Transfer of Property Act, before the amendment of that Act by the Transfer of Property (Amendment) Act of 1929 had not the effect of overriding the Hindu Law and would not entitle the alienee from a member of the joint Hindu family to claim joint possession of the alienor's share as a tenant-in-common by virtue of that section and that his only right is to obtain by a suit for partition the share to which his alienor would be entitled.

The learned editor of Mayne's Hindu Law at page 499, latest edition, expressed the opinion that since by virtue of the Transfer of Property (Amendment) Act, 1929, the section is made applicable to Hindus and Buddhists by omitting the words "Hindu or Buddhist" in the concluding portion of Section 2 of the principal Act, the alienee from a coparcener would be entitled to the benefit of that section and claim joint possession. But this view is not accepted by Mulla in his commentary on the Transfer of Property Act, 3rd Edition at page 216. The section itself applies to co-owners of immoveable property and an alienee from a coparcener does not become an owner or a co-tenant by reason of the purchase. Further, the words "subject to the conditions and liabilities affecting at the date of transfer the share or interest so transferred", save the principles established by Mitakshara Hindu Law that the right of an alienee is only to institute a suit for partition to work out his equities, subject to the charges and encumbrances affecting the coparcenary property or the interest of the alienor at the time of the transfer. These principles are not in any manner and to any extent affected or altered by Section 44 (Section 37) of the Transfer of Property (Amendment) Act and Section 2 of the Principal Act.

The last clause in the section relating to the transfer of a dwelling house cannot be treated as indicating that the "co-owner" referred to in the opening words of the section is applicable to an alienee from an undivided coparcener in a Mitakshara joint Hindu family. The view taken by Mulla in his commentary on the Transfer of Property Act was followed in preference to that of Mayne by Chandrasekhara Aiyar J. in '*Eamaswami Chettiar v. Subramania Chettiar*', S. A. No. 940 of 1945 and by Tyagarajan J. in '*Thimmu Reddiar v. Sennappa Reddiar*', S. A. No. 2339 of 1945 and 95 of 1946. The last decision was affirmed on Letters Patent Appeal by Horwill and Balakrishna Ayyar JJ. in '*Thimmu Reddiar v. Sennappa Reddiar*', L. P. A. Nos. 2 and 3 of 1948. With great respect I am inclined to accept the view taken by Mulla in his commentary on the Transfer of Property Act in preference to the view of the learned editor of Mayne's Hindu Law at p. 493 of the latest edition and the earlier decisions in '*Balabadra Patra v. Khetra Doss*', 31 Mad L J 275 and '*Venkatarama v. Meera Labbai*', 13 Mad 275, is still good law.

29. The last contention urged on behalf of the respondent was that by reason of the insolvency of the father, the first defendant, there was a disruption of the joint family status and -that, therefore, it is not open to the alienee, the third defendant, to insist in this action, for any adjustment of the equities in his favour as his only right which was a right to institute a suit for partition for the purpose of establishing his equity, is gone. In the first place, in my opinion, this contention is not open to the plaintiff-respondent as he had specifically admitted in his plaint that the family was joint and undivided on the date of the institution of the suit & it was supported by the evidence of the father examined on his side as P. W. 1. It is impossible to accede to the request of the learned counsel for the respondent that he should be granted an indulgence to amend his plaint so as to enable him to go behind his pleading and his evidence. In the next place, the contention itself seems to me wholly untenable. The subsequent insolvency of the father does not take away the right of the alienee which had already vested in time.

30. The learned advocate to be logical in the attitude so taken, had to urge that even an alienation by a coparcener of his entire interest in the joint family property or part of it, would bring about a division in status while he all along maintained that the alienee's right was not a specific defined right in the property but was only an unqualified fraction representing the share of the alienor. Somewhat inconsistently in this branch of the argument, he maintained that the share becomes crystallised by reason of the alienation or insolvency practically converting the alienee into a tenant-in-common along with the other members of the family.

The crux of the argument, as I understand it, is that if the share of a member becomes defined in whatever manner it may be, such a definition of the share would operate to disrupt the status of the family and make the other members tenants-in-common along with the alienee or the Official Receiver in the case of insolvency. This position, he attempted to maintain by reference to the Mitakshara definition of Vibhaga or partition and the recognition by the later commentators of the conversion of the joint family status into a tenancy-in-common even by what is now described as a unilateral declaration of an intention which, according to him, is equivalent to Buddhivishesha and by a reference to a statement of the Privy Council in '*Venkatapathi Raju v. Venkatanarasinharaju*', ILR (1937) Mad 1.

31. It is no doubt true as stated previously in this judgment, that some of the Judges of this Court held the view that by reason of the alienation, the alienee becomes a tenant-in-common. That an alienation by a coparcener does not terminate the coparcenary whether the property alienated is either the whole or only a part of his interest in the family property, and that notwithstanding the alienation, the alienor continues to be undivided with the other members of the family with rights of survivorship between him and the other members of the family in respect of the property of the family was laid down clearly by Bhashyam Ayyangar J. in '*Ayyagiri Venkataramayya v. Ayyagiri Ramayya*', 25 Mad 690 at page 717, 'though, it must be observed, in a later decision '*Lakshmi Achi v. Narayanasami Naicker*', 53 Mad 188, Ramesam J., if I may say so with great respect, interpreted this proposition wrongly. This mistake was noticed by Venkataramana Rao J. in '*Ramasubbaraya v. Ganapathiraju*', ILR (1940) Mad 405. For the reason given by Venkataramana Rao, J. in that decision, I respectfully agree with his opinion that the view taken by Ramesam J. in '*Lakshmi Achi v. Narayanaswami Naicker*', 53 Mad 188, is not correct. Even since the decision in '*Ayyagiri Venkataramayya v. Ayyagiri Ramayya*', 25 Mad 690, the preponderance of authority in this Court is in favour of the view taken by Bhashyam Ayyangar J. notwithstanding the expressions of opinion to the contrary by other learned Judges. '*Manjappa Mudali v. Shanmuga Mudalai*', 38 Mad 684; '*Maharaj Of Bobbili v. Venkataramanjulu*', 39 Mad 265; '*Venkatarayudu v. Sivaramakrishnayya*', 58 Mad 126; '*Lakshmanan Chettiar v. Srinivasa Ayyangar*', ILR (1937) Mad 203; '*Suryanarayanamurthi v. Veeraraju*', ILR (1946) Mad 54 and '*Ramasubbaraya Sastri v. Ganapathi Raju*', ILR (1940) Mad 405, support this view. In my opinion, it is too late in the day to set the clock back and to hold that the alienation has the effect of dividing the status of the family.

32. The earlier branch of the argument of the learned advocate was directed to restrict and to curtail the rights of the alienee as far as possible and to prevent in effect the free exercise of the power of alienation by an undivided member of a Hindu joint family governed by Mitakshara Law. He now wants to go to the other extreme and asks us to hold that the alienation practically converts the ownership of the property into a

tenancy-in-common. Judicial decisions in this State have evolved a power of alienation and a logical, and if I may say so with respect, equitable system, adjusting the equity of the alienee and the rights of the other coparceners. The object, I should think, was to encourage the exercise of individual rights with a view to advance commerce and trade and also to enable the coparcener to advance, by raising money, the interests of himself and his branch.

The law has progressed in India from the corporate ownership of the village community into the joint family also of a corporate nature. The joint family was taken as a unit and the conception of joint ownership continued for a long time when there was not much of a progress in the direction of commerce and trade. It is common knowledge that India was purely an agricultural country for a long time and even now the major part of the population of the country make their living by agriculture. The transition from the ownership of a joint family as a unit to individual property has been one of gradual evolution under Mitakshara law by judicial decisions. The swing of the pendulum in some of the countries is to go back and to abolish altogether individual property and vest the ownership of every kind of property in the State.

Whether individual ownership or State ownership of property is good for society and of the two which should survive is for the politicians to solve and for them to decide. It is not within the province of a Judge to consider these problems and express his opinion. But in a society which is advancing, it is unwise to retard the progress by introducing brakes at every stage. To curtail, therefore, or to restrict by limitations the power of alienation is, in my opinion, inconsistent with the progress of society and the evolution of the right of individual property.

33. To resume the argument of the learned counsel for the respondent after this brief digression, it must also be stated that the insolvency of a coparcener does not bring about a division of the status of the family. This question has been considered in this Court in some of the decisions. When a coparcener is adjudicated insolvent, his property vests in the Official Receiver. The property of the insolvent for the purpose of Section 28 of the Provincial Insolvency Act does not, however, include any property which is exempt by the Code of Civil Procedure, 1908 or by any other enactment for the time being in force from liability to attachment and sale in execution of the decree. The share of the insolvent in the family property in so far as it is attachable and saleable under Section 60, C. P. C. will vest in the Official Receiver. It is wrong, therefore, to assume that the entire interest of the insolvent in the joint family property vests in the Official Receiver.

'Venkatrayudu v. Sivaramakrishnayya', 58 Mad 126, considered the effect of insolvency on the joint family status and after an elaborate examination of the authorities, it was held that the insolvency would not sever the joint family status and the purchaser from the Official Receiver would not become a tenant-in-common from the date of his purchase. This opinion was based on the analogy of the effect of alienation by a coparcener of his entire interest in the joint family property. If there was a surplus of the assets of the insolvent after the administration is completed, the question arose whether that surplus which reverts to the insolvent is to be treated as joint family property or as the separate property of the insolvent. Venkataramana Rao, J. sitting as a single Judge considered the question in 'Lakshmanan Chettiar v. Srinivasa Ayyangar', ILR (1937) Mad 203, and held that the reversion of the surplus in the insolvent after the insolvency had the effect of altering the character of the property and that it would become the separate property of the insolvent. He, however did not consider that the insolvency operated to bring about a division in status. The family status continued to be undivided even according to the learned Judge, notwithstanding the insolvency.

In 'Suryanarayanamurthy v. Veeraraju', ILR (1946) Mad 54, Wadsworth and Patanjali Sastri, JJ. pointed out that the view taken by Venkataramana Rao, J. in 'Lakshmanan Chettiar v. Srinivasa Ayyangar', ILR (1937) Mad 203 was not correct and that the character of the property was not altered by reason of the insolvency. Of course, the learned Judges also affirmed the view that the insolvency does not affect the status of the family. This decision was again followed in 'Hanumantha v. Official Receiver, Bellary', ILR (1947) Mad 44, by Wadsworth and Rajamannar, JJ. (as he then was) in which the question that arose for consideration was whether if after the adjudication of a member as an insolvent, another member dies and there is an increase in the share to

which the insolvent would be entitled whether the increased share vested in the Official Receiver as after-acquired property under Section 28(4) of the Provincial Insolvency Act. The learned Judges held that by reason of the Insolvency, the joint family status was not disrupted and that any addition to the share of the insolvent by survivorship would be "after-acquired property" within the meaning of Section 28(4).

The reason why the Official Receiver does not lose that which was vested in him is stated at page 46 to be that the

"vesting amounts to an alienation which 'crystallises the share' of the insolvent to which the alienee is entitled on the date of the adjudication."

This expression in this judgment is the basis and the foundation of the argument of learned counsel for the respondent that the insolvency has the effect of crystallising the share in the sense that the Official Receiver practically becomes a tenant-in-common in respect of that share with the other coparceners. This argument, in my opinion, proceeds on a total misinterpretation of the expression used by the learned Judge, Wadsworth, J, in the context. The crystallisation of the share that is referred to by the learned Judge means only that the fractional interest of the coparcener who is adjudicated insolvent as on the date of the adjudication vests in the Official Receiver, and the fraction of the interest which so vested in the Official Receiver is not altered by subsequent births and the benefit of the increase by subsequent deaths which accrues by survivorship to the insolvent vests in the Official Receiver as after-acquired property in the right Of the insolvent.

This is practically the principle which has been established in 'Ayyagiri Venkataramayya v. Ayyagiri Ramayya', 25 Mad 690, approved by the Pull Bench in 'Chinnu Pillai v. Kalimuthu', 35 Mad 47. That principle is that the fraction of the share which vests in the alienee under an alienation is not altered by subsequent births or deaths and is once for all unalterably fixed. The crystallisation, therefore, in that sense has not the effect of defining the share of the insolvent in the joint family property so as to convert it into a tenancy-in-common and make it a defined share. If the foundation of the argument falls to the ground, the argument itself fails. Further as stated above, it is not the entire interest in the property that vests in the Official Receiver. Part of the property of the family which is not saleable and attachable under Section 60, C. P. C. must necessarily remain with the joint family without any interest in such property vesting in the Official Receiver.

34. Assuming for the sake of argument that the insolvency has the effect of defining the share by a division of the joint right of the coparcener in the sense in which it was used by the Privy Council in 'Appovier v. Ramasubba Ayyan', 11 Moo Ind App 75 (P C), such a definition of a share has not the result of changing the status- of the family so far as the insolvent is concerned. Strong reliance to support the view that it brings about that re suit was placed by learned counsel for the" respondent on a passage in judgment of the Judicial Committee in 'Venkatapathiraju v. Venkatanarasimharaju', ILR (1937) Mad 1 at pages 12 and 13:

"A division of right or a severance of the joint status may result, not only from an agreement between the parties, but from any act or transaction which has the effect of defining their shares in the estate, though it may not partition the estate. If the document clearly shows a division of the right, its legal construction and effect cannot be controlled or altered by evidence of the subsequent conduct of the parties."

The point actually decided by the Judicial Committee in the case was that a renunciation by a member of the joint Hindu family governed by the Mitakshara law merely extinguishes the renouncing member's interest in the family estate but does not affect the status of the remaining members 'Quoad' the family property and that they continued to be coparceners in the same manner, notwithstanding the renunciation. The passage relied on, in my opinion, does not at all apply to a situation where the entire interest of a coparcener is alienated or the interest of the coparcener became vested in the Official Receiver by reason of the insolvency. The division of right can undoubtedly be brought about by agreement between the parties as stated in 'Appovier v. Ramasubba Ayyan', 11 Moo Ind App 75 (PC). It may also be brought about by a unilateral declaration of a member to become divided in status as laid down by the Judicial Committee in 'Girja Bai v. Sadashiv Dhundiraj', 43 Cal 1031, without an actual partition of the properties.

The view of the Judicial Committee as pointed out by Ameer Ali, J. in the judgment is based on Viramitrodaya, Vyavaharamayuka, Saraswatbivilasa, passages from which were extracted at page 1046. The definition of partition given by Vignaneswara in Mitakshara as:

"the adjustment of diverse rights regarding the whole by distributing them in particular portions of the aggregate,"

is also referred to at page 1045. The act, therefore, contemplated in the passages in 'Venkatapathi Raju v. Venkatanarasimharaju', ILR (1937) Mad 1, above extracted must be an act which amounts to an unilateral declaration expressed by a member of an intention to become separate from the family. It has been established that the declaration may be either express or implied from conduct. The 'transaction' referred to in the passage must be a transaction between the members of the family which may not be an express agreement between the parties to become divided in status and to divide the right but may be any document in which a division of the right is assumed or expressed.

The passage in question does not, in my opinion, contemplate the result of bringing about a division of the right when there is not either a consensus of intention expressed by the members of even a unilateral declaration by a member of his intention. The essence of the division of a right, in my opinion, is the expression of intention which may be contained in an agreement between the parties or any document entered into by the parties or it may be a division by the expression of unilateral declaration. The alienation by itself or a compulsory alienation like the insolvency or an execution sale cannot, in my opinion, be treated in view of the authorities already considered in this Court as an expression of an intention to sever the status of the family.

35. Reference was made in the course of the argument to the definition of partition by Vignaneswara where the author defines that term as:

(Vibagonama Dravyasamudhaya Vishayanamancka Swayamanam thathekatheseshu Vyavasthapanam).

The translation given by Colebrooke for this passage is

"Partition (Vibaga) is an adjustment of the ownership of many persons in the aggregate wealth by assigning particular portions of the aggregate to a several ownership."

This, in my opinion, undoubtedly refers to the actual division by metes and bounds by an agreement between the parties. "Ekathesa Vya-vasthapanam" can be only by a voluntary act of the parties and not by a compulsory alienation. Even then it requires the restriction of the ownership of each member in the entirety of the property to particular portions of the aggregate so as to constitute several ownership.

This has no reference even to a mere division of the right without division of the property. Undoubtedly, as the Privy Council pointed out in 'Girja Bai v. Sadashiv Dhundiraju', 43 Cal 1031 (P C), there are texts of Viramitrodaya and others which recognise the division of the right without the division of the property by a unilateral declaration or by 'buddhivishesha." The other passages to which reference was made in the course of the arguments from Jimuthavahana's Dayabaga, Smritichandrika, page 12 and Viramitrodaya do not at all support the argument that without an intention to divide on the part of a member, a division in status can be brought about merely because either his share is crystallised or his interest was alienated whether the alienation is voluntary or even if it is involuntary.

It is needless to consider in detail the other texts which have been placed before us as we think that there is no foundation to support the argument of the learned counsel. I have therefore no hesitation in coming to the conclusion that the insolvency of a member does not change the status of the family. The family was not treated as divided in status notwithstanding the insolvency of the father in 'SAT NARAIN'S CASE', and the decree for partition provided for the discharge of joint family liabilities, 'Sat Narain v. Kishendas', 17 Lah 644 (PC).

36. It was strongly pressed before us that conversion of a member, it has been established, has the effect of severing the status of that member separating him from the family and that that analogy should be applied to the case of insolvency also. I do not think that the analogy holds good as the effect of conversion is to change the religion of the coparcener and it would be impossible to allow him to continue to be a member of the family sharing the worship & the food & the other amenities of the members of the family. I do not think that by such an analogical reasoning the principle can be extended to the case of insolvency.

37. It only remains to state my conclusions in order to avoid any confusion.

1. A coparcener of a joint Hindu family governed by Mitakshara obtaining in the State is entitled to alienate his undivided share either in the whole of the property or in a certain specific item of the property or even the whole of a specific item. In all such cases the only right which the alienee acquires is to stand in the shoes of his vendor and to work out his rights by a suit for partition and in such a suit, if without prejudice to the rights of the other members of the family, it is possible to have the share alienated allotted to the alienor, it may be allotted to the alienee in the right of the alienor. The alienee has to bear the proportionate share of the common burden of the family proportionate to the value of the share alienated to him.

2. Where an alienation is made by a father or manager of a joint Hindu Family and if either the alienation is fully supported by necessity or supported by necessity except to a small extent, the alienation has to be upheld.

3. If, however, the alienation made by the father or manager of a joint family is supported only by partial necessity, the alienee would be entitled in a suit for partition instituted either by him or by other coparceners, impugning the alienation to have the alienor's share allotted to him & also to have the binding portion of the consideration distributed equally having regard to the interest of the alienor and the value of the property alienated.

4. If the non-alienating coparcener challenges, the sale made by the father or manager of the joint family property on the ground that it is not binding on him but institutes a suit only to recover his share in the property alienated thereby admitting the right of the alienee to the other share in that property, and if it is found that the alienation is supported by partial necessity, the common burden discharged from and out of the consideration should be distributed proportionately in the same suit on the principle of 'Vadivelam v. Natesam', 37 Mad 435.

5. If the alienation whether made by a father, or manager or by any other coparcener, though purporting to be for value, is in fact a device to make a gift and not a transfer for consideration, the alienation would not defeat the right of the other coparceners to take the property by survivorship in case of death of the alienor. A non-alienating coparcener is not otherwise entitled to dispute the adequacy or fairness of the consideration for the sale by a coparcener and his only right is to insist that the property alienated should bear the proportionate share of the common burden on the family.

6. Neither the alienation of the entirety of the interest of a coparcener nor an adjudication of a coparcener as an insolvent would have the effect of disrupting the status of the family.

7. The share or in other words the fraction of the share which the alienee acquires is unalterably fixed on the date of the alienation and is not subject to fluctuation either by subsequent births or deaths in the family and in all respects his rights must be determined and equities worked out as on the date of the alienation.

38. It follows that whether the general principle of the right of an alienee to work out his rights in a partition suit or whether the principle in 'Vadivelam v. Natesam', 37 Mad 435, is applied to the facts of this case, the third defendant is entitled to have a condition imposed that the plaintiff should not recover possession of his half share of the property without payment of a half share of the binding consideration, viz., Rs. 3511. The decree, therefore, of the Courts below must be modified by adding that before the plaintiff recovers

possession of the property he must deposit into Court a sum of Rs. 3511 and the plaintiff would thereafter be entitled to recover possession of the property with mesne profits as from the date of deposit. The money so deposited shall be paid over to the 3rd defendant. The appellant is entitled to his costs throughout.

Panchapagesa Sastri, J.

39. Where a sale of joint family properties is challenged by the non-alienating coparceners as not binding on their shares, they have been allowed to bring a suit for partition of the alienated items only and recover their shares therein leaving the share of the alienating coparcener in the possession of the alienee. This is an exception to the rule against partial partition. This right has been recognised by the Full Bench decision in 'Iburamsa Rowthan v. Theruvenkatasami Naick', 34 Mad 269, as "a long established rule." The judgment in that case rejected the argument that the recognition of this right of partial partition is logically inconsistent with and trenches upon the alienee's equity to have his rights worked out in a general partition suit so as to enable him to claim, if possible, an allotment of the whole of alienated items or as much of it as may be possible to the share of his alionor. Its real justification is its obvious convenience and simplicity of procedure and the undesirability of compelling the other coparceners to bring a complicated suit for general partition involving other properties of the family as well.

Its legal basis is rested upon the doctrine that it is open to the non-alienating coparceners to affirm the transaction and to recognise it as valid to the extent of the share of the alienor. Such affirmance of the transaction and the recognition of its partial validity must necessarily postulate a legal fiction of a prior division, quoad the alienated items, between the alienating coparcener and the others and the transfer of the share of the divided member of the alienee. A suit for partial partition brought by the non-alienating coparceners must therefore be deemed in law to contain these averments necessitated by the above legal fiction. The plaintiffs cannot be allowed to challenge the same, as the suit itself must be deemed to have been founded on the basis of such a fiction. They cannot be permitted to advance any arguments contrary to such implied averments, at any rate during the progress of such a suit. The alienee, if he is not satisfied with the share of the alienor which is left undisturbed in his hands, and, is anxious to claim an allotment of the whole of the items, or a greater portion of it, must work out his rights in his own suit for a general partition. Where, however, he does not bring such a suit the rights of all the parties have to be adjusted by the Court within the frame work of the suit for partial partition brought by the non-alienating coparcener. Even in such cases a portion of the consideration of the sale of joint family properties may be found to be binding on the family. What then is the rule to be adopted in adjusting the equities in cases of that kind? This was the only question raised before me in hearing this appeal while sitting singly and the main and important question argued before the Pull Bench.

40. In my humble judgment the most equitable and eminently just rule will be to distribute the binding portion of the consideration proportionately over the whole of the property alienated and make the non-alienating coparceners liable for payment of their proportionate shares of such binding portion of the consideration as a condition precedent for the recovery of their proportionate shares in the alienated properties. The plaintiff has by his deliberate choice adopted the exceptional remedy of a suit for a partial partition of the alienated items alone. He cannot complain if within the frame work of such a suit as brought by him the Courts proceed to adjust the equities of the alienee to as large an extent as possible. There is no sound reason or valid justification for relieving him of his obligation to bear his proportionate share of the common liability or burden even in such a suit, just as he would have to share the same if the suit is to be one for general partition.

The rights of parties should be adjusted in the" same manner as if this suit was a suit for a general partition the alienated properties alone being regarded as the whole of the joint family properties belonging to the family and available for division. This, I understand, to be the real principle underlying the decision in 'Vadivelam Pillai v. Natesam Pillai', 37 Mad 435. This rule has not only the merit of simplicity but works out the equity in as large a measure as the framework of the suit permits. The contrary view laid down in 'Marappa

Goundan v. Rangaswami Goundan', 23 Mad 89, really ignores the equities in favour of the alienee. Moreover, it is obviously incomplete as it does not provide for a case where the portion of the consideration found to be binding exceeds the real value of even the alienor's share; nor is it logical in leaving the entirety of the alienor's share undisturbed in the hands of the alienee where the binding portion of the consideration is less than its value.

The later decision in 'Venkatapathi Naicker v. Pappiah Naicker', 51 Mad 824, removes the first of the anomalies pointed above and provides for the excess being made a charge on the shares of the non-alienating coparceners. Both the decisions, however, throw the entirety of the common burden exclusively and in the first instance on the alienor's share alone. The exoneration of the shares of the non-alienating coparceners from the burden of this common liability is not called for by any compelling principle of law or justice. In my opinion, the decision in 'Vadivelam Pillai v. Natesam Pillai', 37 Mad 435, is right and should be followed. This view of the law is in consonance with the progressive need of the times and really enhances the value of a coparcener's interest in his hands.

41. I agree that the decree of the Court below must be modified as per the judgment of my learned brother Satyanarayana Rao, J.

42. In this view it is not necessary to deal with the other questions of law about which able and learned arguments were forcefully advanced by Mr. Venkatasubramania Aiyar.

43. VISWANATHA SASTRI, J.: I do not rehearse the facts set out in the judgment of my learned brother. I wish at the outset to express my appreciation of the assistance given to us by counsel, particularly the learned counsel for the respondent, the merit of whose erudite and instructive argument is in no way diminished because it has not succeeded. We were invited during the prolonged hearing of this appeal to examine many texts of Hindu Law and many more decided cases but I think that such an examination is of value only if it yields some general principle or test which may be of service in deciding other cases. To refer to all the texts and cases cited would be an endless and unprofitable task. Out of deference, however, to the respondent's argument which covered a wide field, I shall briefly sketch the back-ground against which the case should, in my opinion, be viewed.

44. Unlike decided cases, the textual authority of the Mitakshara is both clear and logical. All the property of a joint Hindu family is held in collective ownership by all the coparceners and none is the owner of a part. Family property is alienable only with the consent of all the coparceners, at any rate, of all those who are in a position to consent. An alienation may be made by one member if the other coparceners are incapable of giving assent as for instance, by reason of their minority and the alienation is for purposes designated by the texts as proper. In no other case is an alienation of family property allowed, the idea being that no individual member of the family has an interest of his own to convey. The family property is held in trust for the members then living and thereafter to be born. Mitakshara I Pl. 23 to 30.

An alienation in violation of the above rule must be treated as 'non est' according to the Smritichandrika. The right of an individual member in family property can be ascertained and fixed by his exercising the right to partition and getting a separate allotment for himself. A partition or 'vibhaga' is the adjustment of the ownership of many persons in the aggregate wealth by assigning particular portions to separate ownership. Mitakshara Chapter 1-1-Pl. 4. Though the respondent's effort was to keep us within the bounds of textual authority and incidentally within the grip of the joint family system, I consider it is permissible for us consistently with precedents, to minimise the inconveniences of a personal law based on texts which have long outlived the epoch in which they were promulgated.

(45) According to the early English lawyers and Judges until a partition took place, the coparceners continued "seized by one and the same title of the whole and every portion of the family property alike". The English notion that joint tenants are seized of the land 'per mie et per tout' was imported into the discussion of the rights of coparceners in a Mitakshara joint family and alienees from them, 'Baluswami Iyer v. Lakshmana Iyer'.

44 Mad 605 at p. 626 (FB). The right of a coparcener in family property springs from the fact of his birth in the family & ceases on his death. On the death of one coparcener, the others take by the 'jus accrescendi' that in which they had a common interest and a common possession during the life-time of the deceased, 'Katama Natchier v. Raja Of Sivagangai, 9 Moo Ind App 539 at p. 611 and 'Ramanna v. Jagannatha Rao', ILR (1942) Mad 88G. A coparcener has not such an ascertained share in joint family property as is capable of being absolutely or indefeasibly alienated by him at his pleasure.

The graphic description of the mode of enjoyment of joint family property given in 1866 by Lord Westbury in 'Appoovier v. Rama Subba Iyer', 11 Moo Ind App 75 (PC), is too familiar to require quotation. The members of the family have a right to be housed and maintained conformably to the means of the family and their respective needs and requirements. They cannot complain of inequality of enjoyment. A coparcener has a right to enforce a partition and reduce to his exclusive ownership and possession that part of the family property which might fall to his share. At such a partition there must be a stock-taking of the whole of the existing assets and liabilities of the family; provision must be made for the discharge of common debts, encumbrances and other liabilities; and the rest of the family property should be divided among the coparceners, 'Sat Narain v. Sri Kishen Dass', 17 Lah G44.

46. The joint family system has however been invaded and rudely shaken by doctrines inspired by English legal conceptions and the demands of a progressive society. The Courts too have lent a helping hand to influences that have undermined the integrity of the joint family. The law relating to self-acquisitions as developed by Courts has responded to the desire of the members of the family to secure their own economic freedom and betterment by individual effort and exertion. The rigour of the Mitakshara rule has been relaxed. The emergence of "managership" of a joint family with incidental right to full possession and control of the family properties and the right to represent the family in suits and transactions affecting the family property, was not based on textual authority. It arose out of the ascription of a corporate character to the joint family and the consequent need for joint action of the members through an accredited representative.

To this extent, the rights of individual coparceners were subordinated to the conception of a corporate entity, represented by its manager. The recognition of wider powers in the manager of a trading family was in response to the needs of modern trade and commerce. The equal rights of coparceners in family properties and their right to interdict alienations by their father were undermined by an appeal to the sanctity attached by Hindu Law to the obligation of a debt. The Courts allowed creditors of a father to attach and sell family property for the satisfaction of their debts not tainted by illegality or immorality. The further step was to recognise the father's power to effect a sale of family property so as to bind his sons' interests for discharging his debts, the consent of the sons being presumed or implied.

Gautama ruled that a father's debts incurred in the course of a business involving speculation need not be paid by the sons out of joint family properties but Courts do not now regard such debts as illegal or immoral. The next step was to enable a creditor to attach and sell the interest of a coparcener not being the father. The further step was to uphold the right of the coparcener himself to alienate his interest in joint family property for value. That the law has been progressively developed by Courts to suit changing conditions in different parts of the country will be evident from the fact that a voluntary sale by a coparcener of his interest in joint family property does not convey any interest to the vendee under the Mitakshara law as administered in Bengal, Bihar and Uttar Pradesh while the opposite result has been arrived at in Madras and Bombay.

47. One convenient method of getting round textual authority prohibiting alienation of property was by saying that the prohibition was merely moral rather than legal, the distinction between the "vinculum juris and the vinculum pudoris" not being always kept in view by the texts. The alienation may be improper but not devoid of legal efficacy. See Sir W. 'Macnaughten's Hindu Law page 6 cited with approval in 'Balwant Singh v. Rani Kishori', 20 All 267 (PC). The Mitakshara prohibition against alienation of joint family property was substantially abrogated by an appeal to equitable principles. English lawyers like Colebrooke, Ellis and Strange, who had to interpret and administer Hindu Law had a special solicitude for the purchasers for value

in good faith and their views profoundly influenced the growth of Hindu Law in the first half of the last century.

Sir Thomas Strange relying on Colebrooke's opinion observed:

"In favour of a 'bona fide' alienee of undivided property, where the sale or mortgage could not be sustained as against the family, such amends as it could afford would be done, out of the share of him, with whom he had dealt; and for this purpose, a Court would be warranted in enforcing a partition". Strange's Hindu Law (1st Edition), Vol. 1 page 179.

Colebrooke previously had said:

"Equity would require redress to be awarded to the purchaser by enforcing a partition of the whole or sufficient portion of (family property) so as to make amends to the purchaser out of the vendor's share." Strange's Hindu Law (1830), Vol. II page 349.

This is the origin of the purchaser's equity, which powerfully reacted on the proprietary rights of coparceners and their right to alienate their interest in joint family property.

As early as 'Suraj Bansi v. Sheo Prasad', 5 Cal 148 PC, the Judicial Committee recognised the serious inroads that had been made into the Mitakshara joint family system and said:

"since the decision, however, of the case of 'Viraswami Gramani v. Ayyasami Gramani, 1 Mad H C R 471, it has been settled law in the Presidency of Madras that one coparcener may dispose of ancestral undivided estate even by contract and conveyance to the extent of his own share; and 'a fortiori' that such share may be seized and sold in execution for his separate debt..... There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindu family; and the law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has, to be allowed to stand in his vendor's shoes and to work out his rights by means of a partition."

In 'Syed Tufzool Hussain Khan v. Raghoonath Pershad', 14 Moo Ind App 40 at p. 50, the Judicial Committee referred to a coparcener's undivided interest as something "specific, existing and definite." In 'Ayyagari Venkataramayya v. Ayyagari Ramayya', 25 Mad 690 and 'Ranganathan Chetty v. Ramaswami Chetty', 27 Mad 162, Bhashyam Iyengar J. held that a coparcener had a "present vested interest" in joint family property transferable in whole or in part for value and that the transferee also took a present vested interest in the property. A further breach in the joint family system was made when the law of insolvency provided that the share of a coparcener in joint family property vested in the Official Receiver or Assignee of his adjudication. This was on the footing that it was property over which the insolvent had a power of disposal. As the law stands today, a coparcener can claim at any given moment of time that he has a definite share in the family property which he can alienate for value without reference to the other coparceners or which a Court can attach and sell for his personal debts.

He has an interest in property which, though it may fluctuate in extent from time to time, is yet definite and ascertainable at any given moment, as for instance by a demand for partition or by an alienation, with this difference that an alienation 'per se' does not affect a severance of the alienor from the joint family, 'Narayanah Sah v. Sankara Sah', 53 Mad 1 at p. 14; 'Baluswami Iyer v. Lakshmana Iyer', 44 Mad 605 at p. 626. The theory of the Mitakshara that an individual coparcener has nothing like a share or specific interest in joint family property and that the alienation of such a property by a coparcener without the consent of the others is void and of no effect whatever has been substantially abrogated by the decisions of Courts. What Jimutavahana did for Bengal in the 13th Century was partially achieved by the Courts in Madras and Bombay in the 19th Century. Nilakanta, though a pronounced follower of Vignaneswara, practically accepted the Dayabhaga view of the nature and extent of a coparcener's right in joint family property. Indeed

Vignaneswara himself recognised that property had its basis only in popular recognition.

48. What are the rights of an alienee of joint family property from a coparcener and how are they to be worked out? Have the other coparceners any, and if so, what rights against the alienee and has the alienee any rights as against them? In the ensuing discussion, it is assumed that the alienation is for value but not for a purpose binding on the family. The texts of Hindu Law do not throw any light on these questions for they do not contemplate an alienation of joint family property by a coparcener otherwise than for family necessity or benefit. Judge-made law has been hesitant with a gradual advance and an occasional set-back. The working out of the alienee's equity has caused not a little embarrassment in the logic of the law, which has to be gathered from decisions in which the principle has been progressively but not always consistently formulated. The touching refrain of the respondent's argument was:

"overrule me if you please, but at least say something logical and consistent with the Mitakshara doctrine."

49. Bluntly I say it is not possible to find a logical solution of an illogical problem. As early as 'Gurulingappa v. Nandappa', 21 Bom 797 at p. 805, Farran C. J. had stated: "The position of the purchaser of the interests of a Hindu coparcener in part 'or' the whole of a joint estate is very anomalous. It is impossible to work out his rights on an exact logical basis. As it is an equity, it must be worked out on equitable principles." The decisions on this topic are so many and so various that it will be impossible to ignore or reconcile all of them.

50. The legal theory is that an alienee steps into the shoes of the alienating coparcener; that he can have no higher rights than the alienor, that he must take the interest conveyed subject to the same limitations and conditions as the alienor, and that except through and in the right of the alienor, he cannot have any claim against the joint family. The stream can rise no higher than its source. This is good logic but law and logic soon parted company. The off-spring became more powerful than its parent and the alienee was held entitled to enforce his rights in a manner not open to his alienor. A coparcener's right to partition dies with him. His alienee for value or a purchaser of his interest at a Court sale after his death pursuant to a prior attachment, could work out his rights by a partition against the surviving coparceners even after the death of the vendor or judgment-debtor as the case may be.

A contract for valuable consideration entered into by a coparcener for the sale of his interest in joint family property has been held to be specifically enforceable against the surviving coparceners after his death, 'Bhagwan Bhau v. Krishnaji', 44 Bom 967 and 'Ramappa v. Yellappa', 52 Bom 307. It is not therefore quite accurate to say as Baker J. did in 'Manjayya v. Shanmugamudali', 38 Mad 684, that the right of an alienee from a coparcener is a mere right 'in personam'. The alienating coparcener is entitled to a partition 'rebus sio standibus' as on the date of suit. The alienee's right, however, is to the share to which the alienor was entitled on the date of alienation according to 'Chinnu Pillai v. Kalimuthu Chetti', 35 Mad 47 FB. An alienor's share is liable to diminution by a decrease of the family assets as well as by an increase in the number of coparceners but the alienee's right has been held not to be affected by these changes.

In 'Brij Narain v. Mangala Prasad', 46 All 95 (PC), Lord Dunedin after observing that this branch of Hindu Law was "illogical" and "anomalous" gave the following caution:

"In such a matter as the present, it is above all things necessary 'stare decisis', not to unsettle what has been settled by a long course of decisions."

The respondent's invitation to us was to follow Vignaneswara wherever he led us ignoring decisions which have held the field for many years.

51. When a coparcener alienates an item of family property, the bargain between the parties determines the interest intended to be conveyed to the vendee. In the case of a Court sale of the interest of a coparcener, the purchaser obtains what was intended to be sold. What the alienee gets is the totality of what he bargained for and not a mere fractional share. The alienee, however, cannot trench upon the rights of the non-alienating

coparcener. In accordance with the 'maxim sic utere tuo ut alienum non laedas' his rights must be enjoyed in such a way as not to interfere with the rights of others. The right of the alienee though fixed as between himself and the alienor and in that sense unchanging, has to be enclosed wholly or partially within the circumference of the alienor's right, that is to say, within the share which on a general partition would have been allotted to him. The respondent's advocate relied on the following passage in page 489 of Mayne's Hindu Law (11th Edition):

"The right to get properties which fell to an alienor at a partition is the primary and indeed the only right which the alienee has, though the Court may at partition allot to him the properties which he purchased at a Court sale or at a private sale if it could be conveniently done."

It is argued that all that an alienee gets is a right to sue for partition standing in the shoes of the alienor and no other right, legal or equitable, as against family properties or the non-alienating coparceners. It is not correct to regard an alienee as a transferee of a mere right to sue. Such a transfer would indeed be opposed to law. There is a transfer of property to the alienee with an incidental right of suit, if necessary, for perfecting his title. It may be granted that an alienation 'per se,' does not convey an unimpeachable or indefeasible title to the alienee. He gets a right or an equity if you like, to stand in the vendor's shoes and work out his rights at a partition of the family estate.

At such a partition, an alienee has the right, to ask that 'ceteris paribus' the share of the alienor should be so made up as to embrace wholly or so far as is possible, the property purchased by him. The Court is bound to grant such a relief to the alienee and if it can be done without injustice to the other coparceners, it will so marshal the properties as to allot the property alienated or as much thereof as possible, to the share of the alienor. This right of the alienee can be worked out in any suit to which he is a party and which is of sufficient amplitude to allow a general stock-taking, of the family assets as a whole and an adjustment of the rights of the coparceners. It is not necessary for an alienee to sue as a plaintiff himself, 'Ramaswami v. Venkatarama', 46 Mad 815 and 'Krishnamurthi v. Nataraja', 1948-1 Mad L J 430 at p. 434. (52) The preponderance of opinion in this Court has been that an alienee from a coparcener does not become a tenant-in-common with the other coparceners and is not entitled to joint possession with or get mesne profits from them. See paragraphs 389 and 390 of Mayne's. Hindu Law (11th Edition). The view of the learned editor of Mayne in paragraph 391 is that Section 44 of the Transfer of Property Act as amended in 1929 confers on an alienee from a coparcener even these rights. By reason of the omission of the word "Hindu" in Section 2 of the act as amended Section 44 now applies to Hindus as well. The section would apply to an alienee from a sharer in a Dayabhaga family whose members hold the common property to quasi severally, each member being entitled to a defined share which he could dispose of as he likes. In the face of the saving words:

"subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred,"

it may be difficult to construe Section 44 of the Transfer of Property Act as abrogating the decisions of this Court denying joint possession and a right to an account of profits to an alienee from a coparcener.

It does not, however, follow that an alienee from a coparcener has no right in or to any property but only a personal remedy against the alienor. Even when the alienee does not get an allotment of the property alienated to him at a general partition, he would be entitled to the property allotted to the vendor for his share in substitution for the property alienated to him. 'Koru Issaku v. Seetharamaraju', 1947-2 Mad L J 166 at pages 175, 17G. What an alienee gets is therefore a right in property carrying with it an equitable right to avail himself of the rule of substituted security. The right to get compensation of substituted property in case the property sold is lost for want of title in the vendor was recognised by the early texts.

53. I have said that the rights of the alienee are not co-extensive with those of the alienor. On the principle that he who seeks equity must do equity, it has been held that an alienee could, in no event, get more than what he bargained and paid for. If he purchases, say, the share of one of four undivided brothers in a

property and at the time of the petition, the existing coparceners are only two the alienee cannot claim a half share because his vendor would be entitled to such share. If, however, there is an increase in the number of coparceners, say, to six, the share of the alienee would be 1/6 according to 'Rangaswami v. Krishnayyan', 14 Mad 408 (FB). The reason was thus stated:

"In the case before us, the delay in suing for partition is imputable to the purchaser and as new coparceners have meanwhile come into existence, the share to be awarded to him must diminish 'protanto' on the simple ground that what he could lawfully purchase was an uncertain interest to be computed into a definite share with reference to the coparcenary at the time of partition."

Good logic as far as it goes. But the necessity felt by Courts to promote certainty of title to property and to protect the interests of purchasers for value, forced the law into a procrustean bed where it has been lying uneasily for a long time. In 'Ayyagari Venkataramayya', v. Ayyagari Ramayya', 25 Mad 690, Bhashyam Ayyengar, J. observed obiter that 'Rangaswami v. Krishnayyan', 14 Mad 408, was wrongly decided. So great was the hold of that eminent Judge on the legal minds of his generation that his dissent soon became the unanimously accepted law of the Court in 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47 (FB). This case decided that an alienee of the interest of a coparcener was entitled to enforce his claim against the share to which the vendor was entitled at the time of the alienation.

Perhaps Bhashyam Ayyengar J. in 'Ayyagari Venkataramayya v. Ayyagari Ramayya'. 25 Mad 690, unduly emphasised some expressions occurring in the judgments of the Judicial Committee in 'Deenadayal v. Jugdeep Narain', 3 Cal 198 (PC), and 'Suraj Bansi Koer v. Sheo Prasad', 5 Cal 148 (PC), and built up a theory of which their Lordships of the Judicial Committee were not the authors. The question is not whether the deductions of the learned Judge were justified in 1902 but whether his conclusions have not become the law of this Court accepted and acted upon as such for nearly half a century.

54. The actual decision of the Full Bench in the 'Ayyagari CASE', 25 Mad 690, was that the death of the alienating coparcener before a partition did not result in an extinction of the interest of the alienee by the operation of the law of the survivorship. But Bhashyam Ayyengar J. covered a much wider ground. Similarly the actual decision in 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47, was that a mortgage executed by a coparcener would operate on his share of joint family property as it stood at the date of the mortgage and that the security would remain undiminished in spite of a subsequent increase in the number of coparceners. But the learned Judges went on to affirm the views of Bhashyam Ayyengar J. in the 'Ayyagari CASE', 25 Mad 690, in their entirety.

The result, though anomalous and illogical, was that an alienee from a coparcener supposed in theory to stand in the shoes of the alienor having no right of his own except through his alienor as against the family became a sharer in joint family property with a fixed and independent right of his own enforceable against the other members of the family. In 'Muthu Kumara v. Sivanakayana', 56 Mad 534, Jackson J. sitting with Mockett J. sought to effect a reconciliation between the Mitakshara doctrine refusing absolutely to recognise an alienation of joint family property by a coparcener without family necessity and the rule of equity recognising the rights of purchasers for value. The learned Judges held that though the fractional share of an alienee from a coparcener was fixed as on the date of alienation the properties in which the alienee was entitled to share were those existing at the time of the partition.

55. If the position of the alienee 'vis-a-vis' the non-alienating coparceners has to be fixed as on the date of the alienation and his rights worked out as if there had been a partition on that date, the family hotchpot would have to be filled up retrospectively, it may be, years after the alienation. If there were a number of alienations in successive years by the same or different coparceners, each one of the alienees can claim to have a separate hotchpot hooked to the date of his alienation, though at the date of the actual partition the existing hotchpot might be merely empty. These difficulties which were real enough did not appeal to Leach C. J. and Horwill J. who, in 'Dharmarao v. Bapanayya', 1941-1 Mad L J 15, assembled an imposing array of decisions in

which '*Chinnu Pillai v. Kalimuthu Chetty*', 35 Mad 47, had been referred to and apparently followed and silenced the criticism of Jackson, J. without an independent consideration of the problem of the alienee's equity.

The reasoning of Krishnan and Curgenvven JJ. in '*Venku Reddi v. Venku Reddi*', 50 Mad 535 (FB), would seem to support the view of Jackson J. that partition quantifies the fractional share of the alienee from a coparcener and that the alienation is subject to the liabilities of the joint family. The learned Judge who decided '*Dharma Rao v. Bapanayya*', 1941-1 Mad L J 15, did not, I humbly venture to think, realise the injustice done to the non-alienating coparceners by their decision. An alienee from one of these coparceners was allowed at a partition to retain an one third share of the whole family estate, while the non-alienating coparcener got one-ninth of the estate (or perhaps a little more) as the result of the birth of other coparceners before partition. This was the consequence of fixing the alienee's rights on the basis of '*Chinnu Pillai v. Kalimuthu Chetty*', 35 Mad 47 (PB).

If that were the law, the alienating coparcener has the best of both worlds. He enjoys the advantages of a divided status by realising the value of his share and of the membership of a joint family with its attendant benefits. Equity is not an one way traffic. In the name of equity it is not permissible to sacrifice the interests of non-alienating coparceners to satisfy the claims of an alienee from one coparcener who knows that he is purchasing something which is subject to the rights of the other coparceners and the liabilities of the joint family. It is one thing to say that the fractional share of the alienee is fixed as on the date of the alienation and it is a different thing to say that the fraction must be related to the family estate as it stood at the date of alienation and not at the date of partition.

If the matter, were '*res integra*' the inclination of my mind would be to agree with the reasoning of Jackson J. The majority of my learned brethren, however, are of the opinion that it is too late in the day to question the authority of '*Chinnu Pillai v. Kalimuthu Chetty*', 35 Mad 47 (FB), in the sense in which it was understood in '*Dharmarao v. Bapanayya*', 1941-1 Mad L J 15, and I do not wish to mar this pleasing unanimity by giving expression to views considered to be heretical. It is a case of '*stare decisis*'. I realise that in a branch of law affecting titles to property it is more important that the applicable rule of law be settled than that it be refashioned on absolutely logical lines. The respondent's advocate hopes that the ghost of '*Rangaswami v. Krishnayya*', 14 Mad 408 (FB), which was buried forty years ago may walk again, nay, he anticipates a flesh and blood resurrection. All that I say is that such miracles, if they happen, will reduce transactions affecting property to a mere gamble.

56. An alienation of family property by a coparcener be he the manager or father, can be set aside '*in toto*' at the instance of the other coparceners if the alienation is not for family necessity or for discharging untainted antecedent debts. Even where the necessity for a sale is partial, that is to say where the consideration raised or applied for meeting necessary purposes is less than the price, the sale can be set aside as a whole as not justified. '*Krishna Das v. Nathuram*', 49 All 149 (PC); '*Niamat rai v. Din Dayal*', 8 Lah 597 (PC), and '*Gauri Shankar v. Jivan Singh*', 53 Mad L J 786 (PC). The property is recovered for the family and if it is found that part of the consideration paid by the alienee has been applied in discharge of debts or liabilities binding on the family, justice and equity require that the family should refund that portion of the consideration to the alienee. See Sections 64 and 65 of the Contract Act and Section 41 of the Specific Relief Act.

Otherwise, the Court would be helping the family to enrich itself unjustly at the expense of the alienee. Even if the property is recovered by the family, it is open to the alienee to sue for partition of the family estate and for allotment of the alienated property to him in the right of his alienor and as part of his alienor's share of the family properties. He can even set up this right as a defence to a suit by the non-alienating coparceners for recovery of their shares of the alienated property, if the suit is comprehensive enough to permit a stock-taking of the entire family estate. '*Ramaswami Ayyar v. Venkatramana Ayyar*', 40 Mad 815; '*Krishnamurti v. Nataraja*', 1948-1 Mad L J 430 at p. 434, and '*Dharma Rao v. Bapanayya*', 1941-1 Madras Law Journal 15.

57. An alienee's suit to work out his equity must be one for partition of the entire family property; and not for partition of any specific item or any specific interest. This is because the alienee has no connection with the joint family and can seek relief only in the right of the alienating coparcener. A coparcener suing for partition must sue for partition of the entire divisible family estate. Ordinarily a suit for partial partition does not lie among coparceners. An alienation by a coparcener of his interest in family property does not put an end to the coparcenary or effect a severance. See Mayne's Hindu Law (11th Edition), paragraph 389, page 490.

It has been laid down in many decisions of this Court starting from 'Venkatachalla v. Chinnayya', 5 Mad H C R 166, that 'it is open to coparceners objecting to an alienation by the father or manager to bring a suit for their share of the property alienated. 'Iburamasa Rowthan v. Thiruvencataswami 34 Mad 269 at pages 272, 275. This kind of suit is different in its scope and effect from a suit for partition so-called. For instance, the inference of an unequivocal intention to separate from the family and become divided in status which a suit for partition gives rise to does not follow in a suit for recovery of a coparcener's share of alienated property. 'Ramasubbraya v. Ganapatiraju', ILR (1940) Mad 405 at pages 410, 412. The dispute in the latter case is confined to the property alienated and is between the alienee on the one hand and the non-alienating coparceners on the other. The coparceners may wish to remain undivided and at the same time may be unwilling to allow the family property to be in the possession of a stranger claiming under a title which is not valid as against the family.

The non-alienating coparceners may, in effect say to the alienee:

"Though we have a right to recover the entire property alienated still as you have paid the vendor the price of the property we consent to your retaining his share. Give us our shares of the property. We agree to have a partition as if this were the only property to be divided."

The suit is in effect one for a partition of the alienated property alone and the decisions allow such a suit. The jural basis of this rule has been clearly and concisely stated in the judgment of my learned brother Panchapagesa Sastri, J. and I respectfully agree with him. The question is whether in such a suit the alienee has an equity to compel the plaintiffs to refund a part of the binding consideration proportionate to the share of the plaintiffs in the alienated property.

58. The decisions of this Court are conflicting. The appellant relies on the decision in 'Vadivelam Pillai v. Natesam Pillai', 37 Mad 435, which though not noticed in the 10th, and 11th editions of Mayne's Hindu Law, has nevertheless been accepted and acted upon in subsequent decisions of this and the other High Courts. This decision dissents from 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89, which is relied upon by the respondent. The decision in 'Venkatapathi v. Pappiah Nayakar', 51 Mad 824, follows the earlier decision and lays down three propositions which will be noticed presently. All the three decisions profess to deal with the mode in which an alienee's equity has to be worked out.

59. The respondents learned Advocate took high ground and maintained that so far as joint family was concerned, an alienee from a coparcener has no legal existence and he must work out his rights only through his alienor and that in a suit for a general partition.

The alienor and a 'fortiori' his alienee can only sue for a partition of the entire estate, partial partition not being allowed to them by law. It is only in such a suit that the alienee's equity can at all be enforced and the alienated property or as much of it as possible allotted to the share of his alienor. In a suit by non-alienating coparceners for recovery of their share of the alienated property, without any intention to become divided from the alienor, the alienee's equity does not come into the picture at all.

Even if it be assumed that he has any claim or equity against the joint family when a suit for recovery of the property alienated is brought, it must be regarded as satisfied by the value of the vendor's interest which the alienee is allowed to retain. 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89. The share of the property which an alienee is allowed to keep is joint family property and an alienee who is allowed to keep it

cannot, under any circumstances, claim any further equity against the family. So ran the argument.

60. With due respect to the learned Judges who decided '*Marappa Goundan v. Rangaswami Goundan*', 23 Mad 89, I fail to understand how a vendee from a coparcener can be said to be a "Volunteer." A person who purchases from one who has a right to sell his interest, whatever it is and pays value for it is in no sense a "volunteer." The learned Judges further ruled:

"that if the vendee wishes to stand by a sale which is valid only partially, such as the present, he must be content with the vendor's share but that if he wishes to repudiate the transaction altogether, his remedy is only against the vendor in a suit for return of the price paid, on the ground that the consideration for the payment failed."

This is with all respect begging the question. If the non-alienating coparceners exercise their right of interdiction and sue for recovery of the entire property alienated, they can, as already stated, be required to pay the alienee the whole of the consideration found to be binding on the family.

If they sue for a general partition, the alienee can work out his equity and might get an allotment of the entire alienated property for himself in the right of his alienor. If they seek recovery of their share of the property, they treat the alienation as valid to the extent of the alienor's share and seek a partition, confined to the alienated property and as against the alienee. It has been held in some decisions that the non-alienating coparceners can recover their shares of the alienated property as their own separate property. '*Chinna Sanyasi v. Suriya*', 5 Mad 196 and '*Kadegan v. Periamunuswami*', 13 Mad LJ 477. There are however difficulties in the way of accepting this position. The recovery by the non-alienating coparceners of their shares of the property alienated would not prevent the alienee from bringing a suit for general partition and asking that the entire property should be allotted to him in the right of his alienor. If so, the property recovered retains its character as joint family property. '*Gurulingappa v. Nandappa*', 21 Bom 797; '*Kandasami v. Velayudha*', 50 Mad 320 and '*Ramasubbaraya v. Ganapatiraju*', ILR (1940) Mad 405 at pages 410, 412.

An alienee from a coparcener does not as already stated become a tenant-in-common with the other coparceners. At the same time, a right of action has been conceded to the non-alienating coparceners to recover only their share of the alienated property in decisions too numerous to be now upset. The position is no doubt illogical but a Court need not throw up its hands in despair and leave the alienee helpless. If on account of the limited scope of the suit instituted by the non-alienating coparceners and by reason of its comprising only the alienated property to the exclusion of other family properties, an alienee is unable to have his equity worked out fully, there is no reason why his equity should not be recognised to the limited extent to which the suit permits. There is no reason why the non-alienating coparceners who recover their shares, should escape liability for a proportionate part of the common burden which the alienee has discharged.

They cannot seek the advantages of a partition confined to the alienated property without submitting to an apportionment of a common liability discharged by the alienee. If the alienee receives or recovers the binding part of the consideration from the non-alienating coparceners, it may be a 'pro tanto' satisfaction of his claim against joint family and he cannot thereafter sue for a partition and allotment of the entire properties alienated to him. The learned Judges in '*Marappa Goundan v. Rangaswami Goundan*', 23 Mad 89, claimed that their decision would

"tend to act as a check on a disposition on the part of speculative persons to enter with some coparceners into transactions calculated to affect the rights of other coparceners who are not parties thereto."

It may be argued that their view seriously impairs the commercial value of the proprietary rights of coparceners by tying them up to the joint family top" closely and by seriously jeopardising the rights of alienees from them. The remedy by way of damages or otherwise against the alienor pointed out by the learned Judges may not always be effective or fruitful.

61. Reference may here be made to 'Ranganathan chetty v. Ramasami Chetty', 27 Mad 162, where this Court held that it was not permissible for a coparcener to evade the prohibition of Hindu Law against gifts of joint family property by professing to make an ostensible sale when the price was wholly and obviously inadequate. The Court ruled that in such a case

"the transaction could be upheld against the family to the extent of the alienor's interest in the joint family properties only to the extent of the value received."

The alienor's interest was treated as having been sold in part and gifted as to the rest.

62. This decision was followed in 'Venkatapathi v. Pappiah nayakar', 51 Mad -824, and the Court enunciated three propositions of which the first was as follows:

"Where the whole of the consideration for a sale even after being allotted to the alienor's share only, is grossly inadequate, the whole transaction may be set aside making the consideration proved a charge on the family property."

When is the consideration "grossly inadequate" when it is merely "inadequate" and when it is low but not "inadequate" are questions which do not admit of an easy answer as the decision itself shows. The quantum of the consideration for a sale is a matter between the vendor and the vendee. This rule is to some extent, displaced in the case of a proposed sale of joint family property for the Hindu Law prohibits a gift by a coparcener under the guise of a sale.

I confess to considerable difficulty in understanding the precise sense in which the learned Judges in 'Venkatapathi v. Pappiah Nayakar', 51 Mad 824, use the expression "consideration" occurring in each of the three propositions enunciated by them. It is clear however that they are not using the expression in the same sense throughout. When they refer in the passage above cited to the whole of the consideration for a sale, I take it that they refer to the price paid by the vendee. When they refer to the "consideration proved" being made a charge on the family property they must refer, I think, to the consideration paid by the vendee and proved to be binding on the joint family. If so, the first proposition is a mere re-statement of 'Ranganathan Chetty v. Ramasami Chetty', 27 Mad 162.

When the non-alienating coparceners sue for recovery of only their share of the properties sold they in effect admit that 'quoad' the share of the alienor, the sale is supported by adequate consideration and is not gift: The second proposition runs thus:

"Where the whole consideration is not grossly inadequate and can be regarded as the price of the alienor's share but is less than the value of such share, the transaction may be upheld as a sale of the alienor's share only and the other members who question the transaction are entitled to recover their shares of the property without being subject to any other equity. In such a case if the members are divided and the alienor leaves other heirs, then the members who question the transaction, he or his heirs may have right to contribution."

Here the learned Judges use the word "consideration" as meaning the binding part of the consideration, for only if it is so understood does the reference to an "Equity" become intelligible.

The reference to a right of contribution in the second sentence of the above extract also confirms this view. In so stating the rule the learned Judges followed the decision in 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89. I am unable, with great respect, to accept the second proposition as a correct statement of the law. Why should the alienor's share in the hands of the alienee be entirely appropriated to the satisfaction of family debts and the non-alienating coparcener's share escape liability? Surely the alienor is not a trustee for sale of his interest in joint family property and for the application of the proceeds for the discharge of family debts, thereby relieving the other coparceners of their share of the burden.

If the non-alienating coparceners, instead of seeking a general partition and the adjustment of all rights and

liabilities and equities between them and the alienor sue for recovery only of their shares of the alienated property, why should they get their shares free of any obligation to pay their proportion of the family debts discharged by the alienee. If they want a piece-meal partition taking advantage of an exceptional procedure sanctioned by decisions, why should they not be made to submit to a piece-meal adjustment of equities, when they recover their shares of the alienated property?

By suing for & partition and recovery only of their shares of the alienated property, they affirm the alienation to the extent of the alienor's share as a proper and valid transaction and invite an adjustment of the equities arising in favour of the alienee from the partial setting aside of the alienation.

The third proposition was in these terms:

"Where the consideration proved exceeds the value of the alienor's share, the transaction may be upheld as a sale of the alienor's share only and for the excess, a charge may be given over the shares of the other members."

Here again, the word "consideration" must be taken to be used in the sense of binding consideration. This is an extension of the principle of *'Marappa Goundan v. Rangaswami Goundan'*, 23 Mad 89. Here again, the value of the share of the alienor is wholly appropriated to the binding portion of the consideration and to the extent the latter exceeds the former, a charge is allowed on the shares of the other members.

It is not explained why there should be a piece-meal adjustment of equity in this case in contravention of the rule laid down in *'Marappa Goundan v. Rangaswami Goundan'*, 23 Mad 89, but not in the case covered by the second proposition. Unless it is assumed -- I see no reason in law or justice for so doing -- that the alienating coparcener's interest alone is liable for the payment of family debts and that an alienee who purchases that interest can therefore have no higher rights it is not possible in my opinion, to support the second and third propositions in *'Venkatapathi v. Pappiah Nayakar'*, 51 Mad 824. No principle of justice or equity entitles the non-alienating coparceners to throw the entire burden of the family debt on an alienee from a coparcener and secure an immunity for themselves at his expense. The same principles must govern private sales and sales 'in invitum'. If there is a court-sale of a coparcener's interest there is no warrant for dissecting the sale in order to find how much of it is a gift and how much of it is a sale.

63. The decision in *'Vadivelam Pillai v. Natesam Pillai'*, 37 Mad 435, presents, on the whole, not only a simple and workable rule but also a just and equitable solution of the problem of the alienee's equity. This decision besides being that of two distinguished Hindu Judges of this Court familiar with Hindu Law and the needs and conditions of modern joint family life has been uniformly followed. The learned Judges held that where an alienation of family property by a coparcener is only partially justified by family necessity and the non-alienating coparceners sue for recovery of their share of the property they must bear their share of the family debts and liabilities discharged by or out of the consideration paid by the alienee.

"According to accepted equitable principles, in the absence of anything appearing to the contrary the consideration for the sale must be distributed over the whole property sold in proportion to the value of each" part (p. 437) .....It cannot be doubted that a coparcener is entitled to part with his own share in any family property for any consideration he pleases. It is equally clear that as between the vendor and the vendees in the absence of any contract to the contrary the consideration for a sale will be apportioned between all the items of the property sold in cases of dispute (page 438)."

This passage came in for strong criticism at the hands of the respondent's advocate who maintained that a coparcener has no share in any property of the family according to *'Appoovier v. Rama Subba Iyer'*, 11 Moo Ind App 75 at page 89 (PC), that an alienee from a coparcener merely got an uncertain fluctuating and contingent interest described vaguely as the alienee's "equity" as opposed to a present legal vested interest; and that his only right was to sue for a partition of the family estate and work out his rights, such as they are, in that suit. He argued that the basic assumption of the learned Judges in the above passage was untenable.



Court, however, is against the view that an alienee from a coparcener is in the position of a tenant-in-common with the other coparceners. See Mayne's Hindu Law (11th Edition), pages 488-491.

In this corner of Hindu Law one is frequently obliged to seek refuge in the well-known shelter provided by Lord Halsbury and say that law is not logical. There is however nothing in the judgment in 'Vedivelam Pillai v. Natesam Pillai', 37 Mad 435, to suggest that the learned Judges rested their decision on the dissentient view of a minority regarding the position and rights of an alienee from a coparcener. There the non-alienating coparcener claimed a partition of only his share of the alienated property. The limited equity recognised in 'Vedivelam Pillai v. Natesam Pillai', 37 Mad 435, should in justice, be available to the alienee if, owing to the restricted nature of the suit for partition by the non-alienating coparceners, it is not possible to have a stock-taking of the family assets and liabilities and the allotment of the entire property to the alienee in the right of his alienor.

If a suit by the non-alienating coparceners to set aside an alienation is of sufficient amplitude to admit of a consideration of the rights of the coparceners in the entire joint family estate, the Court will do complete justice to the alienee and allow him to retain the entirety of the alienated property or as much of it as possible consistently with the rights of the other coparceners. 'Ramaswami v. Venkatarama', 46 Mad 815; 'Krishnamurthi v. Nataraja', 1948-1 Mad LJ 430 at p. 435 and 'Dharma Rao v. Bapannayya', 1941-1 Mad LJ 15.

65. Reference was made to the well-established rule that a Court has no power to make a new bargain between the parties to a sale by splitting the land sold into parcels, evaluating them separately, assigning one of the parcels to the purchaser and directing a refund of a part of the price proportionate to the share of the property sought to be recovered, 'Nagappa chetty v. Brahapambal Ammani', 58 Mad 350. In my opinion, this contention has no force for this is not a case where as between the vendor and the vendee a different contract with terms differing from the sale-deed executed by the one to the other, is sought to be enforced.

This is a case where third persons having an interest in the property sold seek to have the sale set aside to the extent of their interest in the property and ask for a partition only of their share in the property. In such a case the Court can grant relief to the plaintiffs on condition of their restoring the benefit received by them out of the consideration paid by the vendee. In innumerable cases where the Court has set aside a father's, manager's, guardian's, trustee's or widow's sale in excess of the powers of the alienor, it has granted equitable relief to the plaintiff on condition of a refund of that part of the consideration which is found to be binding on the estate.

66. The principle of Section 15 of the Specific Relief Act as applied in 'BALUSWAMI Iyer v. Lakshmana Iyer', 44 Mad 605, to suit for specific performance of a contract for sale entered into by the manager of a joint Hindu family without legal necessity was next referred to. This Court held that the vendee was not entitled to specific performance of the contract as a whole but only to a conveyance of the share his vendor had at the time of the contract, on payment of the entire consideration. On this analogy it was suggested that an alienee of joint family property must rest content with his vendor's share and has no further claim to a refund of a part of the consideration. Here a title which has already passed under the sale-deed duly executed and registered is sought to be displaced in part by third person who were not parties to the contract of sale. This is not a case where a contract of sale is sought to be enforced by the vendee against a vendor with imperfect title. Principles of equity which prevent unjust enrichment of one party at the expense of another and compel restitution of or compensation for a benefit not intended to be gratuitously conferred are here invoked.

67. I am in respectful agreement with the decision in 'Vedivelam Pillai v. Natesam Pillai', 37 Mad 435, which was referred to with apparent approval by the Judicial Committee in 'Masit Ullah v. Damodar Prasad', 48 All 518, at p. 522. In 'Srinivasa Iyengar v. Kuppaswami', 44 Mad 801 at pp. 802-803, Wallis, C. J. referred to the well-known equity of an alienee from a coparcener to a refund from the non-alienating coparceners of a proportionate part of the consideration paid by the alienee and applied in discharge of binding family debts, as a condition of the sale in his favour being set aside at the instance of the other coparceners. The other

decisions of this Court in which the same principle has been accepted are 'Adinarayana Reddi v. Subbarayulu', AIR 1927 Mad 1116; 'Seetharama Naidu v. Balakrishna Naidu', 26 Mad L J 604; 'Subbayya Mudaliar v. Thulasi Mudaliar', 1914 Mad W N 16. If this conclusion deals a blow at the tottering joint family structure there will not be many to shed a tear over the result.

I shall now advert to another branch of the argument of the learned counsel for the respondent which to a large extent, contradicts his submissions on the main part of the case directed to demolishing the authority of 'Vedivelam Pillai v. Natesam Pillai', 37 Mad 435. The suit as framed is one for a general partition by a son against his father impleading also the alienees from the latter and in my opinion, the rights of the alienee to any equities they may have can be satisfactorily worked out in this suit. It is said however, that here is a fatal objection to this course, by reason of the adjudication of the father as an insolvent and the administration of this estate by the Official Receiver. The adjudication coupled with the administration of the estate in insolvency effected a division between the insolvent debtor and his son and therefore, the suit cannot be viewed as one for a partition of joint family estate but only as simple suit for recovery by the son of his half share of an item of joint family property improperly alienated by his father.

As the alienee stands in the shoes of the alienor and uses the alienor's right to claim a partition as a lever against the other coparceners if the alienor has lost his right to a partition, the alienee cannot enforce his equity against the other coparceners by a claim for partition. The equity of the alienee is an 'inter partes' equity as between the alienor and the alienee and not against the joint family. The liquidation of the alienor's right in the joint family property by the administration in insolvency put an end to the alienee's equity which was thereafter available only against the Receiver in insolvency. As a debt or liability of the alienor it has been wiped off by his adjudication in insolvency and his subsequent discharge. This was how the argument was presented to us.

In my opinion, it cannot be accepted. The alienee has a legal right against his vendor to the property alienated and an equitable right against the non-alienating coparceners to have the alienated property allotted to him in the right, of his vendor. Neither the death nor the subsequent insolvency of the alienor affects the vendee's right as against the members of the family and he can work out his right of a partition of the family estate. The insolvency has no effect on the rights of the alienee whose title accrued prior to the filing of the petition for adjudication. The alienee has a right of his own, the extent of the right being determined with reference to the interest of the vendor in the joint family property as it stood on the date of the alienation. As already pointed out the alienee can assert his right as a defence to a suit for partition, if the suit is comprehensive enough to allow a general stock taking of the family assets.

68. Another phase of the argument was that the adjudication of the father effected a crystallisation of his interest in joint family property and the Receiver in whom that interest vested took the place of the father. The vesting of the entire share of the father in the Receiver and the administration of that interest by him effected a severance between the father and son and thereafter there could be no suit for a partition of the joint family estate by the son against the father. According to the Mitakshara "Ekadesavyavasthapanam" or the establishment of the sole right of one person in displacement of the right of all in the "Dravya Samudaya" or aggregate wealth constitutes partition. But the partition contemplated by Vignaneswara is obviously a division by metes and bounds as the result of a consensus among coparceners or in the exercise of the father's power of effecting a partition.

Moreover the intention to become divided must be present and manifested, separate allotments being evidentiary of that intention. According to Vignaneswara partition created a title in each of the erstwhile coparceners by its own effect and operation while Jimuthavahana asserted that partition was merely the external manifestation of a pre-existing right in the sharers. I have already stated that Nilakanta though in the main a follower of the Mitakshara school, differed from Vignaneswara as regards the conception of the interest of coparcener in joint family property and was inclined to accept the theory of Jimuthavahana -- see Mayukka Daya Nirnaya Section 1, Pl. 6, Setlur's translation page 63. This was the basis of the distinction drawn

by English lawyers between the joint tenancy of the Mitakshara family and the quasi-severalty of the Dayabhaga family. According to the later writers of the Mitakshara school, a severance in status resulted from a unilateral declaration of his intention to become divided on the part of a coparcener.

The textual authority is reviewed in '*Kathesumma v. Bechu*', 1949-2 Mad L J 268. The respondent's advocate states that the

"*Ekadessavyavasthapana*" of the Mitakshara which is the essence of a division is brought about by the adjudication of a coparcener as an insolvent and administration of his estate by the Receiver. He maintains that a division in status can be brought about not only by the intention or volition of a coparcener or by an agreement between the coparceners concerned but also by the operation of external facts. Reference was made to the following passage in the judgment of the Judicial Committee in

'*Venkatapathiraju v. Venkatanarasimharaju*', ILR (1937) Mad 1 (PC).

"A division of right or severance of the joint status may result, not only from an agreement between the parties but from any act or transaction which has the effect of defining their shares in the estate, though it may not partition the estate."

In my opinion, the "act or transaction" in this passage has reference to an act or transaction of the parties, such as the expression of an intention to become divided, the institution of a suit for partition, the execution of a document with the necessary recitals etc. It has no reference to an attachment or a Court sale of a coparcener's interest or his adjudication in insolvency. This is made clear by the context in which the expression occurs.

69. It is urged that on adjudication there is a fixation of the interest of the insolvent and the vesting of that interest in the Official Receiver and thereby a severance is effected between the insolvent and his coparceners. If the insolvent dies, his share already vested in the Receiver does not pass by survivorship to the other coparceners, but continued to vest in the Receiver. In '*Narayana Sah v. Sankar Sah*', 53 Mad 1 at page 14, Wallace J. observed that on the insolvency of a coparcener, his entire estate or interest vested in the Receiver and was "thus lost to the family." In '*Lakshmanan v. Srinivasa*', ILR (1937) Mad 203, Venkataramana Rao J. sitting as a single Judge held that the surplus proceeds of the share of an insolvent which had vested in the Official Assignee would on an annulment of adjudication consequent on payment of the insolvent's debts in full revert to him or his heirs as separate property though the insolvent was a member of joint family at the time of his adjudication.

The learned Judge said:

"If the effect of the insolvency is to divest the share of the insolvent of its character as joint family property, it cannot regain that character as joint family property when it comes back to the insolvent on annulment."

Apart from the fact that this view has been overruled in two later decisions of division Benches in '*Suryanarayanamurthy v. Veerraju*', ILR (1946) Mad 54 at page 59 and '*Hanumantha v. Official Receiver, Bellary*', ILR (1947) Mad 44. I am unable, to agree with the reasoning. The vesting in the Receiver on an adjudication is only for the limited purpose of satisfying the creditors of the insolvent. There is no question of an intention on the part of the coparceners to become divided and the joint status of the insolvent is not affected. The law merely places the share of the insolvent coparcener in the hands of the Receiver for the purpose of administration and payment of his creditors.

An attachment of the right, title and interest of a coparcener in joint family property does not effect a severance between him and the other members of the family nor does an involuntary or private sale of his entire interest have that effect. See Mayne's Hindu Law, (11th Edition), Paragraph 389 and the cases cited in the foot-note. An adjudication in insolvency has no more drastic effect. The view of Ramesam J. in '*Lakshmi Achi v. Narayanaswami Naicker*'. 53 Mad 188 at page 195, that a member becomes divided if he alienates his

entire interest does not, it appears to me, proceed on a proper understanding of the observations of Bhashyam Ayyangar J. in 'Ayyagari Venkatramayya v. Ayyagari Ramayya', 25 Mad 690. This was pointed out by the learned Judges in 'Ramasubbaraya v. Ganapathiraju', ILR (1940) Mad 405 at pages 410, 412. Even according to Venkataramana Rao J. in 'Lakshmanan v. Srinivasa', ILR (1937) Mad 203 neither an adjudication of a coparcener nor an alienation of his entire interest in joint family property brings about a severance between him and the other coparceners. This was also the view taken in the two decisions above referred to, in which the view of the learned Judge was dissented from.

With great respect however to the learned Judges who decided 'Hanumantha v. Official Receiver, Bellary', ILR (1947) Mad 44, I venture to doubt whether on the death of a coparcener there is any "devolution" of "interest" on the insolvent within the meaning of Section 28(4) of the Provincial Insolvency Act. The dying coparcener merely drops out or fades away and nobody steps into his place. The claims of the other coparceners spring from the mere fact of their birth, and not from their taking the place of any particular individual. The dying coparcener leaves no interest behind him and there is nothing to pass by devolution to his heirs or other person. It is on this ground that the widow of an undivided coparcener is excluded from succession to his share in the Mitakshara school. It is further reason that coparceners taking the whole estate by survivorship are not held liable for the personal debts and obligations of their deceased coparcener. The result of this decision would be to give the Receiver the benefit of an increase in the share of the insolvent by reason of the death of a coparcener subsequent to the adjudication while the Receiver is not affected by any debts incurred after that date by the joint family. This however does not affect the other principle underlying the decision that the adjudication of a coparcener does not work a severance between him and the other members of the family.

70. On the adjudication of the father in a Mitakshara family, his power to sell his sons' interest for antecedent debts not tainted by illegality or immorality, vests in the Official Assignee under Section 52(2) of the Presidency Towns Insolvency Act. It was so held by the Judicial Committee in 'Sat Narain v. Srikishen Das'. 17 Lah 644 (PC). Decisions of this Court held that the law was the same under Section 28 of the Provincial Insolvency Act. 'Sankaranarayana v. Rajamani', 47 Mad 462 & 'Balavenkata Seetharama v. Official Receiver, Tanjore', 49 Mad

849. Though this line of authority was reversed by 'Ramasastrulu v. Balakrishna' ILR (1943) Mad 83 and 'Virupaksha Reddi v. Siva Reddi', ILR (1944) Mad 212, it has been restored with retrospective effect by the enactment of Section 28A of the Provincial Insolvency Act in 1948, 'Official Receiver of Ramnad v. Devarayan', 1948-2 Mad LJ 415. But during all this time nobody ever suggested that the adjudication of a father effected a severance in status between him and his sons and for that reason his power to sell his sons' interest for his own untainted debts was at an end and could not thereafter vest in the Official Receiver.

Realising this difficulty, the respondent's advocate stated that a severance took place only when the estate of the insolvent had been administered by the Receiver. What about a case where the insolvent has no assets and there is no question of any administration of his estate by the Official Receiver? There may be a joint family consisting of persons who are joint in food and worship without having or holding any property. 'Jankiram v. Nagamony', 49 Mad 98 at pages 115-6. In such a case it must be conceded that the adjudication of one of the members does not work a severance for there is no property to vest in the Receiver and the object of the insolvency is merely to enable the debtor to start a new life unhampered by debts. Again what is to happen during the time the administration of the estate is in progress and the properties are being sold one by one? Is the division to be postponed to the closure of the insolvency proceedings or is it to be said quoad the item sold by the Receiver there is a division?

Again even if the administration is complete what is to happen to properties that are exempt by statute from vesting in the Receiver or to trust properties in which the family of the insolvent has a right to trusteeship. It is well settled that the devolution of trusteeship held by a family depends upon the status of the members of the family at the time when the succession opens. 'Thandavaroya v. Shunmugham Pillai', 32 Mad 167 and

200. There cannot be an administration by the Receiver in respect of these properties and it cannot be contended that the insolvent becomes divided over with reference to them. It follows from these considerations that neither the adjudication nor the administration of the insolvent's estate by the Receiver affects a severance between the insolvent and his coparceners. Under the Hindu Law, the intention to become divided is essential to create a severance. There is no warrant either in the texts or in the decisions or in commonsense for saying that a man becomes divided against his own wishes and the wishes of his coparceners if he happens to be adjudicated an insolvent.

71. The respondent's learned Advocate called in aid the analogy of the conversion of a coparcener to another faith & the decisions which have held that a conversion effects a severance. The distance between a conversion and an adjudication of a coparcener as an insolvent can be measured only in miles. An insolvent coparcener does not cease to be a member of the family and may often continue joint in food and worship with the other coparceners either by choice or by necessity. A convert is regarded as dead and even obsequial rites are directed to be performed for him by the texts of Hindu law. Act XXI of 1850 removes the disqualification arising from apostasy and relieves against the forfeiture of the convert's interest in joint family property.

In 'Abraham v. Abraham', 9 Moo Ind App 195 at page 237, Lord Kingdown observed that conversion dissolved the family tie and severed the convert from the family and compared the situation arising from, a conversion to that of a severance by partition. In their attempt to work out the result of Act XXI of 1850 and fit it into the framework of the joint Hindu family system of holding property, the Courts assimilated the effect of a conversion to a partition. The ancient law-givers, however, never countenanced such a theory. In my opinion, the analogy of a conversion is an unsafe basis for the argument that in Hindu law a severance in status might be brought about even against the wishes of the coparceners or without the volition or intention of a coparcener to become divided.

72. For these reasons, it must be held that the suit for partition was maintainable' by the son against the father notwithstanding the latter's adjudication in insolvency.

73. I agree with the conclusion of my learned brother Satyanarayana Rao J. as regards the decree to be passed in this appeal.

Raghava Rao, J.

74. The question in this case is whether the decrees of the Courts below are correct which granted the plaintiff his half share of certain property alienated by his father the first defendant to the third for Rs. 13,400, although, in fact, worth Rs. 16,400, without imposing a condition on the plaintiff that he should before getting his half of the property pay one-half of the sum of Rs. 7,022, representing that portion of the consideration of Rs. 13,400, paid which was binding on the joint family of the plaintiff and the first defendant. The Courts below granted the decree without imposing such a condition in the view that they took that the case fell within Rule 2 of the three rules laid down by a Bench of this Court (Kumaraswami Sastri and Ramesam, JJ.) in 'Venkatapathi v. Pappiah', 51 Mad 324, for working out the equities between the alienee from a coparcener on the one hand and the non-alienating coparcener or coparceners on the other in a suit by the latter for setting aside the alienation found to be only partially supported by consideration binding on the joint family.

The decree is assailed in this Court on the ground that it is opposed to 'Vadivelam v. Natesam', 37 Mad 435 which, in the submission of the learned Counsel for the appellant (third defendant) enunciates the correct law. It is not disputed that, if that is so, this appeal must prevail; but what is contended for the respondent is, 'firstly', that an earlier decision of a Bench of this Court (Subramania Aiyar and Boddam JJ.) in 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89, lays down the correct law and ought not to have been dissented from in 'Vadivelam v. Natesam', 37 Mad 435 inasmuch as the grounds of dissent are opposed to

fundamental principles of Hindu law and cannot be countenanced, and, 'secondly', that no equity can be claimed by the third defendant who has had and is to have the share of the first defendant actually worth Rs. 8200 When the binding portion of the consideration for the sale of the whole of the property is only Rs. 7,022 and that this case is governed, as rightly held by the Courts below, by Rule 2 of the rules laid down in 'Venkatapathi v. Pappiah', 51 Mad 824.

The first of these lines of argument for the respondent is of wider ambit than the second and entails that the suit should be decreed in accordance with the decision in 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89, without any consideration of equities in favour of the appellant while the second assumes that such equities can be considered but to no good purpose for the appellant inasmuch as no equity can be held to arise on the facts of this case which attract the second of the rules in 'Venkatapathi v. Pappiah', 51 Mad 824.

75. Before dealing with the arguments advanced before us with reference to the three reported decisions, I shall clear the ground by making a few preliminary observations.

76. In the course of a highly learned and strenuous argument, on his own side occupying practically three days out of nearly five of the total hearing, Mr. Venkatasubramania Aiyar dwelt at considerable length against a whole current of more or less settled authority of this Court on the effect of adjudication and administration in insolvency as bringing about a division in status between the person adjudged, insolvent and other members of his family, a question which, in my opinion, does not fall to be considered at all in view of the basis of his client's plaint which, on the contrary, avers jointness continuing even after the adjudication down to the date of the suit No cause can be decided except 'secundum aliegata et probata' and the question cannot therefore be entertained.

Why Mr. Venkatasubramania Aiyar dwelt on the question at all, it was not easy for me to see either for long time but, as he explained the position in answer to a question from me at a later stage of the hearing, it was because, if his first line of argument that there were no equities to be worked out for the alienee except in a suit for general partition were to be repelled on the ground that in the present case we have a suit for such a partition,--it being immaterial whether in such suit the alienee is defendant or plaintiff -- no such suit bringing about a partition in status for the first time between 'the alienor and his co-parceners could be postulated here, because long long ago there had already been a division in the seaseor fixation or crystallisation of the first defendant's share effected by his adjudication' in insolvency. With such fixation or crystallisation, it was contended by the learned Counsel that the appellant even if he had any equities was to have worked them out from the standpoint of their ultimate destination by looking up to the Official Receiver in whom the insolvent's share had become vested and proceeding against him.

The contention, however, overlooked that the-equities claimable by the alienee as standing in the shoes of the alienor had become vested in him by an alienation prior to the insolvency and would have to be worked out as against the other coparceners and not against the alienor himself or the Official Receiver as representing his estate in insolvency. The contention also overlooked that now that the insolvency is at an end, there can be no objections even on the assumption that insolvency means division and that the present suit is for general partition as between tenants-in-common subject to what has taken place in insolvency to the working out of equities as between the plaintiff and the 3rd defendant in respect of the above mentioned item.

77. Again, there were repeated asseverations of anxiety before us from the learned Counsel for the respondent during the argument to reopen the Full Bench ruling in 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47 and rehabilitate the earlier Full Bench ruling that is, the one in 'Rangaswami v. Krishnayyan', 14 Mad 408 FB. Counsel went so far as to maintain that this Full Bench of five Judges had been constituted only because in the opinion of the three Judges who at an earlier stage heard this second appeal any conflict between 'Chinnu Pillai v. Kalimuthu Chetti, 35 Mad 47 and 'Rangaswami v. Krishnayyan', 14 Mad 408, would have to be resolved for the disposal of this second appeal. Whether indeed the conflict between the two Full Bench decisions is

one which is ever required to be resolved in view of the weight of subsequent authority in this Court applying and approving the later Full Bench decision in disregard of the earlier, which has been adverted to by a Division Bench of this Court (Leach, C. J., and Horwill, J.) in 'Dharmarao v. Bapanayya', 1941-1 Mad LJ 15 is another matter with which I shall deal later in this judgment.

The point remains that counsel was not able to make it clear how the conflict arises for a resolution in the circumstances of the present case in which no question of a diminished share for the alienee depending on subsequent births in the family arises for consideration. All that counsel could and did persist in saying was that 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47, is a much misunderstood case in the sense that while it has only laid down that in Hindu Law the alienee of the interest of a coparcener is entitled to enforce his claim against the share to which the alienor was entitled at the time of the alienation regardless of subsequent births and deaths in the family, 'the decision has been however understood in later cases of this Court as authority for the position that a fractional interest in any particular item alienated stands conveyed to the alienee -- a position which counsel contended would be opposed to the fundamental conception of Hindu Law established by a long course of decisions, some of them of the highest authority extending over a period of well-nigh three quarters of a century, that where a coparcener alienates, whether his undivided share in the whole of the family property or his undivided share in certain specific family property or the whole of a specific item of the family property in none of these cases does the alienee acquire an interest in the property so as to become a tenant-in-common with the members of the family entitled to possession but only an equity to stand in his vendor's shoes and to work out his rights by means of a partition.

Till the equity materialises in such working out of rights by the allotment of certain specified property or properties there can be no question, says learned counsel of mesne profits as from the date of alienation; there is every possibility of the right to the specific item alienated in whole or in part being defeated by a subsequent partition in the family and superseded by a right to the other item or items allotted to the alienor's share at such partition or at the partition to be effected by Court in the alienee's or non-alienating coparcener's suit for general partition where the allotment to the alienor of the precise item alienated is found impossible; and there is every possibility of the alienee being evicted from the property alienated in a suit at the instance of the non-alienating coparcener or coparceners. I for one, am prepared to proceed with the decision of this appeal on the footing that the case in 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47, has been misunderstood in some later cases as contended by learned Counsel; and that it should be understood in the manner indicated by him.

As in my opinion rightly put in paragraph 393 at page 494 of Mayne's Hindu Law and Usage, 11th Edition, while the quantum of interest which according to the number of members of the family an alienee of a coparcener's interest acquires by alienation is to be ascertained as on the date of the alienation, the properties of the family in which he has to get his share are as usual ascertained as on the date of the suit for partition. That position is borne out by the decisions in 'Venkureddi v. Venkureddi', 50 Mad 535 and 'Muthukumara v. Sivanarayana Pillai', 56 Mad 534 FB and cannot be and has not been disputed for the appellant either. Judging the matter from this standpoint, it makes to my mind, very little difference for the decision of this case whether 'Rangaswami v. Krishnayan'. 14 Mad 408 or 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47, declares the correct law, as it is not suggested that there has been any addition to the members of the family since the date of the first defendant's alienation.

Nor is it suggested that in addition to the debt representing the binding portion of the consideration for the sale in favour of the appellant, there has been any other binding debt incurred by the first defendant since the date of the sale or that there has been any alteration of the assets and liabilities of the family notwithstanding the first defendant's adjudication in insolvency and the administration of his estate in insolvency such as would introduce any complication into the situation relating to the partition of the only particular item still remaining as claimed by the plaintiff. This claim of partition has to be upheld in accordance with the decision in 'Muthukumara v. Sivanarayana Pillai', 56 Mad 534 and the only question is how the equities have to be worked out in view of the partial necessity for the alienation in question which

has been found by the Courts below in the present case.

78. It may not be out of place at this juncture to say a few words about the way in which the conflict between 'Rangaswami v. Krishnayyan' 14 Mad 408 and 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47 is dealt with in 'Muthukdmara v. Sivanarayana Pillai', 56 Mad 534. In that case the facts were as follows: the defendant was an alienee from a brother in a Hindu joint family and by virtue of the alienation the defendant got into possession of certain parcel of land. The rest of the joint family property became later dissipated and then the plaintiff, the other brother, sued for partition of that parcel. It was on those facts held by Devadoss, J., in Second Appeal that the plaintiff was to be non-suited because the defendant was entitled to claim the whole item for himself as a matter of equity available to him on the date of alienation with reference to the state of family assets and liabilities then existing which was such that it would have allowed of the allotment of the whole item to the alienor's share had there been a partition then and there instead of years afterwards during which the rest of the family properties had become dissipated. This decision was reversed in Letters Patent Appeal.

79. It is true that in that case the conflict did not directly arise for determination as even assuming 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47 and not 'Rangaswami v. Krishnayyan', 14 Mad 408, to be correct as laying down that the share of the alienating coparcener in the family property alienated by him ceased to fluctuate from the date of the alienation, the learned Judges there, (Jackson and Mockett JJ.), held that there was no justification for concluding that the hotchpot to be taken note of for working out the right of the alienee in a suit for partition whether filed by him or against him later on should be hooked to the date of the alienation and not had regard to as with reference to the date of such suit. The opinion of the learned Judges, although obiter, with reference to the conflict in question reveals, if I may say so with respect, an incisive analysis by Jackson, J., of the entire case law bearing on the point.

The learned Judge in his analysis subjects to a very searching criticism Bhashyam Aiyangar's opinion in the Full Bench case in 'Ayyagiri Venkataramayya v. Ayyagiri Ramayya', 25 Mad 690 on which the later Pull Bench ruling in 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47 is founded and points out how the repudiation of the much earlier Full Bench ruling in 'Rangaswami v. Krishnayyan', 14 Mad 408, by the later Full Bench ruling in 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47, is really unfounded. His Lordship points out the errors and infirmities of Bhashyam Aiyangar's reasoning in 'Ayyagiri Venkataramayya v. Ayyagiri Ramayya', 25 Mad 690 and proceeds to show how from the Full Bench ruling in 'Ayyagiri Venkataramayya v. Ayyagiri Ramayya', 25 Mad 690 that the death of the alienating coparcener does not create any right of survivorship to the other coparceners so as to preclude a suit for partition by the alienee after the death of the alienor it had come to be regarded almost as a necessary corollary by White, C. J., in the Full Bench case in 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47, that the quantum of interest which vests in the alienee is not affected by subsequent changes in the number of coparceners.

Says the learned Judge:

"That is good logic; but it is equally good logic to say that if the alienor only sells what he has got and no more, it follows as a necessary corollary that the interest in the alienee fluctuates. We stare, with the principle 'only that passed which the alienor had.' We recognise an arbitrary exception that death does not diminish the alienee's light, then we make the exception itself the principle, and turning round at that point, conclude that something passed which the alienor had not got. A vicious circle. Either view is rational, but it is impossible to pick out one of them as exclusively based either on law, or on logic."

His Lordship concludes the entire discussion with remarks to be found at page 544 of the report in these terms:

"In my opinion the most equitable and logical view of this vexed question is that the alienor cannot part with more than he has got; than is a basic principle which I can understand and I should have been quite prepared to hold that as the right of the alienor becomes extinct upon his death, the right of the alienee becomes

extinct also. However the contrary opinion is founded upon a long series of cases and I agree with the Pull Bench in 'Ayyagiri Venkataramayya v. Ayyagiri Ramayya', 25 Mad 690, that even at that date it was too late to think of upsetting it. So the contingency of death stands as an arbitrary exception to the rule that the right is fluctuating.

But I see no reason to import other exceptions, and prefer the decision of the four Judges in 'Rangaswami v. Krishnayyan', 14 Mad 408, to the decision of the four Judges in 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47. The former decision is logical, and quite equitable for the alienee has only himself to thank if by delaying his right to compel partition he finds his security diminished.

Holding this view I find no basis for the proposition that when he does compel partition the alienee's right to the property must be worked out as from the date of the alienation....."

Whether the view thus expressed in 'Muthukumara v. Sivanarayana Pillai', 56 Mad 534 is or is not correct is a matter which may arise for determination only in another case and not, for the reasons which I shall indicate 'infra', in the present case. We have not heard any argument on this question and I do not propose to express my own opinion on it. An argument has been found unnecessary by this Bench in the circumstances of this case as will appear from a later part of this judgment; but it cannot, in my opinion be maintained that if the question arose for determination in another case this court could avoid a decision on it in the way in which Leach, C.J., and Horwill, J., made short-circuit in the case in 'Dharmaro v. Bapannayya', 1941-1 Mad L J

15.

There are two Full Bench decisions of equal strength in the law reports, 'Rangaswami v. Krishnayyan', 14 Mad 408 and 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47 which undoubtedly conflict with each other. Had the later decision been that of five Judges and not that of four as it eventually happened to be, on account of the dropping out of one of the five Judges who had been constituted into a Full Bench in that case, the matter would, of course, have been different. With two such conflicting decisions in the law reports the question is whether the conflict has not got to be resolved in a case in which it arises for resolution. The learned Judge in the case in 'Dharma Rao v. Bapanayya', 1941-1 Mad L J 15, avoided a reference of the conflict for determination to a Full Bench of sufficient strength to overrule 'Rangaswami v. Krishnayyan', 54 Mad 408 on the basis of their reasoning to be found expressed at page 18 of the report in these terms by each, C. J. who delivered the judgment of the Court:

"It is said by the learned counsel for the appellant in this case that as there are here two Full Bench decisions, each by a Court composed of four Judges, he is entitled to rely on the earlier decision, but this argument cannot be accepted because as I have already indicated this Court has held that the later decision settled the law, so far as this province is concerned. In 'Baluswami Aiyar v. Lakshmana Aiyar', 44 Mad 605, the question was considered by Wallis C. J. and Oldfield and Kumaraswami Sastri JJ. The leading judgment was delivered by Kumaraswami Sastri, J. and in it the learned Chief Justice and Oldfield, J. concurred. After referring to 'Rangaswami v. Krishnayya', 14 Mad 408 and 'Chinnu Pillai v. Kalimuthu Chetti', 35 Mad 47, Kumaraswami Sastri J. said: "It may, therefore, be taken as settled that there is no fluctuation in the share to which the alienee is entitled and that his share will be the share of the vendor at the date of the alienation, subject of course to the equities in favour of the other members of the family against the transferor."

'Other cases in which the same view has been taken are 'Sinnachami v. Ramaswami Chettiar'. 22 Mad L J 85; 'Ganesh Row v. Tulja Ram Rao', 26 Mad L J 460; 'Seetharam Naidu v. Balakrishna Naidu', 26 Mad L J 604; 'Doraiswami v. Nandiswami Saluvan', 38 Mad 118; 'Soundararajan v. Saravana Pillai', 30 Mad L J 592; 'Subba Goundan v. Krishnamachari', 45 Mad 4.49; 'Ramaswami Aiyar v. Venkatarama Aiyar', 46 Mad 815 & 'Vasireddi Balachandrasekhara v. Lakshminarasimham', 1940-1 Mad L J 820.

The only dissentient note was struck in 'Muthukumara v. Sivanarayana Pillai', 56 Mad 534, which was decided by Jackson and Moekett JJ. The decision given was in accord with 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad

47, Jackson J. in the course of his judgment in which Mocktt J. concurred, indicated a strong preference for the decision in 'Rangaswami v. Krishnayyan', 14 Mad 408. Inasmuch as 'Chinnu Pillai v. Kalimuthu Chetti', 35 Mad 47 had in numerous judgments extending over a period of twenty years been accepted as settling the law, it is with great respect, difficult to understand the need for this further discussion in view of what has gone before 'Chinnu Pillai v. Kalimuthu Chetti', 35 Mad 47, must be followed and therefore the appellant's main contention must be rejected."

80. I am not satisfied with all respect to the learned Chief Justice that this mode of treatment of the conflict between 'Rangaswami v. Krishnayya', 14 Mad 408 and 'Chinnu Pillai v. Kalimuthu Chetti', 35 Mad 47 is correct. The fact that a Full Bench decision of four Judges has not been accepted by another Full Bench of four Judges does not certainly show that the former has ceased to be & that the latter has, in its place, become binding authority on the point. Nor does the mere fact that later Divisional Benches have accepted the later Full Bench ruling and refused to consider themselves bound by the earlier Full Bench ruling make any difference to the continuing existence of the conflict between the two Full Bench decisions unless one of them is upheld and the other overruled formally and in an appropriate manner.

It may be that the later Divisional Benches accepted the ruling in 'Chinnu Pillai v. Kalimuthu Chetti', 35 Mad 47 as setting the law under the impression that it was a ruling of five judges and not of four. The very fact that the judgment of Krishnaswami Iyer J. who had dropped out of the case before delivery of judgment was published in the Law Reports along with the opinions of the four other Judges may have created that impression. The course adopted by the learned Chief Justice of the time in directing the judgment of Krishnaswami Iyer J. to be published in the Law Reports was itself perhaps ill-advised and certainly misleading. What his Lordship ought to have done was to constitute another Full Bench with some other Judge putting in the place of Mr. Justice Krishnaswami Iyer for the re-hearing of the point referred to the original Full Bench.

This the learned Chief Justice failed to do and the result is that there is a conflict still continuing in the Law Reports which is bound to be embarrassing. The learned Judges in 'Muthukumara v. Sivanarayana Pillai', 56 Mad 534, were certainly justified in their treatment of the conflict as best suited their reasoning and their judgment. They were not bound by the later Full Bench ruling which never could, or did, overrule the earlier Full Bench ruling. Whether the dissentient note struck in 'Muthukumara v. Sivanarayana Pillai', 56 Mad 534, is or is not sound in itself is a different matter. But that it 'could' well be struck by the learned Judges who decided that case does not appear to my mind to admit of any doubt. I cannot agree with the learned Chief Justice that 'inasmuch as 'Chinnu Pillai v. Kalimuthu Chetti', 35 Mad 47, had in numerous judgments extending over a period of twenty years been accepted as settling the law, it is with great respect, difficult to understand the need for this further discussion'. The need was felt by the learned Judges in 'Muthukumara v. Sivanarayana Pillai', 56 Mad 534, because they felt themselves and rightly, in my opinion, free to discuss the relative merits of the two Full Bench 'rulings of equal strength in 'Rangaswami v. Krishnayya', 14 Mad 408 and 'Chinnu Pillai v. Kalimuthu Chetti', 35 Mad 47, the conflict between which had not been so far settled by this Court.

I wonder too whether any subordinate Court of this State may not so long as the two conflicting Full Bench decisions prevail in the law reports without a settlement of the conflict by a fuller Bench feel free, as the learned Judges in 'Muthukumara v. Sivanarayana Pillai', 56 Mad 534, felt free, to choose for itself either the one or the other of the Full Bench decisions as it pleases. The conflict between the two Full Bench rulings is in my opinion, one which ought to be resolved in a proper manner in a case in which the question, on which the conflict exists, actually arises for determination. As Leach C. J. himself remarks in 'Seshamma v. Narasimha Rao', ILR (1940) Mad 454 at p. 475

"If a Division Bench does not accept as correct the decision on a question of law of another Division Bench, the only right and proper course to adopt is to refer the matter to a Full Bench for which the rules of this Court provide. If this course is not adopted, the Courts subordinate to the High Court are left without guidance."

So, in my opinion, if there are two conflicting Full Bench decisions of equal strength on any point, it is necessary that the conflict should be submitted to a fuller Bench for determination in any case in which the question on which the conflict exists does arise for decision. If this course is not adopted, Courts subordinate to the High Court are left without guidance as to which Full Bench ruling to follow and which to reject: Even Judges of this Court may be left with no sure guidance as to which of the two Full Bench decisions to follow and which to reject and will accordingly be inclined to feel themselves free, as did the learned Judges in 'Muthukumara v. Sivanarayana Pillai', 56 Mad 534, to choose either the one Full Bench ruling or the other as best suits their sense of reasoning with the result that confusion only becomes worse confounded.

In my opinion there is no question of 'stare decisis' such as precludes a consideration of the relative merits of the two Full Bench rulings by a Bench competent by reason of its numerical strength to pronounce upon such merits. 'Stare decisis' in favour of 'Chinnu Pillai v. Kalimuthu Chetti', 35 Mad 47 may be a good ground for such competent Full Bench overruling the decision in 'Rangaswami v. Krishnayyan', 14 Mad 408. 'Stare decisis' cannot be a ground inhibiting Judges of this Court or even Subordinate Judges from choosing for themselves between 'Rangaswami v. Krishnayyan', 14 Mad 403 and 'Chinnu Pillai v. Kalimuthu Chetti', 35 Mad 47 unless this Full Bench or a Full Bench of at least equal strength overrules the former decision and upholds the latter. If as I presume, 'stare decisis' was the consideration which influenced the learned Judges in 'Dharmarao v. Bapannayya', 1941-1 Mad L J 15 not to refer the conflict for determination by a competent Full Bench I can only say that they failed in their duty to do so under a misconception that the principle of 'stare decisis' forbade such reference.

I may add that in this very case in the interests of early guidance to be afforded to subordinate Courts as well as to Judges here and by way of an exception to the ordinary rule of practice that a Full Bench ought not to busy itself with answering hypothetical questions, I should have possibly been prepared to entertain the question on which the conflict exists and hear arguments of counsel thereon, had my learned colleagues been clearly similarly inclined. There has been no formal reference of the question to this Bench by the Full Bench of three Judges who earlier heard this appeal and in the actual circumstances of the course which the hearing of this appeal has taken I regret that an opportunity for the resolution of the conflict has not arisen in this case. My regret stands further accentuated by the consideration that my learned brother, Viswanatha Sastri, J. is, on the merits of the question, inclined in favour of 'Rangaswami v. Krishnayyan', 14 Mad 408 in preference to 'Chinnu Pillai v. Kalimuthu Chetti', 35 Mad 47 although, regarding the case as one of 'stare decisis', to use his expression,--but in my opinion with all respect wrongly so regarding the case--he has felt himself not called upon to consider the question of conflict any further and to decide in favour of 'Rangaswami v. Krishnayyan', 14 Mad 408 in accordance with the inclination of his mind.

I for one do not regard as heretical any expression of view in favour of the ruling in 'Rangaswami v. Krishnayyan', 14 Mad 408 and against the ruling in 'Chinnu Pillai v. Kalimuthu Chetti', 35 Mad 47 in the view that I have expressed that there is really no question of 'stare decisis' for application in the present case. After all as pointed out in Broom's Legal maxims (10th edition) pp. 90 and 91 the Rule of 'Stare Decisis' only means that where a rule has become settled law it is to be followed although some possible inconvenience may grow from a strict observance of it, or although a satisfactory reason is wanting, or although the principle and the policy of the rule may be questioned. The rule can in my opinion bear no application to a situation in which there is conflict between two Full Bench decisions of equal strength. The rehabilitation of the ruling in 'Rangaswami v. Krishnayyan', 14 Mad 408 as against the ruling in 'Chinnu Pillai v. Kalimuthu Chetti', 35 Mad 47, if that is going to be the result of any reference of the question to a sufficiently Full Bench for determination, will only mean the re-importation of the leaven of logic into a situation, highly illogical created by the ruling in 'Chinnu Pillai v. Kalimuthu Chetti', 35 Mad 47.

If, on the other hand, the result of any such reference is to be the other way, we can then--but not till then--console ourselves with the thought that after all, law is not always logical and that what was wrongly treated as settled law has indeed become the settled law of the land so as not to imperil titles already created. Whether the result is to be one way or the other is not a matter which I can anticipate or on which I propose

to express anything like a definite opinion of my own in the absence of arguments before us as to the relative merits of the two Full Bench rulings.

81. The next observation which falls to be made with reference to the present case is that all the three reported decisions whose mutual conflict has led to a Full Bench hearing of this appeal (the decisions in 'Marappa Goundan v. Hangaswami Goundan', 23 Mad 89; 'Vadivelam v. Natesam', 37 Mad 435 and 'Venkatapathi v. Pappiah', 51 Mad 824 related to suits simply for the recovery by the non-alienating coparcener or coparceners of his share or their shares of the particular item or items of joint family property alienated by a coparcener, without a prayer for general partition and not to a suit like the one in the present case which is for a general partition after setting aside the alienation impugned, The conflict between 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89 and 'Vadivelam v. Natesam', 37 Mad 435 and between 'Vadivelam v. Natesam', 37 Mad 435 and 'Venkatapathi v. Pappiah', 51 Mad 824 does not, in my opinion, call for resolution in the present case in which the plaintiff has become divided from his father, the first defendant by the institution of a suit for general partition and in which the equities on the setting aside of the alienation in question must be adjusted as between the members of a divided family.

It is not disputed for the respondent that the equitable principle of apportionment of a common burden over the several parcels subject thereto and belonging to tenants-in-common on which the decision in 'Vadivelam v. Natesam', 37 Mad 435 rests becomes applicable in the circumstances of the present case. There is only one item alienated by the father prior to the insolvency and the only question which calls for consideration is whether although the plaintiff and first defendant were undivided at the time of the alienation, the binding portion of the consideration for the sale of that only item still remaining to be divided is not to be apportioned as the only debt now pertaining to the family between the separated interests of the father and the son in the manner laid down in 'Vadivelam v. Natesam', 37 Mad 435. It is manifest that the answer must be in favour of the appellant and that this is quite sufficient for the disposal of this appeal.

82. Support for this manner of treatment and application of the case in 'Vadivelam v. Natesam', 37 Mad 435 can be found in the judgment of Jackson J. sitting singly in 'Adinarayana Reddi v. Subbarayalu Reddi, AIR 1927 Mad 1116. There defendant 2, the father of defendant 3, sold to defendant 1 the entire family property of himself and his son and defendant 1 subsequently sold it to the plaintiff. Rs. 300 out of the consideration for the sale was found to have gone in discharge of mortgage debts binding on the family. The suit was decreed as to the half share of the second defendant with a charge for Rs. 150 given over the half share of defendant 3. The learned Judge first observes in his judgment thus:

"If a manager of a Hindu family sells half the family estate for justifiable necessity the benefit must be distributed over the shares of the various members. At the same time, a manager can sell his own share for what he likes.

The proper course is to divide the property by metes and bounds and to allot to the other members of the family their shares charged with the amount by which they have benefited by the liquidation of debts."

Then the learned Judge refers to 'Vadivelam v. Natesam', 37 Mad 435 to the facts thereof and the decision therein and proceeds to say:

"In the present case the property should also be divided; and defendant 3 would be entitled to his half share of the property sold, charged with Rs. 150/- the amount by which he has benefited on the discharge of the mortgages. The other half share belonging to the second defendant must be regarded as sold to defendant 1 and ultimately to the plaintiff.

The point to keep in view in working out these equities is that as regards the vendor's own share the Courts held him to his sale and are not in the least concerned with the merits of his bargain. Therefore the vendee on partition steps into his shoes. Then each share is charged with its portion of relief obtained by the transaction."

To a case like 'Adinarayana Reddi v. Ssbbarayalu Reddi', AIR 1927 Mad 1116 or like the present in which the entire family estate and all the members of the family are present before the Court, whether the suit be at the instance of the alienee as in 'Adinarayana Reddi v. Subbarayalu Reddi', AIR 1927 Mad 1116 or at the instance of the non-alienating co-parcener as here the application of 'Vadivelam v. Natesam', 37 Mad 435 is simple and easy. In such a case, the actual division by metes and bounds of the property sold, with charge given over the share of the non-alienating coparcener for a proportionate share of the consideration proved to be binding is beyond doubt the proper mode of adjustment of equities which gives effect to the two principle of distribution of a common burden over all the shares of the co-parceners and the right of any coparcener to sell his own sharp for what he likes, to use the language of the learned Judge who decided 'Adinarayana Reddi v. Subbarayalu Reddi', AIR 1927 Mad 1116.

The limitations within which only the two principles can be given effect to in a suit for partial partition in which the non-alienating co-parcener seeks to recover his share of the item alienated--a question which will be discussed and pronounced upon in a later portion of this judgment--did not arise for discussion or decision in that case, even as they do not strictly speaking arise for determination here. In this view of the matter, it is by no means strictly necessary to deal with the arguments of counsel addressed to us on the basis of a suit, pure and simpliciter, for recovery by a non-alienating coparcener of his share of a specific item alienated for consideration found partly binding. Since my learned brothers have however chosen to deal with them and express their decision thereon in view of the importance of the questions debated and the length of time spent by the Court over the hearing relating to them, I shall not withhold my opinion on them but shall turn straightway and seriatim to the two lines of argument of Mr. Venkatasubramania Aiyar.

Of them, the first has, in its turn, a twofold aspect. One is that it seeks to demolish both 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89 and 'Vadivelam v. Natesam', 37 Mad 435 in so far as they make advertence to a share predicable as such in a member of a joint Mitakshara family in respect of any particular item of the family estate. The other is that it seeks to affirm 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89 and invalidate 'Vadivelam v. Natesam', 37 Mad 435 as to the reasoning on which the former decision rests in holding an alienee of such an item from a coparcener disentitled to any equities whatsoever. This reasoning, it is contended, is sound, but has been wrongly dissented from in 'Vadivelam v. Natesam' 37 Mad 435.

83. With reference to the first aspect of the first line of argument there is, in my opinion, no real force, although there may seem to be, if you take some of the language of the learned Judges in the two cases in 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89 and 'Vadivelam v. Natesam', 37 Mad 435 literally. In the two cases alike, the learned Judges did use the word 'share' as It it related to the particular item alienated by a coparcener whereas the truth of the matter in the eye of law is that there can be no share predicable in favour of a co-parcener in any item of the family property so long as the estate continues joint. The argument in this aspect is, as it seems to me, however, only a verbal criticism. To employ the words of a certain observation of Sir George Rankin in 'Ramanna v. Jagannada', ILR (1942) Mad 886 at p. 892 even a member of a Mitakshara family may sometimes be forgiven for speaking of his share as his "1/3rd share", 1/4th or the like instead of using the more accurate but more elaborate expression "The share which if a partition were to take place today would be 1/3rd, 1/4th or the like."

Neither the learned Judges in 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89 nor the learned Judges in 'Vadivelam v. Natesam', 37 Mad 435 could reasonably speaking, have been unalive to the basic principle of the Hindu Law which renders a share as such unpredictable in any item of the family estate with reference to any member of the family. They must be taken therefore to have meant by their use of the word 'share' to use the language of the learned counsel for the respondent, only that interest in the entire family estate which if attempted to be expressed in terms of an arithmetical fraction, can only be done by a 'fraction', no doubt defined as to its denominator by a number representing the actual number of co-parceners in existence at the date of alienation according to 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 147 or at the date of suit for partition by the alienee according to 'Rangaswami v. Krishnayyan', 14 Mad 408 but as to its numerator undefined and incapable of being defined in the form of a concrete figure representing the net divisible

assets till after their ascertainment within the circumference of the complete stock taking of a transaction of general partition.

The essence of the difference between the Judges in the one case and the Judges in the other remains however for consideration in that the former refuse to recognise any equity on the pari of the alienee to be worked out in the suit for recovery by the non-alienating coparcener of his share of the property alienated, while the Judges in the latter do recognise such an equity and work it out on the principle of apportionment of a common burden between two or more parcels subject thereto the Judges in the two cases alike recognise the alienability for consideration in this province of the share of a coparcener in a joint family property and address themselves to the question of the equities available to the alienee on a setting aside of an alienation by the coparcener, as only partially, and not altogether, supported by consideration binding on the family only, they differ in their answer to the question, because they differ rather fundamentally, maintains learned counsel for the respondent, in their perception of the true nature of a coparcener's interest and the true effect of a conveyance by him of such interest. Here I agree with the learned counsel.

84. Before considering which of these two views is correct--which relates to the second aspect of the first line of argument of Mr. Venkatasubramania Aiyer -- and the further allied question whether and how far the working out of the equities in the manner laid down in '*Venkatapathi v. Pappiah*', 51 Mad 824 is sound,--which relates to the second line of argument of learned counsel--it may not be inappropriate to refer to certain broad considerations more or less settled by judicial decisions or more or less indisputably emerging on principles which are relevant to this question of the working out of such equities and which I propose to formulate in the shape of the following propositions.

(1) A gift or devise by a coparcener in a Mitakshara family of his undivided interest is, ordinarily speaking and subject to an exception in the case of a manager in favour of small 'gifts to female relations on special occasions or for pious, charitable or religious purpose, wholly invalid, void in toto. This principle cannot be evaded by the undivided member 'professing to make an alienation for value, when such value is manifestly inadequate and inequitable' (vide '*Rottala Ranganatham Chetty v. P. Ramaswami Chetti*', 27 Mad 162).

(2) That alienations of a co-parcener's share even if for consideration are inconsistent with strict Hindu Law was laid down by the Privy Council as early as '*Suraj Bunzi Koer v. Shee Prasad Singh*', 6 Ind App 88:5 Cal 148 P C. the principle is that the property of the family belongs to all the members jointly as to a corporation, in the words of Shearer J. in '*Mahabur Persad v. Ramyad*', 12 Beng L R 90 At p. 94 and no one of the individual members has any share in it which he can deal with as his property. In the well-known and oft-quoted words of Lord Westbury in '*APPROVIER'S CASE*', 11 Moo Ind App 75 which have become the '*locus classicus*' on the point, according to the true notions of the undivided property in Hindu Law, no individual member of that family while it remains undivided can predicate of the joint and undivided property that he, that particular member has a certain definite share.

No individual member of an undivided family could go to the place of the receipt of the rent and claim to take from the collector or receiver of the rents a certain definite share (11 Moo I A 75). According to the strict theory of Mitakshara Law each coparcener has a proprietary interest in the 'whole' of the coparcenary property. No co-parcener can therefore alienate his interest in the property, without the consent of the other coparceners (Vide Mulla's Principles of Hindu Law 10th Edn. page 304). At the same time it seems to have been felt by Courts that in equity a person who had parted with his money should receive something in exchange. So in '*Deen Payal v. Jugdeep Narain Singh*', 3 Cal 198 at p. 209 P C the alienee was given a right limited to compelling the partition which his alienor might have been compelled, had he been so minded, before the alienation of his share took place.

3. According to the Law of Mitakshara as administered in the provinces of Madras and Bombay, and the Central Provinces, including Bihar, (Berar?) a coparcener of an undivided family may sell, mortgage or otherwise make an alienation for value of his undivided interest be it in the co-parcenary property as a whole

or in a specific item thereof; or be it by way of a whole specific item without the consent of the other coparceners. In all the other provinces a coparcener cannot sell, mortgage or otherwise alienate for value his undivided interest in the joint family property without the consent of the other coparceners and the father who was a co-sharer with his minor son cannot give such a consent on behalf of his minor son. An alienation made by a coparcener without the consent of the other coparceners has been held to be only voidable at the option of the other coparceners, the alienating coparcener himself not being competent to impeach it.

In all the provinces in India, the undivided interest of a coparcener in the joint family property may during his life-time be seized and sold, in execution of a decree against him for his own debt; provided the attachment was made before his death, it is immaterial whether the sale is before or after death (Vide *Mayne on Hindu Law and Usage*, 11th Edition paragraph 381), there can be little doubt as their Lordships of the Privy Council observe in '*Suraj Bursi v. Sheo Persad*', 5 Cal 148 at p. 166 (PC) that all such alienations whether voluntary or compulsory are inconsistent with the strict theory of a joint and undivided Hindu family; and the law as established in Madras and Bombay has been one of gradual growth founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes and to work out his rights by means of a partition.

As their Lordships further observe in the later case in '*Lakshman Dada Naick v. Ramachandra Dada Naick*'. 5 Bom 48 P C at 62:

"The question therefore is not so much whether an admitted principle of Hindu Law shall be carried out to its apparently logical consequences as what are the limits of an exceptional doctrine established by modern jurisprudence."

(4) As the purchaser of a coparcener's interests gets only an equity to enforce a partition, he takes the share upon partition subject to all the liabilities in the hands of the vendor, as for example, a liability to pay the alienor's father's debts. But where the alienation is itself in discharge of binding debts, the alienee cannot, in a suit for partition, be saddled with other family debts as any such condition would amount to a direction that the same property be sold twice over for this purpose, a position which no Court with power to apply the principles of equity could ever contemplate with equanimity.

(5) the equity which a purchaser from a co-parcener acquires is enforceable by him alike as a defendant in a suit of the non-alienating co-parcener for general partition and as plaintiff in a suit of his own for general partition. That it is enforceable by him as such defendant has been ruled by this Court in '*Davud Beeviammal v. Radhakrishna Ayyak*', 44 Mad L J 309 and '*Ramaswami v. Venkatarama*', 46 Mad 815 on the strength of the Privy Council ruling in '*Ramakishore v. Jainarayan*', 40 Cal 966 notwithstanding the view to the contrary in '*Subba Goundan v. Krishnamachari*', 45 Mad 449 and cannot be seriously doubted or disputed,

(6) the alienee's own suit to enforce the alienation in his favour by means of general partition in effectuation of such equity as he obtains by the conveyance in his favour is not technically a suit for partition in the sense of the Mitakshara law and the decree which he may obtain for enforcing the transfer either in whole or in part by partition of the family property will not by itself break up the joint ownership of the members of the family in the remaining property or the corporate character of the family. On the other hand, the co-parceners objecting to the alienation may, without bringing a suit for general partition sue for a decree for their shares in the property alienated by the coparcener.

the distinction rests upon the ground that in a suit for partition by the purchaser, an account of the whole estate must be taken In order to see what interest, if any, the alienor possesses; but as the coparceners may wish to remain undivided amongst themselves, notwithstanding an alienation by one of them of his interest in the joint estate as a whole or in any item thereof, which does not 'per se' bring about a disruption of status, they are entitled to confine the suit between themselves and the stranger purchaser to the property in dispute.

This is, in fact, a well-established exception to the rule ordinarily obtaining against partial partition although it is not as well-established whether the result of such a suit which, while affirming the unauthorised alienation as to the alienor's own share, repudiates it as to the remainder, is to make the share or shares of the property alienated which is or are recovered by the non-alienating coparcener or coparceners his or their separate property or to leave it as joint family property still. On the other hand, it is competent to the non-alienating co-parcener or co-parceners to exercise his or their right of interdict against the unauthorised alienation and sue to recover the entire property alienated, in which case, if the suit succeeds, the property is got back for the family as its estate.

7. Where in the suit for general partition with the alienee either as plaintiff or as defendant, as mentioned 'supra', his right is worked out by allotment to the alienor's share of the very item alienated as it may have been, whether in whole or in part, or by allotment to the alienor's share of other items, after ascertainment of the net divisible residue of the family assets with due provision made for all binding family obligations, and in full 'quid pro quo' for the consideration paid which is wholly not binding on the joint family, there are no further equities to be adjusted even as there will be none 'a fortiori' where the consideration is wholly binding on the family end the alienation is to be upheld wholly.

An alienation may be upheld in its entirety though the necessity was only partial, in other words, even though the whole consideration received was not for a necessary purpose or for the discharge of antecedent debts. Where the necessity for a particular sale is only partial, ie., where the money required to meet the necessary purposes is less than the amount sought to be raised by the sale, the real question for determination is whether the sale itself is one justified by legal necessity the reason for this is that it is not always possible for the managing member to sell just that share of the family property which will bring in the precise sum which is wanted to clear the debts which are binding. But in a case where the circumstances only disclose a partial necessity, the sale will, however, be valid only where the purchaser acts in good faith & after due enquiry, and is able to show that the sale itself is justified by legal necessity, though he is under no obligation to enquire into the application of any surplus of the consideration.

8. The question of equities can only arise where the alienation in question is to be found partially supported and partially unsupported by necessity, or, in the case of the father alienating, by antecedent debts. Any such question can only be part and parcel of the law of 'restitutio in integrum' which requires that a person ought not, after setting aside an alienation, to be permitted to retain the benefit of the consideration received thereunder.

9. Any equity can only be given effect to according to equitable principles not exceeding the limits set by law, as otherwise it would cease to be an equity, in the language of Lord Blanesourg in the Privy Council in 'Nagappa Chetty v. Brihadammal Ammal', 58 Mad 350 at P. 362 P C. In that case the Privy Council upset the decree of the High Court which had with reference to the valid portion of the consideration for a sale of an impartible zamindari by the father challenged by the son, directed the ascertainment of a proportionate number of villages out of the total number sold, in order to uphold the sale to the extent of such proportionate number, the course adopted by the High Court was condemned by the Privy Council as tantamount to splitting the parcels sold with a view to making a new bargain between the parties. Similarly when in 'Musitulla v. Damodar Prasad', 48 All 518, the High Court disapproved of a like direction by the trial Court as an unworkable decree, the Privy Council expressed its concurrence with the view of the High Court.

85. It is with these broad considerations borne in mind that we have to consider the question of working out of equities in favour of an alienee from a co-parcener under a transaction which is only partially supported by binding consideration. The question is by no means admitting of an easy answer and calls for resolution of the conflict between the decisions in 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89; 'Vadivelam v. Natesam', 37 Mad 435 and 'Venkatapathi v. Pappiah', 51 Mad 824, in the light of and without prejudice to the propositions above formulated. Why I say 'in the light of and without prejudice to the propositions above formulated' is because I consider it no part of the province of this Full Bench, in spite of its strength of

number to do anything by way of upsetting settled law for the purpose of settling conflicting law. As I think, we ought, on the other hand, to lay down the law on the point under consideration, consistently and not inconsistently with the law undisputedly prevailing on allied points.

True it is that consistency on abstract grounds of logic cannot always prevail in the realm of Judge made law. It may also be that as said by Lord Halsbury once, Law is not a logical science. But if that dictum of the learned Lord cannot, as appears from '*Rangaswami Goundan v. Nachiappa Gounden*', 42 Mad 523, avail as a source of consolation for presuming an illogical extension of principle in interpreting the existing case law on a subject it can hardly be doubted or disputed that only logical applications, and extensions of existing legal principle should stand encouraged and all illogical applications and extensions of legal principle should stand discouraged. So much is in my opinion required for that healthy, if slow and gradual, broadening out from precedent to precedent which is of the essence of the living mechanism of a system of justice governed by the authority of decided cases.

86. Now, the wider argument of Mr. Venkatasubramania Aiyar is that the holder of a mere equity like the alienee from a coparcener can invoke no equities to his aid against the non-alienating coparcener seeking to set aside the alienation when the Court finds it to be supported only partially by binding consideration. When such an alienee is described as a person who has acquired only an equity, what is meant however is, not that he has no legal interest whatsoever in the property alienated such as entitles him to equities on the setting aside of the alienation with reference to the binding part of the consideration, but that for the materialisation of such interest in the property which he can properly call exclusively his own, he is bound still to take steps whether in a suit of his own or in a suit for general partition instituted by the non-alienating coparcener or coparceners.

Equities arise because of the partially binding character of the transaction and do not stand excluded because the title of the alienee is not at the very inception a perfect right to a specific item. The title may be inchoate in the sense that in the allotment at a general partition he cannot claim the item as his own or mesne profits thereon as from the date of the alienation. The title may be defeasible or even turn out illusory in the sense that on allotment at the general partition he may get other item or items, or nothing at all in substitution. But subject to such infirmities, he does certainly derive from the alienation a legal right, not a bare right in personam to use the language of Bakewell J. in '*Manjayya v. Shanmuga*', 38 Mad 684, but a right to something much nearer to real property than a mere claim to partition, to use the language of Wallace J. in '*Narayana Sha v. Shankar sha*', 53 Mad 1 at p. 15, something 'specific, existing and definite' in the language of Lord Justice James in the Privy Council in '*Tuffuzool Hossain Khan v. Raghoonath Pershad*', 14 Moo I A 40 at 50.

On the non-alienating co-parcener or coparceners seeking to recover his share or their shares of the specific property alienated the question is whether he is not entitled to put forward any equities at all as arising with reference to the portion of the consideration found binding. If the non-alienating co-parcener or co-parceners is or are permitted to recover his share or their shares of the particular property alienated without an adjustment of equities, not only will he or they be thereby allowed undue advantage but there will also be no further occasion afforded to the alienee to enforce equities.

Just as in a later suit for general partition by him, he cannot, if as I think '*Sourimuthu v. Pichia Pillai*', 49 Mad 483 and not '*Kandaswami Udayan v. Velayudha Udayan*', 51 Mad L J 99 : 50 Mad 320, lays down the correct law, ask for allotment to his alienor of the share recovered which will have become his separate property under '*Chinna Sanyasi v. Suriya*', 5 Mad 196; '*Kadegan v. Peria Munuswami*', 13 Mad L J 477 and '*Sourimuthu v. Pichia Pillai*', 49 Mad 483, notwithstanding Wallace J.'s view to the contrary in '*Davud Beevi Ammal v. Radhakrishna*', 44 Mad L J 309, so too he cannot ask for the adjustment of equities either. On this question of working out of equities of course the position in law might well be different if the Courts did not recognise the right to partial partition at all on the part of the non-alienating coparcener or coparceners. That right being there, the only question is whether there is anything unjust in allowing to the alienee such adjustment of the equities arising out of the partial validity of the transaction as is possible in law in the very suit for partial

partition instituted by the non-alienating coparcener or coparceners. In my opinion the answer to the question must be in the negative.

87. Even in 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89, relied on by the learned advocate for the respondent the equities of the alienee were not negated on the ground that he was the holder of an equity only the question that arose there was, whether Rs. 120/- out of the price paid by the defendant to the plaintiffs' father having gone to discharge a mortgage debt which the plaintiffs also were bound to pay their interests in the property comprised in the sale by their father should be held liable for their share of the Rs. 120/- namely Rs. 80/-. In negating the liability, Subramania Aiyar J. who delivered the judgment of the Court, consisting of himself and Boddam J, first makes the following observation:

"In making the purchase the defendant was with reference to the plaintiffs but a volunteer, and he cannot, as against them, claim by way of equity a charge on their shares for the Rs. 80/- even though this sum was applied towards the discharge of their joint debt. (Cf 'Sivaganga Zamindar v. Lakshman', 9 Mad 188 at pp. 197, 200 and 201)."

It is not quite easy to understand precisely what the learned Judge meant by the use of the word 'volunteer' in the sentence quoted. Nor does a reference to 'Sivaganga Zamindar v. Lakshman', 9 Mad 188 at pp. 197, 200 and 201, remove the difficulty of obscurity involved in his observation. In this last case, in execution of a money decree obtained against the holder of an impartible zamindari a creditor attached certain immovable property, a portion of the zamindari, which he described as property of the debtor. This was sold by the Court and purchased by one Lakshman. A suit having been brought by a son of the judgment-debtor after his father's death to recover the property from Lakshman, it was held that all that Lakshman acquired was the life interest of the judgment-debtor in the property and that, therefore the plaintiff was entitled to recover.

As appears from page 197 of the report the purchaser seems to have contended that as his purchase money was applied to pay off the debts on the estate for which the zamindari and the plaintiff were liable he in equity was entitled either to have possession of the property bought or to hold the property until he should be recouped with the purchase money. The contention was repelled by Kernan O. C. J. thus:

"I do not see what equity the purchaser can have. He did not get an assignment of the decree; he was a volunteer in buying against the plaintiff. He made a bad speculation as it turned out on account of the death of the zamindar, but if he had lived, the purchaser probably by having possession of the zamindar's residue would be able to make money from his bargain."

At pages 200 and 201 of the report which are part of the judgment of the other learned Judge, Muthuswami Aiyar J. this is what we find;

"Another contention is that if the appellant's title to the zamindari is declared, he should be declared entitled to its possession on payment of his father's debt or the purchase money. The purchaser bought the late Zamindar's interest, whatever that was, for the money which he advanced. If the Zamindar had lived long it would have been a profitable speculation rather than a losing speculation. In the event which has occurred, it has turned out to be a losing speculation. I do not see how this can give rise to any equity in favour of the purchaser."

It is difficult to find any parallelism of facts between the case in 'Sivaganga Zamindar v. Lakshman', 9 Mad 188 and the case before the Court in 'Marappa Goundan v. Rangaswami Goundan'. 23 Mad 189, such as justifies the use to which in the sentence quoted from the later case the decision in the earlier was sought to be put. Perhaps all that was meant by the learned Judge (Subramania Aiyar J.) in the later case was that if the Court came to the conclusion that there was no justification for the sale by the plaintiffs' father the purchaser must be regarded as a mere volunteer notwithstanding that the purchase money may have been applied in discharge of a binding debt. I am not satisfied that the legal position indicated thus by the learned Judge is really correct. Whatever that may be, proceeding further, the learned Judge observes thus:

"Even if there were any doubt as to whether the defendant was a volunteer one must hesitate to countenance the introduction of a new rule such as that suggested having regard to the practical inconvenience which is likely to arise in giving effect to it. Now a sale of joint property by a coparcener though made without legal necessity is in this presidency valid to the extent of vendor's share. Suppose that share is really worth the whole of the amount paid by the vendee as the price why should he get anything more?"

Next suppose that the share is worth less than the price paid. The vendee cannot in such a case reasonably ask for a charge for more than the difference between the real value of the share which he gets and the price he had actually paid. It is scarcely necessary to say that questions as to such valuation are often not capable of easy and satisfactory settlement. The simpler and better view undoubtedly is that if the vendee wishes to stand by a sale which is valid only partially such as the present, he must be content with the vendor's share but that if he wishes to repudiate the transaction altogether his remedy is only against the vendor in a suit for the return of the price paid on the ground that the consideration for the payment failed.

This view will on the one hand avoid all necessity for an enquiry into matters alluded to before and on the other tend to act as a check on a disposition on the part of speculative, persons to enter with some coparceners into transactions calculated to affect the rights of other coparceners who are not parties thereto. The contention of the defendant is clearly unsustainable and cannot be accepted."

88. It will be seen from the foregoing quotation from 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89 that the reason given by the Court in support of its conclusion, negating the equities is not the circumstance that the alienee is only the holder of a bare equity but the practical inconvenience in giving effect to them in a manner not till them recognised as well as the check which a refusal of the kind of equities claimed would operate to bring into existence against collusive transactions between some co-parceners and speculative persons who may enter into transaction with them prejudicially to the interests of the other coparceners who are not parties thereto. The conclusion reached by the Court in that case was, that the vendee must either be content with the vendor's share if he wishes to stand by a sale valid only partially or must sue the vendor for the return of the price paid on the ground of failure of consideration if he wishes to repudiate the transaction altogether.

89. During the argument as well as for some time thereafter, it seemed to me that this view might well be accepted as based on the whole on considerations calculated at once to preserve the interests of coparceners in family properties and to ensure a rough and ready rule in the administration of justice. It also seemed to me that the conclusion reached by the learned Judges in 'Marappa v. Rangaswami', 23 Mad 89 as to the remedy to be pursued by the alienee in a case where the alienation might not be binding on the family was on lines implicably, if not statedly, similar to what a Full Bench of this Court in 'Baluswami Aiyar v. Lakshmana Aiyar', 44 Mad 605 F B adopted in dealing with a suit for specific performance of a contract for sale by the managing member of a joint Hindu family found not to be binding upon the other members of the family, the purchaser in such a case having been held not entitled to enforce specific performance of the entire contract, but, if he was so minded, to have such performance on payment of the full consideration for the share of the alien or only; there was nothing wrong as I thought in the principle of the ruling in 'Marappa v. Rangaswami', 23 Mad 89 above adverted to.

90. I have, however, on a closer consideration of the matter since reservation of judgment come to the conclusion that there would be grave and serious injustice involved in refusing altogether as that ruling does equities to the alienee with reference to the binding part of the consideration for the sale in his favour while allowing the non-alienating coparcener or coparceners to sue for his share or their shares of the property alienated. After all, if the alienee should think that working out of Equities in the suit for partial partition by the non-alienating coparcener -- whatever the mode of such working out may be -- which is another question, might not be altogether as much to his advantage as working out of Equities in a suit for general partition, it would be open to him to file such a suit and ask for stay of the coparcener's suit till the disposal of his own or obtain a joint trial of both by appropriate application. If he does not do so, but wants coparcener's suit itself a

working out of equities, is he to be refused such working out? Viewing the matter from this standpoint I must repel the argument of Mr. Venkatasubramania Aiyar so far as it is directed to a re-affirmance of the ruling 'Marappa v. Rangaswami', 23 Mad 89.

91. The question then is whether assuming 'Marappa v. Rangaswami', 23 Mad 89 to be unworthy of acceptance, the ruling in 'Vadivelam v. Natesam', 37 Mad 435 sullers, as contended by the learned counsel for the respondent from any serious legal infirmity such as would invalidate it and entail its rejection as well. It is contended by counsel that the infirmity about the decision is twofold; (1) in that it rules that it cannot be doubled that a coparcener is entitled to part with his own share in any family property for any consideration he pleases, (2) in that it holds that it is equally clear that as between the vendor and the vendee in the absence of any contract to the contrary the consideration for the sale will be apportioned between all the items of property sold in cases of dispute.

92. In order to prove the first infirmity said to beset the decision in 'Vadivelam v. Natesam', 37 Mad 435 counsel relies on the Full Bench ruling in 'Rottala Ranganathan Chetti v. Ramaswami Chetti', 27 Mad 162 to the effect that the principle that no, coparcener can make a gift of his interest cannot be evaded by the undivided member professing to make an alienation for value, when such value is manifestly inadequate and inequitable. Counsel contends, therefore, that a question as to the proper consideration for the alienation of a coparcener's interest is not a matter with which the other members of the family are in no way concerned. The learned Judges in 'Vadivelam v. Natesam', 37 Mad 435 it is urged, erred in holding that "a co-parcener is entitled to part with his own share in any family property for any consideration as he pleases.

93. In order to make out the second infirmity the learned advocate for the respondent has drawn our attention to a series of decisions beginning with 'Deendayal v. Jugdeep Narain Singh', 4 Ind App 247 : 3 Cal 198 P C and ending with the two decisions of this Court reported in 'Krishnamurthi Iyer v. Nataraja Aiyar', 1948-1 Mad L J 430 and 'Subbiah v. Venkateswarlu' 1948-1 Mad L J 478. Counsel contends that all that the alienee from a co-parcener acquires being an equity to work out his rights standing in the shoes of his alienor, the learned Judges in 'Vadivelam v. Natesam', 37 Mad 435 are wrong in assimilating the case in question to a case of a sale of more items of property than one in which as between the vendor and the vendee in the absence of a contract to the contrary the consideration will be apportioned between all such items in cases of dispute.

94. It is urged that 'Vadivelam v. Natesam', 37 Mad 435 is only the logical consummation of the fundamental misconception first ventilated in this Court in 'Venkatachala Pillai v. Chinnaiya Pillai', 5 Mad HCR 166 that a share in any item as such of joint family property alienated by a co-parcener is at all capable of passing to the alienee. This, it is said, is opposed to 'APPOOVIERS CASE' 11 Moo Ind App 75 (PC). The decision in 'Venkatachala Pillai v. Chinnaiya Pillai', 5 Mad HCR 166 it may be mentioned, is the very first case which was relied on before us by the learned advocate for the appellant in the course of his argument and there is no wonder that the argument for the respondent has been directed to a prominent attack against it.

In order to appreciate the relative arguments of counsel on both sides in regard to this decision, it may be necessary to know what exactly the facts of the case were the facts as well as the actual decision are stated as follows by Bhashyam Aiyangar J. in 'Ayagiri Venkataramayya v. Ayagiri Ramayya', 25 Mad 690 at p 715 quite correctly, if I may say so with respect:

"In that case, the vendor (one Subbaraya Mudali) as one of two co-parceners was entitled to a moiety of the joint family property. He sold one entire village and put the purchaser in possession thereof. After the death of the vendor the surviving coparcener brought a suit to recover his one half share in the village. The purchaser resisted the suit on the ground that the entire village formed less than a moiety of the whole family property and that, therefore, the conveyance would operate to vest in him the whole village. Though the principle was recognised 'that each co-parcener has a vested present undivided estate in his share which he may at any time convert into an estate in severally by a compulsory or voluntary partition, and that such

estate was transferable like any other interest in property yet the contention that the vendee was entitled to the whole village was overruled on the ground that though the extent and value of the village in question was less than the extent and value of a moiety of the entire family property, yet as the vendor was entitled only to one moiety in the village, the conveyance could operate 'to convey only a moiety of the village.'

In the course of the judgment in that case 'Venkatachala v. Chinnayya', 5 Mad HCR 166 there occurs the passage at page 170 of the report to this effect:

"The estate of each coparcener gives him only the right to enjoy a fair proportion of the benefits of the whole family property in common with the other coparceners. But as respects the proprietary right to the corpus of the property, there is a perfect unity of title which makes the coparcenary to some extent of the nature of a joint tenancy, and until a partition takes place coparceners continue seized by one and the same title of the whole and every portion of the property alike the law recognising the right of one co-parcener to hold possession and manage for the joint benefit of himself and the rest.

By the sale in the present case, therefore, the vendor, Subbaraya, could not in our judgment transfer to the first defendant's father a valid title to any specific portion of the joint family property but only to his beneficial estate as an undivided co-parcener with the incidental right of partition, and it follows that the first defendant is not entitled to more than the moiety of the village lands which were alone the subject of the contract of sale."

Mr. Venkatasubramania Aiyar's complaint is that while the law is correctly stated in the rest of the passage quoted the deduction made from it as expressed at the end of the passage namely:

"That the first defendant is not entitled to more than the moiety of the village lands which were alone the subject of the contract of sale"

is erroneous. That is why! says counsel, the Court in dealing with the argument for the defendant-appellant that a half of the purchase money should be made good to him, observed :

"Had any portion of the purchase money.....been

expended.....for the benefit of the joint estate the plaintiffs' legal right to possession might upon equitable grounds have decreed subject to the refund of half the purchase money....."

Counsel in effect contends that the case cannot be regarded, as authority for anything more than the proposition as stated by Collins C.J. and Muthuswami Aiyar J. in the Full Bench Case in 'Rangaswami v. Krishnayan', 11 Mad 408 at page 417 where after referring to 'Veeraswami Gramani V. Avaswami Gramani', 1 Mad HCR 471 as well as 'Venkatachala Pillai v. Chinnaiya Pillai, 5 Mad HCR 166, the learned Judges observe:

"the principle on which these decisions rest is that the vendor could confer a valid title not to any specific portion of the joint family property, but only to his beneficial estate as an undivided coparcener with the incidental right of partition."

95. It is also contended by Mr. Venkatasubramania Aiyar that the case in 'Vadivelam v. Natesam', 37 Mad 435 which reflects the error of 'Venkatachella Pillai v. Chinnaiya', 5 Mad HCR 166 in so far as it proceeded not on the basis of a suit for general partition and of the stock-taking incidental thereto as the proper remedy for an alienee from a co-parcener but on the basis of a fractional interest in the alienated item as unimpeachably conveyed 'in praesenti' to the alienee which corresponds to the quantum of interest of the coparcener in the entire property of the coparcenary is itself vitiated by fundamental error. It is also pointed out by the learned counsel that- the idea of a tenancy-in-common resulting with reference to an item of property alienated from the fact of the alienation as held in 'Subba Rao v. Ananthanarayana Ayyar', 23 Mad L J 64 to which one of the judges who, took part in 'Vadivelam v. Natesam'. 37 Mad 435, Sundara Iyer J. was party lies at the root of the decision in 'Vadivelam v. Natesam', 37 Mad 435 and that such an idea does not really hold the field on account

of later decisions as well as earlier.

Reference is made in this connection to paragraph 386 of Mayne on Hindu Law and Usage pages 487 and 488 and to the foot-note 'W' in particular at the latter page. The paragraph runs as follows:

"Where the transfer is of an undivided interest in the whole of the family property the transferee will get whatever may be allotted to the transferor's share in a suit for partition. A coparcener may alienate either his undivided share in the whole of the family property or his undivided share in certain specific item of the family property or the whole of a specific item of the family property. In all these cases, the alienee does not acquire an interest in the property so as to become a tenant-in-common with the members of the family entitled to possession but only an equity to stand in his vendor's shoes and to work out his rights by means of a partition."

96. the foot-note refers to 'Suraj Bansi Koer v. Sheo Pershad', 5 Cal 148 (P C); 'Manjaya v. Shanmuga', 38 Mad 684; 'Maharaja of Bobbili v. Venkataramanjulu', 39 Mad 265, as dissenting from the dicta to the contrary in certain other cases also referred to in the foot-note. Reference is also made by Counsel to the view of Sadasiva Aiyar J. in 'Soundararajan v. Arunachalam Chetty', 39 Mad 159 at, p. 172 (F B), Sadasiva Iyer J. being the other learned Judge who had taken part in 'Vadivelam v. Natesam', 37 Mad 435. So learned counsel contends that the decision in 'Vadivelam v. Natesam', 37 Mad 435, must be taken to have been tangibly coloured by notions of joint tenancy and tenancy-in-common derived from English Law which are not by their nature strictly speaking applicable to the case of a joint Hindu family of which one co-parcener alienates his interest in a particular item of the family property. I am inclined to think that these points of criticism levelled by the learned counsel against the reasoning of the ruling in 'Vadivelam v. Natesam', 37 Mad 435, are entitled to great weight. Assuming so, the question still remains whether the decision itself is wrong as contended by the learned counsel or can be supported, notwithstanding these points.

97. It is difficult as I have already observed to hold, so long as the view declared by a Full Bench ruling of this Court in 'Iburamsa Rowther v. Thiruvankataswami Naick', 34 Mad 269, in accordance with practice and precedent going back to 'Venkatachela v. Chinnayya', 5 Mad H C R 166, prevails that the co-parceners objecting to the alienation may, without bringing a suit for general partition, sue for a decree for their shares in the property alienated by a coparcener, that the equities arising out of the partial character of the validity of the transaction should not be taken into consideration at all by the Court in such a suit. Where one of two coparceners makes an unauthorised alienation, surely the other coparcener may either exercise his right of interdiction and sue for the recovery of the entire property alienated or affirm the alienation to the extent of the share of the vendor and sue for the recovery of his share.

If he does the former at the option of the alienee, he might be given an unconditional decree for possession with liberty to the defendant alienee to work out his equities in a separate suit for partition (vide 'Iburamsa Rowther v. Thiruvankataswami Naick', 34 Mad 269; 'Hari Narain v. Ruder Perkash', 10 Cal 626 P C and 'Suraj Bansi v. Sheo Prasad', 5 Cal 148 (P C) or he might be given a decree conditional on refunding the amount found binding on the family on whose behalf clearly he is suing, as in the case of widow 'alienations sought to be set aside by reversioners, or karnavans' alienations sought to be set aside by junior members of the tharwad, or dharmakarthis' alienations sought to be set aside by the succeeding dharmakarthis or guardians' alienations sought to be set aside by or on behalf of the ex-ward or the ward respectively. Even where he chooses to affirm the sale as to the alienor's share and sue for his own shares, does it not look prima facie equitable that he should be made liable for his proportion of the consideration found to be binding?

98. True, prima facie it does look so, as a matter of off hand parity by reasoning. But then this overlooks what Subramanja Aiyar J. rightly points out in 'Marappa v. Rangaswamp', 23 Mad 89, namely, the possibility that the share sold is worth much more than that for which it is sold, and the hardship which that way arises to the other coparceners to whom the value of the vendor's share is by no means a matter of no concern having

regard to the Full Bench ruling in 'Rootalla Ranganathan Chetti v. Ramaswami Chetti', 27 Mad 162. Further, the working out of equities in a suit concerning a particular item of family property alienated by a coparcener and the valid portion of the consideration for the alienation thereof involves the difficulty that the portion of the property recovered by the non-alienating coparcener may not be liable for other debts of the family if such portion possibly becomes as a result of the decree in the suit the separate property of the non-alienating co-parcener.

In fact if regard is had to the strict theory of Hindu Law, that the alienee from the coparcener acquires nothing more than an equity, working out of equities otherwise than in a suit for general partition by him is not to be permitted to him at all. Moreover it cannot be denied that the more satisfactory mode after all of working out of equities is furnished by a suit for general partition in which the net divisible residue can be ascertained and an allotment can be made thereafter to the share of the alienee as standing in the shoes of the alienor. It cannot be disputed too that a suit of the non-alienating co-parcener for partial partition is not liable to be converted into a suit for general partition at the instance of the defendant so that the more comprehensive working out of equities as in a suit for general partition may be adopted.

Referring to the decisions in 'Ayagiri Venkataramayya v. Ayagiri Ramayya', 25 Mad 690 and another decision cited before them in 'Iburamsa Rowther v. Thiruvencataswami Naicker', 34 Mad 269, the Full Bench observe in their judgment at page 275 of the report thus:

"Those cases however do not lay down that the member of the family suing for his share could be driven by the purchaser from another sharer to institute a suit for general partition."

Having regard to these several consideration, I am of opinion that although so long as a suit for partial partition at the instance of the non-alienating, co-parcener stands recognised in law, there must, inevitably, be a corresponding working out so far as possible, of partial equities, only pertaining to the particular item alienated and depending on the partial character of the validity of the consideration for the alienation of such item, such working out cannot be on the basis adopted in 'Vadivelam v. Natesam', 37 Mad 435, however equitable prima facie such basis may seem.

99. In a case decided by Full Bench of this Court, 'Narayana Sah v. Sankar Sah', 53 Mad 1, the breach in the water-tight compartment of ancient Hindu Law relating to property of a joint Hindu family evidenced by the gradual development of the case law connected therewith has been noticed in some detail by Wallace J. and Anantakrishna Aiyar J. Wallace J. also refers in his judgment in that case to the way in which the breach has become widened with reference to the present state of law in the case of an insolvency of a coparcener. The question in the Full Bench case was whether when there had been a partition of one or more members in a joint Hindu family, the other members remaining united, is this partition to be taken into account in determining the shares due to the various branches in a subsequent partition as laid down in 'Manjanatha v. Narayana', 5 Mad 362, or should the subsequent partition be made 'rebus sic stantibus' at the time of such subsequent partition?

The Full Bench answered the question in the manner laid down in 'Manjanatha v. Narayana', 5 Mad 362. Coutts-Trotter, C. J. in his judgment observes at page 5 of the report:

"The point is a very short one, and, were the whole matter to be regarded as being at large, I should attach very great weight to the arguments addressed to us with much learning by Mr. K. S. Krishnaswami Ayyangar. There can be no doubt of the logic of the statement that, until, an actual partition arises, no member of a coparcenary can be said to have a share, nor can any branch of the whole family; but in my opinion, it is far too late to apply all these logical rules in their strictness to Hindu Law as we find it today. Modifications have been found necessary as, for instance, in the case of the alienee from a member of the coparcenary, who is allowed to stand in his shoes and enforce a partition. See 'Suraj Buwsi Koer v. Sheo Persad' 5 Cal 148 (P C), where their Lordships frankly concede that the sanctioning of such transactions can be justified not by strict Hindu Law but by necessary implications of equity. Similarly with regard to a partial partition as in the present

case, I think it may be taken as settled law now, that the separation of one branch of the family does not involve a notional partition of the whole property including all the members, with the corresponding legal fiction that the remaining branches or members are to be deemed to have reunited."

Wallace J. at pages 15 and 16 of the report observes:

"I do not think the conclusion can be resisted that, as the law stands, it involves the proposition that a coparcener possesses and can transfer something much nearer to real property than a mere claim to partition. It is an interest in property, indefinite from the point of view that it may fluctuate in extent from time to time, but definite and ascertainable at any particular point of time, and actually made definite and ascertained by the act of the coparcener seizing and using it for his benefit, and holding it as against the possession and use of it which the joint family as a whole is entitled. The act of alienation makes definite the indefinite interest which the coparcener has and fixes it so that it is unaffected by any internal change within the joint family or by any of the rules of Hindu Law about devolution on death.

So far, the Courts have not gone so far as to hold that an alienation 'per se' is such an expression by the alienor of his unequivocal intention to separate as is sufficient to effect a severance of the alienor from the joint family, and at present the law is that the alienor, in spite of the alienation, remains a member of the joint family, 'Ayyagari Venkataramayya v. Ayyagari Ramayya', 25 Mad 690, although the suit by the alienee for partition would presumably sever an alienor entirely from the joint family, and the alienee must always sue for partition of the alienor's whole share, 'Nanjayya v. Shanmuga', 38 Mad 684." Anantakrishna Aiyar J. at page 20 of the report points out:

"The Hindu Law texts do not contemplate cases of partial partition..... partial, either as regards the property to be divided, or partial, as regards the co-parceners who seek to become divided. But such partial partitions have been taking place for a long time and the law relating to the same is practically Judge-made, law."

The learned Judge proceeds further to remark at page 23:

"Seeing that partial partition was not recognised by the old Hindu Law-givers and none of the Hindu Law texts refer to the same, it is clear that the rules relating to such partial partitions should be sought for in places other than original Hindu Law texts. The law relating to partial partition is essentially Judge-made law. Such law was moulded out of considerations of principles of equity. Therefore, one has to look to principles of equity in adjudicating on questions relating to partial partition."

Then again at page 25 of the report referring to the dictum of the Privy Council in 'Lakshmanan v. Ramachandran', 5 Bom 48 at p. 62 (P C), namely:

"The question therefore is not so much whether an admitted principle of Hindu Law shall be carried out to its apparently logical consequences as what are the limits of an exceptional doctrine established by modern jurisprudence."

The learned Judge remarks:

"The Hindu text writers knew nothing of partial partition. Therefore the theory and incidents of joint family and joint family property according to the genius of the Mitakshara are not the sole questions that should govern us, but it is the nature and extent of the equitable principles relating to partial partition established by modern decisions that have to be really considered and applied to such cases."

I must express my respectful concurrence with the mode of approach adopted by all the learned Judges of the Full Bench on the question referred to them for decisions as well as in particular with the remarks of Anantakrishna Aiyar J. on the true character of the doctrine of partial partition and the considerations of equity which have to be borne in mind by Courts in dealing with cases of partial partition.

100. the result of my consideration of the case, so far, is that, in my opinion, the equities arising from out of the partial character of the validity of the co-parcener's alienation must not be left out, as was done in 'Marappa v. Rangaswami', 23 Mad 89, but must be worked out, not however, on the basis laid down in 'Vadivelam v. Natesam', 37 Mad-435. The question then is whether they should be worked out as laid down in 'Venkatapathi v. Pappiah', 51 Mad 824.

101. Before dealing with this question, I propose to say a few words more in regard to the contention of Mr. Krishnaswami Iyer that the equities must be worked out in the manner laid down in 'Vadivelam v. Natesam', 37 Mad 435. The learned Counsel for the appellant has sought to fortify his position by maintaining that 'Vadivelam v. Natesam', 37 Mad 435, which is the primary authority in his favour has been accepted as good law in later decisions of this Court down to 'Venkatapathi v. Pappiah', 51 Mad 824, as well as, in a way, by the Privy Council in 'Masit Ullah v. Pamodar Prasad', 48 ALL 518 P.c. Of such decisions of this Court the one important decision which calls for consideration is 'Seetha Rama Naidu v. Balakrishna Naidu', 26 Mad L J

604. That was a case decided by Wallis, J., (as he then was) sitting on the Original Side of this Court. The suit; in question was one brought by the plaintiffs who were the sons of the first defendant for a cancellation of the alienations of their father and for partition.

Dealing with the alienation of Item 5, the learned Judge held that out of the total consideration of Rs. 850, therefor, Rs. 414 had been accounted for as for purposes binding on the family while Rs. 436 was left unaccounted for the learned Judge was prepared to allow the alienation to the extent of Rs. 414 and in dealing with the equities to be worked out with reference to Rs. 436 the learned Judge observed at page 610 as follows:

"If the alienation were by a widow or guardian or dharmakartha, in the circumstances of the present case, the alienation to a much greater extent than was necessary would be set aside on payment to the alienee of the amount which was held binding. It is however contended that this is not the proper way to deal with an alienation by a co-parcener where the alienation is only partially binding because according to the law now established in this presidency, such an alienation is in any event binding to the extent of the coparcener's share as it existed at the date of the alienation without any liability to increase or diminution by virtue of subsequent changes in the joint family."

Consequently, it is contended that the alienees in this case acquired a one-third share in the property alienated independently altogether of the sum of Rs. 414 which was held to have been advanced by him for purposes binding on the joint family. As regards this sum there is the decision of 'Marappa v. Rangaswami'. 23 Mad 89, before the decision in 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47, that the alienee is only entitled to the share of his alienor and has no further claim on the shares of the other coparceners in respect of the sum for which the alienation was rightly made. This view has been dissented from by Sundara Aiyar and Sadasiva Aiyar, JJ., in a very recent case in 'Vadivelam v. Natesam', 37 Mad 435, and does not so far as I can Judge appear to rest on any sound principle.

It appears to me that the right way of look at it is this: the alienee acquired by the alienation a one-third share of the first defendant in this case. That one-third share must of course be burdened with a one-third of the joint liability of the family for Rs. 414 but there is no reason so far as I can see why the shares of the other coparceners should not similarly be burdened with their proportionate share of the liability and therefore I hold it is binding on them to the extent) of two-thirds of Rs. 414; and in the result that the alienee is entitled to one-third share plus 2/3 of Rs. 414 as a charge upon the shares of the other coparceners."

It is clear that the learned Judge in this case definitely ruled out the decision in 'Marappa v. Rangaswami', 23 Mad 89, as resting on no sound principle. I agree. I have already discussed that case in the course of this judgment and do not propose to say anything more about it. The learned Judge has further accepted 'Vadivelam v. Natesam', 37 Mad 435 as sound law. So far as this view of the learned Judge is concerned, two points have been attempted to be made by the learned Counsel for the respondent. One is that this view rests

upon the same fallacious reasoning as the ruling in 'Vadivelam v. Natesam', 37 Mad 435, I have already dealt with this aspect of the matter and do not propose to say anything more. Mr. Venkatasubramania Aiyar further emphasises the reference to 'Chinnu Pilli v. Kalimuthu', 35 Mad 47, in the course of the passage cited, as indicating a misunderstanding on the part of the learned Judge as to the true scope of the Full Bench ruling and as vitiating his decision as well as the decision in 'Vadivelam v. Natesam', 37 Mad 435.

The learned Counsel contends that while the Full Bench no doubt ruled that the fundamental interest of the alienee of a coparcener is what the co-parcener was entitled to on the date of the alienation in accordance with the number of members then in existence, the Full Bench did not as supposed by the two learned Judges in 'Vadivelam v. Natesam'. 37 Mad 435 and by the single Judge in 'Seetharam Naidu v. Balakrishna Naidu', 26 Mad LJ 604, rule that the fractional interest would attach to any particular item alienated without reference to the stocktaking of the entirety of the assets and liabilities of the family incidental to a general partition.

It does not seem to me that this contention founded on the sentences in the passage quoted namely:

"As regards this sum, there is the decision in 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89, before the decision in 'Chennu Pillai v. Kalimuthu Chetty', 35 Mad 47 that the alienee is only entitled to the share of his alienor and has no further claim on the shares of the other coparceners in respect of the sum for which the alienation was rightly made."

and in particular upon the words:

"before the decision in 'Chinnu Pillai v. Kalimuthu Chetti', 35 Mad 47 in the sentence is well founded.

the real purpose of the reference to 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47 can be gathered from the later part of the judgment of the learned Judge where he observes thus in continuation of the passage already set forth by me; Says the learned Judge:

"I need only allude to the contention which was put forward by Mahadeva. Aiyar that the proportion of the alienee was liable to be affected by subsequent additions to the family. It seems to me that this is Inconsistent with the principles laid down in 'Chinnu Pillai v. Kalimuthu Chetty'. 35 Mad 47."

I am inclined to think that it is only for the purpose of refuting this contention of Mr. Mahadeva Aiyar that 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47, was at all referred to by the learned Judge.

In my opinion, there is nothing in his judgment which suggests that he was minting 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47 to any further effect than that just indicated. If that is so, there is no misunderstanding of 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47, on the part of the learned Judge such as vitiates his reasoning in affirmation of the ruling of Sundara Aiyar and Sadasiva Aiyar, JJ., in 'Vadivelam v. Natesam', 37 Mad 435.

102. the Privy Council decision in 'Masit Ullah v. Damodar Prasad', 48 All 518 is one of the decisions to which I propose to refer in the context of this discussion. That is a decision which Mr. Krishnawami Aiyar drew our attention to in support of his contention that 'Vadivelam v. Natesam' 37 Mad 435, has been referred to with approval by the Privy Council and must, therefore, be accepted. The suit in question in the Allahabad case before the Judicial Committee was one by the son in a Mitakshara family of North West Provinces to set aside a sale by the father of joint family property for Rs. 18,400. Out of this amount of consideration, Rs. 16,400 was proved to have been utilised for payment of the debts of the plaintiff's great grandfather, not illegal or immoral in their nature, Rs. 2,000 was left unaccounted for and the evidence of the plaintiffs' father in regard to how it had been spent having been withheld from the Court the sale was upheld by the Privy Council altogether. The main question in the case was whether or not a Hindu governed by Mitakshara is liable for the

debt of his great grandfather in the same manner as he is liable for the debts of his father or grandfather. The trial Court having answered that question in the affirmative but having found that out of the total

consideration, a sum of Rs. 2,000 had not been accounted for passed a decree declaring that the plaintiff is entitled to have proportionate property released from the sale-deed and only to the extent of his share the High Court on appeal answered the question of law as to the great grandson's liability for debts of the great grandfather in the negative and further found that the plaintiff was not entitled to anything more than Rs. 3,077 which was actually left in the hands of the vendees for payment to certain creditors of his father (defendant) and which had been proved to have been paid to these persons by the vendees. The decretal part of the judgment of the High Court is to be found set forth at page 522 of the report in these terms:

"The result is that, the plaintiff is entitled to a decree directing that he may recover possession of one half of the property specified at the foot of the plaint, subject to payment into Court for the benefit of the defendants-vendees of a sum of Rs. 1,561-2-6."

The amount in question was apparently the plaintiff's share of the binding debt found by the Court. On further appeal to the Privy Council the question of law was answered by their Lordships in the affirmative, that is, in agreement; with the Subordinate Judge and in disagreement with the High Court. Further, it was held by their Lordships on the evidence and probabilities that the sum of Rs. 2,000/- and odd which had been held by the Subordinate Judge to have been not properly accounted for must be treated as proved, because the evidence of the father as to the way in which the amount was utilised was not forthcoming and that raised a presumption against the plaintiff. At the end of the judgment of the Privy Council there is this observation which their Lordships make after answering the question of law and dealing with the question of fact in the manner above stated:

"In their Lordships' judgment, the ruling in 'Vadivelam v. Natesam', 37 Mad 435 does not apply to the facts of this case."

It is contended by Mr. Krishnaswami Aiyar from this that that ruling must be taken to have received the approval of the Privy Council because all that their Lordships have said is that it did not apply to the facts of the case before them, not that it was wrong on principle. While I am not inclined to think this way of looking at the reference by their Lordships to the ruling in 'Vadivelam v. Natesam', 37 Mad 435 can be regarded as conclusively correct, there is no doubt that the Privy Council ruling does certainly seem to support the learned Counsel for the appellant by way of suggesting a 'prima facie' point which must be accepted unless there is any reason to the contrary established.

It certainly is possible to hold from the reference by their Lordships of the Privy Council to the ruling in 'Vadivelam v. Natesam', 37 Mad 435 in 'Masit Ullah v. Damodar Prasad', 48 All 518, that the inference by implication sought to be extracted by the learned Counsel for the appellant from that reference is not by any means unreasonable. Of course, if on its own merits 'Venkatapathi v. Pappiah', 51 Mad 824 is to be preferred to 'Vadivelam v. Natesam', 37 Mad 435, a question with which I shall presently deal, the fact of the reference to 'Vadivelam v. Natesam', 37 Mad 435 by the Privy Council in 'Masit Ullah v. Damodar Prasad', 48 All 518 cannot operate as an obstacle in the way of the respondent; because the reference to 'Vadivelam v. Natesam', 37 Mad 435 in 'Masit Ullah v. Damodar Prasad', 48 All 518, is not in the nature of an express statement of categorical approval, but only a cautious abstention from any pronouncement on its merits, in view of its inapplicability to the facts of the case before their Lordships.

103 Now, therefore, to turn to the question of the merits of the ruling in 'Venkatapathi v. Pappiah', 51 Mad 824 as a question open to consideration untrammelled by anything said in 'Masit Ullah v. Damodar Prasad' 48 All 518 as to 'Vadivelam v. Natesam', 37 Mad 435, it is well to know how exactly the question arose in the later decision of the High Court so far as it is material for the purpose of the present discussion. There was a sale effected by the plaintiff's father of certain joint family property worth about Rs. 2,000, for Rs. 600 of which Rs. 400 was proved to have been utilised for the discharge of debts binding on the family. The argument for the appellant which fell to be considered was that the whole sale was to be set aside on condition of the plaintiff paying to the vendee Rs. 400/- which he was willing to do, instead of the Court upholding the sale to the

extent of the share of the plaintiff's father.

The argument was based upon 'Ranganathan Chetty v. Ramaswami Chetty', 27 Mal 162 but was repelled by the Court (Kumaraswami Sastri and Ramesam, JJ.), Ramesam, J., who delivered the Judgment observing thus:

"But even in 'Ranganatham Chetty v. Ramaswami', 27 Mad 162, what was held was that the transaction could be upheld against the family in respect of the alienator's interest in the joint family property only to the extent of the value received and that if the conveyance had been of a reasonable portion of the joint family property for the discharge of an antecedent debt, the conveyance as such would bind the sons also; but in the circumstances of the particular case it was held that the vendee could not claim the benefit of the sale even as regards the father's share. In that case even if the sale was regarded as a sale of the father's share, the consideration would be grossly inadequate and to give effect to the sale of the father's share would be to evade the principle of Hindu Law that it is not competent to an individual member of a Hindu family to alienate by way of gift his undivided share, or any portion thereof, and this principle cannot be evaded by the undivided member professing to make an alienation for value when such value is manifestly inadequate and inequitable."

Ramesam, J., thereafter proceeds to deal with 'Marappa v. Rangaswami', 23 Mad 89 and 'Vadivelam v. Natesam', 37 Mad 435 as being cases more in point for and more akin to the case before the Court. In which the transaction was upheld as a sale of the alienor's share only, where the consideration was not grossly inadequate if regarded as consideration for the share only. Once again distinguishing the case before the Court from the case in 'Ranganathan Chetty v. Ramaswami Chetty', 27 Mad 162, the learned Judge observes:

"In the present case if the sale is regarded as a sale of the father's share only, as the share was worth Rs. 500/- the sale could not be regarded as for a grossly inadequate consideration and as practically effecting a gift of his share and there is no objection to upholding the sale as one of the father's share only. In this respect the facts of the case before us do not resemble the facts in 'Ranganatham Chetty v. Ramaswami Chetty', 27 Mad 162, but resemble the facts of the other cases mentioned above."

From the rest of the discussion in 'Venkatapathi v. Pappiah', 51 Mad 824 there are two things which become clear. One is that the learned Judges in that case did not accept the decision in 'Marappa v. Rangaswami', 23 Mad 89, as correct in so far as it refused altogether any equity in favour of the refunding of any portion of the purchase money to the vendee found binding on the estate. The other is that the learned Judges equally clearly refused to accept the principle of 'Vadivelam v. Natesam', 37 Mad 435 found expressed at page 438 of the report that:

"It cannot be doubted that a co-parcener is entitled to part with his own share in any family property for any consideration he pleases."

This principle which the learned Judges admit as no doubt correct where the vendor is a divided member, they refuse to accept where the vendor is still a member of the joint family as, if accepted in the latter case as well it would conflict with the statement of law in 'Ranganathan Chetty v. Ramaswami Chetty', 27 Mad 162 where it was observed that:

"The principle that a member of a joint family cannot make a gift of his share cannot be evaded by making a sale for a grossly inadequate consideration and practically making a gift of the property."

The learned Judge therefore holds thus:

"We agree with the observations in 'Ranganathan Chetty v. Ramaswami Chetty', 27 Mad 162 and are inclined to dissent from the observations in 'Vadivelam v. Natesam', 37 Mad 435."

Thereafter, the learned Judges proceed to consider how exactly the equities in the case would have to be worked out consistently with the Full Bench ruling in 'Ranganatham Chetty v. Ramaswami Chetty', 27 Mad 162

with which

They agree. In considering the question they observe next:

"The result would be if the consideration is distributed over all the shares, and if we then try to uphold the sale even as regards the alienor's share, the sale of that share should (not) be for a possibly inadequate consideration. In the present case the sale of the father's share which is worth Rs. 600 at least would be for Rs. 100 which is his one-fourth share of the consideration proved. Looked at from this point of view the sale of the father's share too would be for an adequate consideration with the result that it cannot be upheld on the principles laid down in '27 Mad 162.' In such a case the only equity that can be worked out in favour of the vendee would be to uphold the sale of the alienor's share and to allot the whole of the consideration as consideration for that share. If it is less than the value of the alienor's share no further equity in favour of the vendee arises. If it is more, for the excess a charge may be given for the share of the coparceners."

The learned Judges further point out in this connection that:

"It may be that in such a case where the consideration is found to be binding on the whole family the effect of allotting the consideration wholly to the alienor's share would be to give rise to some equity in favour of the alienor, for the result of such allotment would be to make him bear the whole of the debt, whereas it is a debt really binding on the whole family. If the family is divided, as a result of this transaction it may be that he may file a suit for contribution but if the family continues undivided there is no need for such equity." Finally this is what their Lordships say: "

To sum up three possible cases arise:

(1) Where the whole of the consideration, even after being allotted to the alienor's share only, is grossly inadequate, the whole transaction will have to be set aside making the consideration proved a charge on the family property. That would be a case resembling '27 Mad 162.'

(2) Where the whole consideration is not grossly inadequate and can be regarded as the price of the alienor's share, but is less than the value of such share, the transaction may be upheld as the sale of the alienor's share only and the other members who question the transaction are entitled to recover their share of the property without being subjected to any other equity the case would then resemble 'Marappa v. Rangaswami, 23 Mad 89. In such a case if the members are divided and the alienor leaves other heirs than the members who question the transaction he or his heirs may have a right to contribution.

(3) Where the consideration proved exceeds the value of the alienor's share, the transaction may be upheld as the sale of the alienor's share only and for the excess a charge may be given over the shares of the other members."

104. It will be seen from the foregoing that so far as the first of the rules laid down in the case is concerned there can be no doubt about its soundness the Full Bench in '27 Mad 162' fully supports it : and there has been no reason shown for the appellant why it should not be accepted. It was argued that the matter of adequacy of the consideration for the alienation of a share of the coparcener is a matter of no moment whatsoever to the other coparceners. The ordinary principle that anybody can sell his own property for any consideration he pleases must, it is said, apply to the case of an alienation of a coparcener of his own share in the family property. I am not however prepared to accept this contention. The case in 'Banganatham v. Ramaswami Chetty', 27 Mad 162' has held the field for about half a century and rests on a principle which considering the corporate character of the joint family has never been questioned. In the case contemplated by the rule in question the only equity that can be worked out is 'of the kind indicated therein which is what '27 Mad 162' itself allows for.

105. The real question is as to Rules (2) and (3) and the basis on which they rest. They come in, it will be seen, only where even distributing the binding consideration amongst all the sharers, it is impossible to uphold the

sale as a sale of the alienor's share even on account of the inadequacy of the proportionate part of the binding consideration even for a sale of the alienor's share only. The exact meaning of these rules has given rise to considerable debate before the Court because of some doubt felt by us during the hearing in regard to the meaning of the word 'consideration' employed in more than one place in the formulation of the rules -- as to whether it means the entire consideration named in the deed or the binding part of the consideration. I have carefully pondered over the doubt since reservation of judgment and come to feel on the whole that the meaning of the rules is by no means open to real or serious doubt, whatever their soundness. It seems to me that where the whole consideration is referred to in the rules, that means the whole consideration actually paid for the deed. On the other hand, where the expression used is 'the consideration proved', it obviously refers to the consideration proved to be binding upon the joint family.

106. Rule (2) in my opinion deals with a case in which the whole consideration is not grossly inadequate and the consideration proved to be binding can be regarded as the price of the alienor's share but is less than the value of such share. That the rule should be so read, i.e., by introducing there into the words 'the consideration proved to be binding' -- is clear from two circumstances: one is that then only will the illustration in '*Marappa v. Rangaswami*', 23 Mad 89 referred to in the rule stand justified. The other is that Rules (2) and (3) are converse to each other and Rule (3) uses the expression 'consideration proved' which has contrasted with the expression 'the whole consideration' or 'the whole of the consideration' occurring elsewhere in the formulation of the rules means 'consideration proved to be binding.'

Moreover, from the last sentence of Rule (2) which refers to the right of contribution of the alienor and after his death, of his heirs at a subsequent partition in the family, it is clear that the consideration proved must refer to the consideration proved to be binding as except on the hypothesis of binding character no right of contribution in respect of the amount assigned to the share of the alienor is reasonably conceivable. The rules have been understood in this manner by the learned Subordinate Judge in the Court of trial and the learned District Judge on appeal in the present case and no difficulty has been expressed by them in the matter of understanding the rules on account of vagueness of language. To condemn the rules on the ground of such vagueness and therefore to overrule them, or to refuse to apply one or the other of them in a given case to which one or other is capable of being applied if understood properly is to create an imaginary difficulty where in fact there is none and to do serious injustice to the learned Judges who decided '*Venkatapathi v. Pappiah*', 51 Mad 824.

It is of course a different matter if the rules themselves are unsound if understood in the way mentioned by me and adopted by the Courts below in the present case. Moreover, the rules have been incorporated into *Mayne on Hindu Law and Usage* in the latest as well as the immediately prior editions and it cannot be presumed that they have been mechanically incorporated by the learned editors without satisfying themselves about what is meant by them.

107. Now to analyse the rules so incorporated with reference to the principles on which they rest in order to examine the soundness of their foundation, it is clear that after refusing though not in so many terms to accept the view of the learned Judges in '*Marappa v. Rangaswami*', 23 Mad 89, that no equities ought to be worked out at all, the learned Judges in '*Venkatapathi v. Pappiah*', 51 Mad 824, set about to ascertain the rules for working out the equities in the light of the very considerations of the true value of the share set forth in '*Marappa Goondan v. Rangaswami Goondan*', 23 Mad 89 as grounds rendering such working out impracticable. It is equally clear that they set about the task on the basis of the principle of the Full Bench ruling in '*Ranganatham v. Ramaswami*', 27 Mad 162 FB that the adequacy of the consideration for the sale by a coparcener of his interest is by no means a matter of no moment to the other coparceners. It is also clear that they set about the task after accepting the principle of distribution of the binding portion of the consideration over the several shares consistently with '*Ranganatham Chetty v. Ramaswami Chetty*', 27 Mad 162 and considerations of the true value of the share, but not in the manner contended for by the appellant before us, i.e., as though the shares were like different items of property subjects to a common burden which is liable to be apportioned over them irrespective of the true value of the share alienated as a matter of no

moment to the other coparceners.

The learned Judges set about the task by seeking to assign the entire binding portion to the share of the alienor if it is less than the true value of the alienor's share; and by leaving it to him or his heirs to claim contribution at the subsequent partition; and where the binding portion exceeds the value of the share by recognising a charge over the shares of the non-alienating coparceners for such excess. As already noticed, these rules (Rules 2 and 3 as numbered by the learned Judges) come into operation where, even distributing the binding consideration amongst all the coparceners' shares it is impossible to regard the sale of even the alienor's share as anything but for a possibly inadequate consideration. Where on the basis of such distribution there is no such Inadequacy the sale stands as in respect of the alienor's share.

It will be seen that this is a rather limited mode of working out the equities to favour of the alienee but more consonant to the conception of a coparcenary continuing even after the alienation and even in respect of the share recovered according to '*Kandasami v. Velayudha*', 50 Mad 320:51 Mad L J 99. Although in the first instance in the case contemplated by Rule (2) the burden is thrown entirely on the alienor's share there is the provision made for contribution at the subsequent partition in the family. Then again, in the case contemplated by Rule (3) although not expressly so stated, there is room, I Imagine similarly for adjustment of rights between coparceners arising out of possibly more burden being thrown on the alienor's share in the first instance, at the partition to be later on effected between them. The equities laid down by the learned Judges are such as recognised the principle of continuing jointness between coparceners notwithstanding the alienation without at the same time offending against the rule of partial partition well established in Hindu Law from as long ago as '*Venkatachala Pillay v. Chinnayya*', 5 Mad H C R 166.

These equities commend themselves to me to be better in the sense that they do not go beyond but Conform to the limits set by law to use the language of Lord Blanesaug in '*Nagappa Ohetiar v. Brihadammbal*' 58 Mad 350 at p. 362 (PC). To set about working out equities in the manner laid down in '*Vadivelam v. Natesam*', 37 Mad 435 is in my opinion to revolutionise the Hindu Law by seeking to place the Interest of a coparcener on precisely the same footing as the interest of any absolute owner of property in a manner opposed to fundamental conceptions as to the nature of the interest acquired by an alienee from a coparcener too deep-rooted to be destroyed altogether. Whatever the inroads on the original incidents of joint family holding of property already sanctioned by decided cases in the Interests of alienees who have parted, with consideration or of the personal creditors of a coparcener who has become adjudged an insolvent whether at his own instance or on the petition of a creditor, the right of the alienee remains no more than an equity even according to the latest cases of this Court in '*Krishnamurthi Iyer v. Nataraja Iyer*', 1918-1 Mad L J 430 and '*Subbiah v. Venkateswarlu*', 1948-1 Mad L J 418 and according to the implication of the observation of Sir George Rankin in the Privy Council decision in '*Ramanna v. Jagannadha*', ILR (1942) Mad 886 at p. 892 (PC), referred to earlier in this judgment.

While, that may not forbid working out of equities altogether as already observed, by me in the course of this judgment, the equities to be worked out must be ascertained within the limits set by law and must be conceived not on the basis that the coparceners have become altogether separated 'quo ad' the item which is the subject-matter of the alienation by one of them and of the suit for recovery of his share by the non-alienating coparcener without any need of further adjustments as to that item between them at a later suit for partition in respect of the remainder of the joint family estate but in accord and harmony with the settled principle of continuing jointness of the family, even after such recovery of the share be it as his separate property or private family property with reference to the rest of the property of the family till the jointness becomes disrupted by subsequent partition at which the further equities by way of rights of contribution as between the alienor and his coparceners may be worked out as arising from the result of the suit of the non-alienating coparcener.

The ground apparently on which the burden of the entire binding debt is thrown in the first Instance upon the alienor's share in Rules (2) and (3) in the ruling in '*Venkatapathi v. Pappiah*', 51 Mad 824, is that in alienating

his share for a purpose only partially binding on the joint family property and without the consent of the other members of the family the alienating coparcener has been guilty of something in the nature of bad faith though not in the sense of a breach of trust in the strict sense of the latter expression in relation to the rest of the members of the coparcenary. But at the same time he is not penalised for his conduct in the ultimate result as the assignment or attribution of the binding portion in its entirety to his share leaves him still with his rights of contribution at a subsequent partition between himself and the other members of the family.

108. The learned Judges in the case in '*Vadivelam v. Natesam*', 37 Mad 435, in my opinion, wrought a social reform in the guise of a judicial decision which was not within their province. On the other hand, the learned Judges in '*Venkatapathi v. Pappiah*', 51 Mad 824, have attempted to deal with '*Marappa Goundan v. Rangaswami Goundan*', 23 Mad 89 and '*Vadivelam v. Natesam*', 37 Mad 435, together, by going further than the one but not so far as the other and evolved a formula of compromise or '*via-media*' between the two decisions, in consonance with well-established principles, meeting out justice alike to the alienee and to the non-alienating coparcener. The ruling in '*Venkatapathi v. Pappiah*', 51 Mad 824, holds the scales as even as possible between the two parties without making of equity a principle of unilateral operation.

It is anomalous enough that under the law as it stands, the alienating coparcener is able to realise the full value of his share by an alienation for consideration and continues to enjoy all the same the advantages of a subsisting state of coparcenary between himself and the other members of his family. It is to add another anomaly to the situation to hold as the learned Judges in '*Vadivelam v. Natesam*', 37 Mad 435 held, that the alienee, who acquires only an equity in the sense of a right "subject of course to the equities in favour of the other members of the family against the transferor" to use the language of Kumara-swami Sastri J. in '*Baluswami Iyer v. Lakshmana Iyer*', 44 Mad 605, is entitled to the kind of equitable apportionment laid down by those learned Judges, notwithstanding the unfair and inequitable conduct of the alienor by means of which he obtains an undue advantage over his coparceners. If the coparceners of a joint Hindu family were in exactly the same position as ordinary co-owners or tenants-in-common the position might differ, and well attract the principle at the basis of '*Vadivelam v. Natesam*', 37 Mad 435.

On the one hand, for us to refuse equities altogether on the basis of the ruling in '*Marappa v. Rangaswami*', 23 Mad 89, may be to set the dial back from where it has progressed to in '*Vadivelam v. Natesam*', 37 Mad 435. On the other hand, for us to sanction the working out of the equities in accordance with the later decision will be to sanction the abrupt precipitation of the motion of the clock which the learned Judges in '*Vadivelam v. Natesam*', 37 Mad 435 rather daringly and unwarrantedly promoted. These learned Judges were not right in taking such action and no wonder the learned Judges in '*Venkatapathi v. Pappiah*', 51 Mad 824, disapproved of the decision reached in the earlier case.

These learned Judges after taking note of the Pull Bench ruling in '*Ranganatham Chetti v. Ramaswami Chetti*', 27 Mad 162. contravened by the learned Judges in '*Vadivelam v. Natesam*', 37 Mad 435, after recognising the principle of distribution of the binding portion of the consideration over all the shares, given effect to by the learned Judges in '*Vadivelam v. Natesam*', 37 Mad 435, in disregard of the considerations as to the true value of the property alienated adumbrated in '*Marappa v. Rangaswami*', 23 Mad 89, only to be rejected for no valid reason, laid down the three rules for working out the equities in favour of the alienee in a sufficiently just and practical manner calculated to satisfy the claims of the alienee as well as of the non-alienating coparceners. I do not consider the mere simplicity of a formula for working out such equities like the one laid down in '*Vadivelam v. Natesam*', 37 Mad 435, to be sufficient virtue in itself to attract my judgment. If it were, there would be that virtue even about the ruling in '*Marappa v. Rangaswami*', 23 Mad 89.

I consider that, however lacking in the simplicity of the ruling in '*Marappa v. Rangaswami*', 23 Mad 89, or the ruling in '*Vadivelam v. Natesam*', 37 Mad 435, we ought not on that ground to discard the view of the learned Judges in '*Venkatapathi v. Pappiah*', 51 Mad 824, whose names are not a whit less illustrious than those of the learned Judges responsible for the decision in '*Vadivelam v. Natesam*', 37 Mad 435, especially when that view

is the only possible view in harmony with binding precedent as well as the surviving basic principles of the holding of property by the joint Hindu family of the Mitakshara school after all the inroads on it which decided cases of binding authority have made. To add one more to the list of such inroads which has the effect of further assimilating the share of the coparcener in joint family property to any ordinary, separate property possessed by a person in co-ownership with another so as to destroy the basic distinction between the two kinds of property is a feat from which I shrink with this inevitable conservatism of judicial outlook, which is part of my constitution.

It may be that the progressive conditions of modern Hindu society do require relaxation of some of our ancient rules of law. It may be that some of us do sometimes feel that the share of a member of a joint Hindu family should become much more of a fluid asset than it is at the present day in the interests of commerce and business, in the interests of social as well as individual prosperity I am afraid, however, I cannot share the view of my learned brother Viswanatha Sastri J. that there will not be many to shed a tear over a conclusion which deals a further blow to the tottering joint family structure. I, for one, am an ardent admirer of the Mitakshara joint Hindu family system with the innumerable virtues which it enshrines and cannot witness such a blow except in a spirit of genuine concern, whatever that may be, any change in the law can come in through judicial decisions only within limits which govern Courts and for anything beyond must come in by way of legislation.

The question for the Court in such a case, to use the language of the Privy Council in 'Lakshman v. Ramachandra', 5 Bom 48 at p. 62 is not so much whether an admitted principle shall be carried out to its apparently logical consequence as what are the limits of an exceptional doctrine established by modern jurisprudence. The doctrine of equity in favour of an alienee from a coparcener can never in my opinion, however much extended already by judicial decisions, be further extended so as to lay the axe at the very root altogether of the nature which a coparcener holds in the joint family estate. 'Vadivelam v. Natesam', 37 Mad 435 sought to so extend the equity.' 'Venkatapathi v. Pappiah, 51 Mad 824, discountenanced the attempt. A regrettable feature of the situation perhaps is that the learned Judges in the latter case did not then and there refer the question on which they differed from the earlier decision to a Pull Bench for determination.

Anyhow, now, as the question has come up for determination, I prefer the latter decision to the earlier and while recognising, in disapproval of the ruling in 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89, that equities have to be worked out in favour of the alienee from a coparcener with reference to the binding portion of the consideration on cancellation of the alienation at the instance of the non-alienating coparcener, I prefer to have the equities worked out in accordance with the rules laid down in the later decision rather than in accordance with the rule laid down in the earlier. It is significant to note that although 'Vadivelam v. Natesam', 37 Mad 435 was referred to in Coutts-Trotter's edition of Mayne on Hindu law and Usage, the reference has been removed from the edition of Srinivasa Aiyangar, even as it is not to be found in the latest edition of Chandrasekhara Aiyar J.

The view of law that I am taking may not perhaps look like quite as logical as the view of the learned Judges in 'Vadivelam v. Natesam', 37 Mad 435. But that decision went to one extreme even as 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89, had ' remained at the other extreme. Either of these decisions might be more logical in the abstract than the decision in 'Venkatapathi v. Pappiah', 51 Mad 824. But after all, it is not abstract logic that so much matters in cases of this kind as the logic of relative consistency between decisions on the same or similar topics. I hold that the balanced and poised view of the learned Judges in 'Venkatapathi v. Pappiah', 51 Mad 834 savouring, it may be, of the mathematical bent of mind of one of them and founded, undoubtedly, in the instincts of a sober and healthy outlook, neither unduly progressive nor unduly conservative, characteristic of both of them meets the requirements of the situation with which we are dealing in a manner' most consonant to considerations of law as well as equity.

To the process of working out of equities as laid down in 'Venkatapathi v. Pappiah', 51 Mad 824 it is difficult to see what just exception the alienee can take. Where the binding part of the consideration is either equivalent

to or less than the value of the share of the alienor he cannot have any cause of complaint. Where it exceeds he gets a charge for the excess over the share or shares of the other member or members.

109. If the binding consideration is the basis on which the question of equities in his favour is to be considered according to 'Venkatapathi v. Pappiah', 51 Mad 824, how can he complain of it when that is the only basis on which the validity of the alienation in his favour is itself to be considered, where there is no consent to the alienation proved on the part of the other members of the family? After all, the alienation is that of the coparcener's interest in the Joint family which ordinarily cannot be disposed of except for fully binding consideration or with the consent of all other members of the family. The alienee acquired that interest, no more, and no better, for the value which he pays. Where that value happens to exceed the binding portion of the consideration he has only to thank himself if it turns out eventually that he has paid more than he ought to have paid for the share which is all that he bargained for and which he ought not to have bargained for at all except on the basis of consent of the other coparceners or on the basis that all that he is paying is for purposes binding on the family.

It is only a qualified estate that a coparcener owns and possesses and no alienee from him can claim equities so as to convert it into an unqualified estate. There are limitations attached to it as inherent incidents and the coparcener cannot alienate nor the alienee acquire more than the limitations warrant, such limitations exist in the case of a widow and daughter in what is not her stridhanam property and neither there nor here can any Court destroy them or do away with them, however unpalatable they may be. The fact of payment of consideration which is of the essence of the equity invocable by the alienee can only justify the working out of equities consistently with the limitations attaching to the estate conveyed.

If no Court can destroy or do away with such limitations directly, neither can it destroy nor do away with them indirectly under the guise of working out of equities. No Court has the power to enlarge an estate beyond the limits set by law and if the equities worked out consistently with such limits still leave the alienee in the position that he is not thereby getting the full 'quid pro quo' for the consideration paid by him, he has of course his remedy under the ordinary law for damages for breach of covenant for title, where the covenant exists as usually it does. Where, however, the covenant stands excluded by the terms of the bargain between the parties he has only to please himself with what he gets as a result of the working out of equities according to the rules in 'Venkatapathi v. Pappiah', 51 Mad

824.

110. I may also mention in this connection that there is to be found in '27 M L J', notes of Indian cases at page 62 a learned note expressing preference of 'Marappa Goundan v. Rangaswami', 23 Mad 89 to Vadivelam v. Natesam', 37 Mad 435 and setting forth grounds for the preference. Although for the reasons given by me in the foregoing, I cannot accept '23 Mad 89' as sufficiently meeting the requirements of equity in favour of an alienee for consideration it seems to me to use the language of the learned Editors, that from their tenderness to purchasers and creditors Courts have proceeded sufficiently far in derogation of the rights of coparceners that they may properly be asked to halt and consider whether it is right to remove altogether, what seems to be a desirable check on a disposition on the part of speculative persons to enter with some coparceners into transactions calculated to affect the rights of other coparceners who are not parties thereto which the learned Judges in '23 Mad 89' had in mind. 'Venkatapathi v. Pappiah'. 51 Mad 824. preserves the check not in the wrong manner laid down by '23 Mad 89', i.e., by refusing equities altogether but in the right manner best calculated to reconcile the interests of the alienee as well as the other coparceners, i.e., by working out the equities 'in the limited manner and measure sanctioned by its three rules. I accordingly accept it.

111. Considerations of equity are sometimes apt to mislead Courts and deflect them from the proper path of law. That happened for instance in the case in 'Govindu v. Venkatapathi', ILR (1947) Mad 105, where Leach C. J. delivering the judgment of the Court consisting of himself and Lakshmana Rao, J., in a case which related to

the validity of an alienation by a limited estate holder like a Hindu widow held thus :

"where owing the lapse of time it is impossible to produce evidence of necessity in support of an alienation by a Hindu widow or evidence of enquiry by the alienee and there is no ground for suspecting abuse by the widow of her power to alienate for a necessary purpose, we consider that the cases quoted (noticed above in this judgment) provide ample authority for the Court disregarding the ordinary rule of Hindu law and drawing an inference in favour of the validity of the alienation. In such circumstances, it would be unreasonable not to recognise an exception to the rule; otherwise grave injustice might result."

This view of the learned Chief Justice and Lakshmana Rao J. has been since overruled by a Pull Bench of this Court consisting of the present Chief Justice, Satyanarayana Rao and Viswanatha Sastry JJ. 'Subbamaniah v. Sooraya', ILR (1950) Mad 1053, Viswanatha Sastri J. in his judgment observes:

"In our opinion, it is not permissible for us to convert a rule of evidence into a rule of substantive law. Lapse of time does not alter the incidence of the burden of proof nor does it dispense with evidence direct or circumstantial, to prove justifying necessity for an alienation by a limited owner under the Hindu Law."

Equity ought never in my opinion to be pressed into service for over-stepping the limits set by law.

112. To sum up now the several conclusions reached by me on this part of the case:

1. 'Marappa v. Rangaswami', 23 Mad 89 cannot be accepted as good law in so far as it refuses equities altogether to the alienee in the suit for partial partition by the non-alienating coparceners;

2. 'Vadivelam v. Natesam', 37 Mad 435 cannot be accepted as good law in so far as, while rightly sanctioning the working out of equities in such a case, the rule adopted by it for the purpose is one opposed to fundamental conceptions pertaining to the nature of a coparcener's interest in the family estate as well as to the nature of the right which the alienee acquires;

3. 'Venkatapathi v. Pappiah', 51 Mad 824, must be accepted as good law as sanctioning the working out of equities in accordance with such fundamental conceptions and within and only within the limits set by law.

113. These conclusions I have reached, bearing in mind and applying to the case on hand the principles embodied in propositions Nos. 1 to 9 formulated in an earlier part of this judgment. After reaching these conclusions. I have also anxiously considered whether I should differ from my learned brothers on what may seem to be a point of practice and procedure, the proper mode of working out of equities in favour of the alienee from a coparcener where the alienation is only partially supported by binding consideration. I have finally made up my mind to differ for the reason that the point is so much mixed up with principles of substantive law that if I differ I do, differ I must.

114. I may mention two points of relatively subsidiary importance before I close my treatment of this part of the case. One is that both the rulings in 'Marappa v. Rangaswami', 23 Mad 89 and 'Venkatapathi v. Pappiah', 51 Mad 824, are shown side by side with each other in Mayne on Hindu Law and Usage in the present edition as well as in the edition immediately prior to it. It is started first at page 508 in paragraph 407 of the latest edition:

"Where an alienee stands by an alienation which is only partially binding he must be content with the alienor's share. If he wishes to repudiate the transaction altogether his 'only' remedy is by a suit against the vendor for the return of the price paid on the ground that the consideration for the same has failed." In the same paragraph it is further stated: "When an objection is made to set aside the alienation the following rules of the Madras High Court in 'Venkatapathi v. Pappiah', 51 Mad 824, are applicable."

The rules are thereafter stated. From the juxtaposition of the two passages quoted, without notice of any conflict between them it may appear that the remedy suggested to the alienee in 'Marappa v. Rangaswami',

23 Mad 89, Is one which coexists with the remedy by way of working out of equities, as laid down in 'Venkatapathi v. Pappiah', 51 Mad 824. I wish to make it clear that in my opinion that is so, notwithstanding the difficulty created by the word 'only' underlined (here quoted) by me in the first passage. It is only in the sense that equities were refused altogether to the alienee against a non-alienating coparcener by the ruling in 'Marappa v. Rangaswami', 23 Mad 89 where he chose to stand by the alienation that it must be taken that the ruling in 'Marappa v. Rangaswami', 23 Mad 89 is no longer in my opinion good law. The remedy of a suit against the vender for the return of the price paid on the ground of failure of consideration in the case of total repudiation of the transaction by the non-alienating coparcener stands altogether unaffected by the ruling in 'Venkatapathi v. Pappiah' 51 Mad 824.

The remedies are alternative and it is open to the alienee to choose the one or the other as he pleases. If it is a question of working out of equities as I have already said that must be in accordance with the ruling in 'Venkatapathi v. Pappiah', 51 Mad 824, which I consider to be correct and not in accordance with the ruling in 'Vadivelam v. Natesam', 37 Mad 435, which I consider to be wrong.

115. The other subsidiary point with which I propose to shortly deal is as to the effect of Section 44 of the T. P. Act, (as amended in 1929, by the omission of the words 'Hindu or Buddhist' In the concluding part of Section 2 of the T. P. Act) on the right of mesne profits which under well-settled decisions of this Court stands denied to an alienee from a coparcener. It is the opinion of Mayne on Hindu Law and Usage in the latest edition as well as the edition immediately prior thereto (Vide para 391, p. 493 of the latest edition) that the result of the amendment of the Act in 1929 is that :

"While the transferee of a share of a dwelling house belonging to an undivided family is not entitled to joint possession, the transferee of a share of other immoveable property is entitled to joint possession and enjoyment; he would be tenant-in-common entitled to mesne profits if he is kept out of possession."

As pointed out by my learned brother, satya-narayana Rao J., in his judgment, this opinion has not been followed in this Court by Chandrasekhara Aiyar J. in second Appeal No. 940 of 1945 or by Tyagarajan J. in Second Appeal No. 2339/45 and 95/46 or in the Letters Patent Appeal decided by Horwill & Balkrishna Aiyar JJ. against the latter decision in affirmance of the view of Tyagarajan J. The view expressed by Mulla in his commentary on the T. P. Act (3rd Edn.) which has been followed in these decisions for the reasons given therein is in my opinion preferable to that expressed in Mayne on the Hindu Law and Usage.

116. There remains for treatment only the question of the effect of a coparcener's adjudication in insolvency and the administration of his share of the family estate by the Official Receiver upon the decision of this case. The way in which argument was framed by the learned counsel for the respondent on this point has been set forth by me in a very early part of this judgment as I observed there, the question does not strictly arise for determination in this case because of the allegations in the plaint of a continuing jointness between the plaintiff and the first defendant down to the date of suit. What I am saying therefore on this question is bound to be 'obiter' even as what this Bench saying on the question as to the proper mode of working out of equities is bound to be. Since on this question also the other members of the Court have expressed their opinion it may not be out of place for me to say just a few words of my own on this question.

117. The point which Mr. Venkatasubramania Aiyar sought to make is that with the crystallisation of the share of a coparcener on his adjudication for separate treatment by the Official Receiver or Official Assignee, there is an automatic severance of statute which comes about in the family. Partition, says learned counsel, is as defined by Mitakashara and other relevant texts "the adjustment of diverse rights regarding the whole (of the joint estate) by distributing them over particular portions of the aggregate". Therefore, as in the case of an unilateral declaration by a coparcener of his intention to become divided so, according to Mr. Venkatasubramaniam, there results irrespective of any such violation on the part of the coparcener a fixation of his right on insolvency.

It is absolutely beyond doubt that the ancient texts on Hindu Law never contemplated any such situation as of

insolvency or any such results as of severance. I respectfully agree on this question with all that has been said by my learned brothers in their Judgments. Their treatment of the question is so exhaustive and their conclusion is so obviously sound to my mind that I reckon it to be a sheer waste of judicial time to seek to add one single further word of my own to their judgments.

118. In the result, I agree with the decree proposed by my learned brother, Satyanarayana Rao J.

Panchapakesa Ayyar, J.

119. I have gone through the judgments of my learned brothers and am in agreement with them that this second appeal should be allowed with costs throughout and the respondent made to pay half the binding debt (Rs. 3,511/-) as a condition precedent for recovering his half share in the property alienated by his father, P.w. 1, before his insolvency, and for claiming mesne profits, and that the rule in 'Vadivelam Pillai v. Natesam Pillai', 37 Mad 435 should be applied, in preference to the rules in 'Marappa Goundan v. Rangaswami Goundan'. 23 Mad 89 and 'Venkatapathi v. Papiah Nayakar', 51 Mad 824 but subject to the application of the rule in 'Ranganathan Chetty v. Ramaswami Chetty', 27 Mad 162 as it is too well settled to be disturbed new and as it also, according to me, embodies the simplest and most easily workable rule of sound equity and justice.

I am also of opinion that even apart from the ruling in 'Vadivelam Pillai v. Natesam Pillai', 37 Mad 435, the scope of this suit, a partition suit brought by the respondent for getting his half share in the entire remaining family properties divided and delivered to him allowing the appellant alienee to retain the father's half share in the alienated properties, is wide enough to work out the equity of the alienee under the Hindu Law, as a purchaser for value from an undivided coparcener, in this suit itself, by stepping into his alienor's shoes and working out his right to get his share partitioned, and give him the relief regarding half the binding debt discharged by executing the sale-deed in his favour. I am also convinced that the insolvency of the father and the administration of his interest in the joint family properties by the Official Receiver did not effect a severance in status between father and son and make this suit in consequence not a suit for partition.

In view of the Importance of the matter, I wish to add a few words on some aspects of the 'general and particular arguments so ably and vividly addressed to us by Mr. Venkatasubramania Iyer for the respondent. His arguments were a passionate plea to set aside the rule in 'Vadivelam Pillai v. Natesam Pillai', 37 Mad 435 on the ground of alleged error, inconsistency with the law laid down by the 'Mitakshara' and in the ruling in 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89 and 'Venkatapathi v. papiah nayakar', 51 Mad 824 and its inequity, and also to rule that the suit would not amount to a general suit for partition, allowing of the equity to be worked out apart from the rule in 'Vadivelam Pillai v. Natesam Pillai', 37 Mad 435 as the insolvency of the father and the administration of his interest in the joint family properties by the Official Receiver had effected a severance in status, leaving no more scope for partition or equity. After listening to his arguments with great attention and respect, I am unable to agree with them.

120. There is no doubt whatever in my mind that a private purchaser from an undivided Hindu coparcener in Madras, Bombay and Madhya pradesh (old Central Provinces and Berar) gets not merely a right in 'personam' or a right to sue, as urged by Mr. Venkatasubramania Iyer, but a, tangible property right, whether in law or equity it does not very much matter, a right which, according to settled decisions which it is too late to question or disturb, does not disappear at the death of the alienating coparcener (See 'Bhagwan Bhau v. Krishnaji', 44 Bom 967 and 'Ramappa v. Yellappa', 52 Bom 307 and which gets fixed at the alienating coparcener's estimated fractional share in the joint family properties at the time of the alienation as it were crystallising it as on that date 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47 FB and 'Dharma Rao v. Bapanayya', 1941-1 Mad LJ 15.

In a very early case, 'Viraswami Gramani v. Ayyasami Gramani', 1 Mad H C R 471, quoted with approval by the Privy Council in 'Suraj Bansi v. Sheo Prasad', 5 Cal 148 PC, this Court decided, on the basis of an equity not recognised by the 'Mitakshara' but Invoked by Coletorooke, Ellis and Strange, that in the Presidency of

Madras one coparcener may dispose of his ancestral undivided estate even by contract and conveyance to the extent of his own share and a 'fortiori' that such share may be seized and sold in execution for his separate debt. This equity is, in my opinion, not altogether undeducible from Hindu Law and need not be wholly attributed to English Law, an alien system, as urged by Mr. Venkatasubramania Iyer. Equity was well-known to Hindu sages who put "swasya cha priyamatmana:" (what is approved by one's conscience, literally, what is acceptable to one's soul), as a source of law along with the 'Sruti. Smriti and sadachara:' (Vedas', 'Sastras' and valid custom.) (see Manu. II 12; Yajnavalkya 1. 7 etc.)

Hindu sages wanted equity to step in, in order to render justice where the text of the 'sastra' would operate to bring about inequity, Brihaspati's text (quoted in 'Vyavaharanirnaya of Varadaraja' and other books) runs:

KEVALAM SASTRAMASRITYA NA KARTAV-YOHI NIRNAYA; YUKTIHINE VICHARETU DHARMAHANI: PRAJAYATE., (The decision should not be based only on the 'sastras.' By an inequitable judgment there is permanent loss of 'Dharma.')

121. Nor is Hindu Law devoid of examples of change of law for equitable considerations, despite texts, even Vedic texts, to the contrary. Thus, a Vedic Text by describing women as "nirindriya" (devoid of the necessary limbs), was sought to deprive women of all right to property by giving it the meaning "impotent" and quoting the well-known text "Anansaukliba patitan." But, Varadaraja and others got over this property disqualification by giving an equitable interpretation to the word "nirindriya" and making it merely a disqualification to receive a share in the 'soma juice' in a certain sacrifice. Emperor Dushyanta seems to have been responsible for giving posthumous children in the womb a share at partition, out of equitable considerations, enunciating the equitable doctrine, "The King stands as the father of all unborn posthumous children."

122. The reverse also happened sometimes. Vyasa said categorically: (See Viramitrodaya): STHAVARAM DVIPADAMCHAIVA YADYAPI SVAYAMABJITAM SAMBHUYASUTAN SARVAN NA DANAM NACHA VIKRAYA : YE JATA YEPYA JATASCHA YE CHA GARBHEVYA-VASTHITA: VRITHIM CHA TEBHIKAM-KSHATI NA DANAM NA CHA VIKRAYAM." (Though immoveables and bipeds (slaves or serfs attached to land are meant) have been acquired by a man himself, a gift or sale of them should not be made without consulting all the sons. They who are born and they who are yet unbegotten and they who are still in the womb require the means of support. So, no gift or sale of these should be made.) But this rule has been abrogated, though quoted both in the 'Mitakshara' and the 'Dayabhaga', for equitable reasons, regarding self-acquired property, on the ground that it is a mere religious and moral injunction and merely recommendatory, and not a rule of positive law, and mandatory, and that Yagnavalkya's text permitting such gift or sale will prevail.

123. Manu treats sale without ownership as theft, and such a sale, if made secretly (say, without the knowledge of the other coparceners) will increase the presumption of guilt. The seller of immovable property who did not give possession to the purchaser, after receiving the consideration from him, was held liable for punishment like a thief, and the purchaser was given compensation in money or in equivalent property (See Texts of Manu, Brihaspati, Katyayana, Sankha and Vyasa, quoted in 'Vyavaharanirnaya' of Varadaraja, pages 274 and 277 Adyar Edn. 1942, edited by Professor K. V. Rangaswami Aiyangar). The equity given by Colebrooke, Ellis and Strange, and by our courts, to the purchaser from an undivided coparcener, whether of entire interest or his interest in a specified item or the whole of a specified item, can easily be fitted in with the equity given by Brihaspati, Katyayana, Sankha and Vyasa, as it is only compensation in money or in equivalent property in a suit for partition or partial partition. The imperfect alienor is made to give over his right of partition to the alienee for value and repair the damage just as the raper or seducer of a woman in Hindu times was made to repair the damages by marrying her in 'Rakshasa and 'Paisacha' forms. So, I see no violent departure from ancient Hindu Law principles in granting this equity.

Indeed, an ancient and vigorous law, like Hindu law, existing for at least three thousand years continuously, must, it is obvious, change from time to time in some way for adjusting itself to changing times and conditions to meet the needs of a progressive society. The sages recognised this, as is shown by Parasara's

famous verse:

'Krite tu manava dharmastretayam Gautama: smrita; 'Dwapara Sankha Likshita; Kalau parasara smrita:" (Parasara I. 24) (In the 'Krita' age the 'Dharmasastra' of Manu, in 'Treta' age that of Gautama, in 'Dwapara' age the 'Dharmasastras' of Sankha and Likshita, and in 'Kali' age the Dharmasatra of Parasara shall be followed.)

124. It will be a mistake to regard Hindu Law as static and unprogressive, as some western historians do. It has always been changing with the changing times though imperceptibly so far, like the waters of the Ganges or the stones of the Himalayas. The recognition of the purchaser's equity was necessitated by the paramount need to enable undivided coparceners to raise money on their undivided shares, and get a good value for sale of such shares, by giving them "specific, existing and definite" rights (recognised in 'tupzool hussain khan v. raghoonath prasad', 14 Moo Ind App 40, in the joint family properties when making such purchases,

125 I consider the rule in 'Vadivelam Pillai v. Natesam pzzlai', 37 Mad 435 to be more simple and workable and not less equitable than the rule in 'Mabappa Goundan v. Rangaswami Goundan', 23 Mad 89 or the somewhat extended rule in 'Venkatapathi v. Papiah Nayakar', 51 Mad 824. When a non-alienating coparcener's right to sue for his share in an alienated item (leaving the alienating coparcener's share in that item with the alienee) is recognised as in 'Venkatachala v. Chinnayya', 5 Mad H C R 166, 'Iburamsa Rowther v. ThiruVenkataswami'. 34 Mad 269. Ramasubbayya v. Ganapatiraju', ILR (1940) Mad 405 etc., and a right of partial partition virtually conceded to him, I do not see any inequity in allowing the alienee his equity regarding the share of the binding debt due by the non-alienating coparcener in that partial partition suit itself. What is sauce for the gander ought to be sauce for the goose too! The Hindu texts mentioned above allow of both compensation in money as well as equivalent' property in all such cases of sale without proper and. full title. There is no reason in law or equity to throw the entire binding debt on the alienating coparcener's share, as the decisions in 'Mabappa Goundan v. Rangaswami Goundan', 23 Mad 89 and 'Venkatapathi v. Papiah Nayakar', 51 Mad 824 virtually do.

I cannot see how a purchaser for value, like this appellant, can be termed a 'volunteer" in the best known sense of that term namely, a person who has paid no consideration. Nor is he a person who never intended to buy what no claims, like a man buying a widow's estate claiming the reversion. Nor is he a man volunteering to buy what he knows to be against law, like a man buying the High Court building even for consideration from a High Court peon or gardener, or buying some property from a lunatic or ignorant 'purdhanashin' guardian of a minor, even for consideration, after using undue influence or fraud. It is also significant that in 'Venkatapathi v. Papiah Nayakar', 51 Mad 824, the purchaser is given, under proposition three, some more equity in such partial suit than in 'Marappa Goundan v. Rangaswami Goundan', 23 Mad 89. I agree with my learned brothers Satyanarayana Rao and Viswanatha Sastri, JJ. that the three propositions laid down by ttamesam, J., in 'Venkatapathi v. Papiah nayakar', 51 Mad 824 are not capable of being given definite meanings without doubts and misgivings, as the word "consideration" has been used by Ramesam, J., in two senses, namely, the entire consideration named in the deed and the binding part of that consideration.

So I am for adopting the rule in 'Vadivelam Pillai v. Natesam Pillai', 37 Mad 435, laid down by two eminent Hindu Judges and followed In so many later rulings of this Court by other eminent Judges, once for all, and also the rulings in Ayyagari Venkataramayya v. Ayyagari ramayya', 25 Mad 690, 'Chinnu Pillai v. Kalimuthu Chetty' 35 Mad 47 FB. and 'Dharma Rao v. Bapanayya', 1941-1 Mad L J 15 subject to the rule in 'Ranganathan Chetty v. Ramaswami Chetty', 27 Mad 162, prohibiting gifts to pass off in the guise of sales for nominal amounts, in preference to the rulings in 'Marappa Goundan v. Rangaswami Goundan", 23 Mad 89 and 'Venkatapathi v. Papiah Nayakar', 51 Mad 824.

126. Mr. Venkatasutaramania Iyer urged that the principle of 'stare decisis' should not be applied in this case as the rulings in 'Vadivelam Pillai v. Natesam Pillai', 37 Mad 433, 'Ayyagari Venkataramayya v. Ayyagari Ramayya', 25 Mad 680; 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47 PB and 'Dharma Rao v. Bapanayya', 1941-1 Mad L J 15 are wrong and inequitable. I do not consider them to be wrong or inequitable. I may also

say that, the principle of 'stare decisis' will apply even if they are wrong. The Privy Council has in 'Brij Narain v. Mangala Prasad', 46 All 95 said:

"In such a matter as the present, it is above all things necessary as 'stare decisis', not to unsettle what has been settled by a long course of decisions,"

In law, as in custom, 'certainty and 'long observance' are of far greater importance than 'logicality' or 'abstract equity.' Even Hindu Nyaya. Sastras recognise this principle under the doctrine of 'Visha Vriksha Nyaya (Poison tree argument) which is stated as follows:

"Even a poison tree planted by oneself should not be cut down after it has taken root and has been enumerated."

For that reason, I am not for following the ancient and abandoned course of the stream of law represented by the decisions in 'Rangaswami v. Krishnayyan', 14 Mad 403 and 'Muthukumara v. Sivanarayana', 56 Mad 534 (which have greater logicality and abstract equity) and the supporting observations in 'Venku Reddi v. Venku Reddi', 50 Mad 535 and I am for following the new and current course of the stream of law represented by the rulings in 'Chinnu Pillai v. Kalimuthu Chetty'( 35 Mad 47 and 'Dharma Rao v. Bapanayya', 1941-1 Mad L J 15 as laying down the present law on this point. Decisions followed uniformly for three decades like 'Chinnu Pillai v. Kalimuthu Chetty', 35 Mad 47 do not deserve to be disturbed.

127. I agree with my learned brothers that the purchaser from an undivided 'Mitakshara' coparcener in this State does not become a tenant-in-common with the non-alienating coparceners and is not entitled to joint possession with them or to get mesne profits from them, despite the omission of the word "Hindu" from Section 2 of the Transfer of Property Act, making Section 44 of that Act applicable to the Hindus as well. I agree with the reasons given by my learned brothers Satyanarayana Rao and Viswanatha Sastri, JJ., for that, and have nothing to add.

128. I am clearly of opinion that the frame of the suit brought by this respondent is ample enough to allow of the purchaser's equity being worked out in this very suit, the respondent made to pay half the binding debt as a condition precedent for recovering his half share in the properties alienated to the appellant and the mesne profits on that half-share. The pleadings show that it is a general suit for partition, and the suit is filed on the basis of non-division between the respondent and his father on the date of the suit. The respondent also examined his father, as P.W. 1, to prove non-division between the two till the date of the suit. The plaintiff has not been amended. And I cannot also conceive of permission being: given to amend the plaintiff at this stage. Besides, the alienation in favour of the respondent was before the father's insolvency, and neither the subsequent insolvency of the father nor the administration of his interest in the family properly by the Official Receiver will have the effect of severing the father's interest from the respondent's interest.

129. The analogy of conversion of a coparcener to Islam or Christianity effecting a severance In a Hindu Joint Family without agreement or unilateral consent, and indeed against the will of one and all the members, was relied on by Mr. Venkatasubramania Iyer to show that even adjudication in insolvency will effect a similar severance, as agreement and consent, even unilateral, is not needed to effect severance. He relied also on the Observations of the Privy Council in 'Venkata-pathiraju v. Venkatanarasimharaju', ILR (1937) Mad 1 P C:

"A division of right, of severance of the joint status, may result, not only from an agreement between the parties but from any act or transaction which has the effect of denying their shares in the estate, though it may not partition the estate."

I agree with my learned brothers satyanarayana Rao and Viswanatha Sastri, JJ., that the phrase "any act or transaction" in that passage has reference only to an act or transaction of the parties, such as the expression of an intention to become divided, the institution of a suit for partition, the execution of a document with the necessary recitals etc., all involving an expression of "buddhivishesha" (the exercise of the will of a coparcener),

and that it has no reference to acts of purely third parties like an attachment or Court sale of a coparcener's interest or his adjudication in insolvency.

It may well be said that a Hindu can never become a member of a joint family by mere consent and can never leave it without consent. Conversion effects a severance of the convert from the joint family only by virtue of Act XXI of 1850 removing the Hindu Law disqualification from inheritance regarding a convert who was regarded as a dead in Hindu law, obsequial ceremonies being performed for him, and he given no share at all. and the decision of the Privy Council in 'Abraham v. Abraham', 9 Moo Ind App 195 PC, comparing the situation arising from 'conversion to one arising from partition. It may also be noticed that in this case an Implied consent of the converted coparcener and the unconverted ones to partition may perhaps be with some strain inferred, as the unconverted ones will not be willing to have common mess, dwelling and worship, the essence of a Hindu joint family, with the converted man. In insolvency, however, there is no such implied consent, or impossibility of having common mess, dwelling and worship. Shakala says:

"EKAPAKFNAVASATANEMEKAM DEVARCHANAM GRTHE VAISVADEVAM TATHAIVAIAKAM VIBHAKTANAM GRIHE GRIHE." (Those who live in the same mess, have one worship and one fire likewise in their home are coparceners. Separated coparceners have got separate worship and fire in each house.) (Shakala, quoted in the 'Mayukha'.)

130. It is not necessary for a Hindu Joint family to have any property (See 'Janaktram v. Nagamoney', 49 Mad 98. Hindu sages did not say anything about insolvency perhaps because there were no provisions in those days for insolvents being adjudicated and protected and their available assets distributed. The equity rule has been extended by, modern Courts for the benefit of the insolvent and his creditors as to purchases from an undivided coparcener. For the reasons given in detail in the judgments of my learned brothers Satyanarayana Rao and Viswanatha Sastri, JJ., with which I fully agree, I am satisfied that neither adjudication as an insolvent nor administration in insolvency effects a severance of the joint family status of the insolvent 'vis-a-vis' the other coparceners. No decision has ever laid down like that. All decisions proceed on the footing that no severance of joint family status takes place by insolvency or administration in insolvency.

Mr. Venkatasubramania Iyer urged that the adjudication or at least the administration in insolvency effected a change from the common right of the insolvent to the 'Dravyasamudayam (Collective wealth) into a crystallised separate right to a share (Ekadesavyavasthapana mentioned in the Mitakshara) and so effected a severance. But, as pointed out by my learned brothers, Satyanarayana Rao and Viswantha Sastri, JJ., the 'Ekadesavyavasthapana' of the Mitakshara obviously refers only to an actual partition of the properties by metes and bounds, or heaps and shares, and not to any division by status. Besides, what is to happen in the case of the adjudication as insolvent of a coparcener of a joint family owning or holding no property? What about the unattachable properties not vestable in insolvency in the Official Receiver like trust properties, properties exempt under Section 60 C.P.C., etc? Indeed, even the very able argument of the learned counsel for the respondent in this 'respect' is like the argument on a hopelessly untenable' point referred to in the 'Nyaya' books, where no sooner is one objection met than two more appear and where the argument is compared to a well dug in sandy soil where the sides will always be falling in.

131. In this case, happily, there is no difficulty in working out the equity as there are no other family debts or liabilities proved, and there is no increase or decrease even in the number of the coparceners, and only the debt of Rs. 7,022/- has to be divided into two. and the plaintiff made to pay his half share as condition precedent.

132. So, I am also of the opinion that the decree of the Courts below must be modified by directing the plaintiff to deposit into the trial Court a sum of Rs. 3,511/- as a condition precedent to his recovering his share in the suit properties In the hands of the appellant and the mesne profits from that half share (which can be claimed only from the date of such deposit) and that the respondent should pay the appellant's costs throughout and agree to the decree proposed to be passed by my learned brother Satyanarayana Rao, J

