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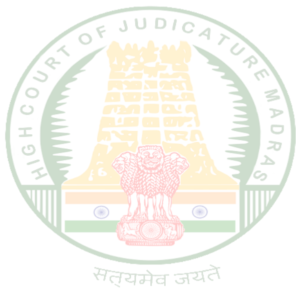

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THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.11.2024

CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR JUSTICE C.KUMARAPPAN

A.S.No.696 of 2017
and
C.M.P.Nos.2002 and 2007 of 2022

1.Malliga (died)

2.Selvam

3.Minor Harish

4.Prabhavathi

[Respondents 3,4 and 13 are transposed
as Appellants 2 to 4 vide order of the Court
dated 11.03.2024 made in C.M.P.No.1476 of
2024 in A.S.No.696 of 2017 (MSJ and KGTJ)]

...Appellants

Vs.

S.Shanmugam (died)

S.Ayyamperumal (died)

1.S.Rani

2.S.Jaya Sudha

3.S.Balaji

4.S.Iswarya

5.S.Thiyaneshwaran

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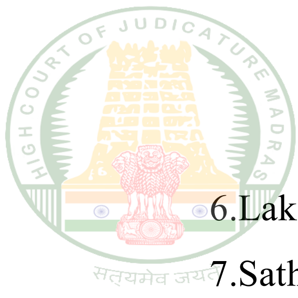

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6.Lakshmi

7.Sathya

8.Bama

9.Mekala

10.Sumathi

[Respondent 1 to 5 brought into record as LRs of the deceased respondent viz., (Shanmugam) and respondents 6 to 10 brought into record as LRs of the deceased respondent viz., (Ayyamperumal)) vide court order dated 11.01.2022, made in C.M.P.Nos.20755 to 20757 of 2021 in A.S.No.696 of 2017 (TRJ &DBCJ)]

...Respondents

<u>Prayer</u>: Appeal filed under Section 96 read with Order 41 Rule 1 of the Code of Civil Procedure, 1908, praying to set aside the judgement and decree dated 14.11.2017 in O.S.No.155 of 2013 on the file of the III Additional District Judge, Salem and to allow the above appeal.

For Appellants	:	Mr.R.Nalliyappan
For Respondents	:	Mr.R.Munusamy for R1 to R5 R6 to R10 - Served - No Appearance

JUDGMENT

*(Judgment of the Court was delivered by **R.SUBRAMANIAN, J.**)*

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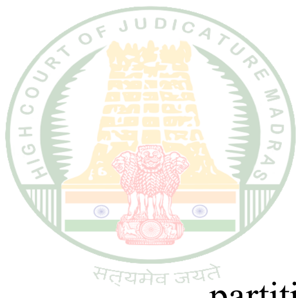

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The second defendant in O.S.No.155 of 2013, a suit for partition, is on an appeal aggrieved by the rejection of her claim to a share in the suit properties by the Trial Court.

2. Parties will be referred to as per their rank in the suit for the purpose of convenience. The first respondent as plaintiff sued for partition and separate possession of his half share in the suit properties. Item 1 of the suit properties originally belonged to one Chinnu Gounder, who had, by a settlement deed dated 25.07.1946, settled the said properties among other properties in favour of his three sons namely Sevi Gounder, Chinnapaiya Gounder and Chinna Gounder, and two of his brother's sons namely Ayyamperumal Gounder and Periasamy Gounder. As per the said instrument, the settlees will take a life interest in the properties settled under the said document and after their death, the properties will devolve on their male issues. The document also provides that in the absence of male issues, the properties will devolve on the other heirs. Contending that Sevi Gounder died leaving behind the plaintiff himself and the first defendant as his heirs, the plaintiff sought for partition and separate possession of his half share.

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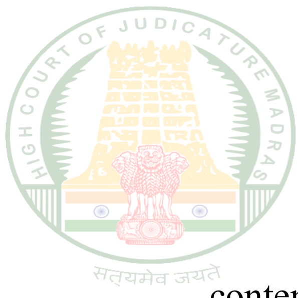

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3.1 With reference to Item 2 of the suit properties, it was the contention of the plaintiff that the said property was purchased by the plaintiff and the first defendant jointly on 29.01.1978 and as such, the plaintiff and the first defendant are entitled to half share. As regards Item 3 of the property, it was the claim of the plaintiff that the property belonged to Sevi Gounder, father of the plaintiff and the first defendant ancestrally and therefore, the plaintiff is entitled to half share in the said properties.

3.2 It was contended that Sevi Gounder's wife, Ayyamammal died on 01.09.2000 and Sevi Gounder died on 16.11.2004. The plaintiff also claimed that a portion of Item 2 was sold to one Murugesan and Mahalakshmi by the plaintiff, as well as the first defendant jointly. The suit was resisted by the first defendant, contending that the plaintiff has not added another co-parcenor namely the wife of a pre-deceased son of Sevi Gounder by name Chinnaiya Gounder. It was also contended that there was an oral partition effected by Sevi Gounder himself during his life time in which specific portions of the property were allotted to the parties and hence the plaintiff is not entitled to claim partition. It was a further contention that

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after the sale of 1.14 acres of land in Item 2 of the suit properties, the entire sale consideration of Rs.5 Lakhs was received by the plaintiff, which according to the first defendant would affirm the oral partition effected by Sevi Gounder even during his life time.

3.3 It was also claimed that Sevi Gounder had executed a Will in the year 1982, bequeathing Item 3 of the suit properties to him and therefore, he would be entitled to the entire Item 3 to the exclusion of the other heirs. On the above pleadings, the first defendant sought for dismissal of the suit.

4. In order to rectify the defect of non-joinder raised by the first defendant, the second defendant was impleaded as a party to the suit. The second defendant is none other than the widow of one of the sons of the Sevi Gounder namely Chinnaiyan, who is said to have died in the year 1968. The second defendant, upon impleading, filed a written statement contending that she is entitled to 3rd share in the suit properties. The oral partition claimed by the first defendant was also disputed.

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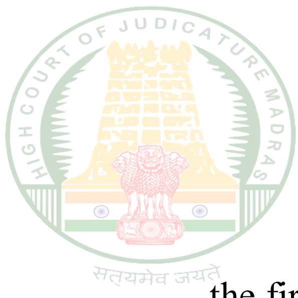
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5. The claim of the plaintiff that the second defendant had married the first defendant, after the death of her husband and she is living with him as his wife was also disputed by the second defendant. Since Ayyamperumal, the first defendant claimed that he had settled a possession of the properties in favour of his son Selvam and the said Selvam in turn had settled the properties in favour of his son Harish and they were also impleaded as defendants 3 and 4. Though they were shown as respondents 3&4 in the appeal. They were subsequently transposed as appellants 2 and 3. They had also filed a separate written statement, which in effect, adopted the written statement filed by the first defendant.

6. On the above pleadings the learned trial Judge framed the following issues:-

> *1) Whether the plaintiff is entitled to half share in the suit property ?*
>
> *2) Whether the plaintiff is estopped from claiming a share in Item 2 of the suit property, since he had received the entire consideration of Rs.5 Lakhs, after the sale in favour of Murugesan and Mahalakshmi ?*
>
> *3) Whether Item 3 belongs to the first defendant as*

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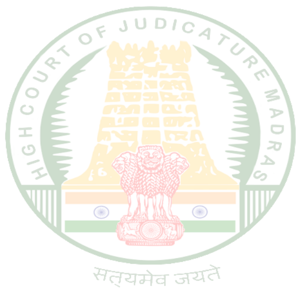

per the Will of Sevi Gounder and whether his plea that he had settled it in favour of his son is true ?

4) Whether the suit is bad for non joinder of necessary parties ?

The following additional issues were also framed:

5) Whether the defendants are the absolute owners of the suit properties ?

6) Whether the plaintiff is entitled to half share in the 1st item of the suit property ?

7.1 At trial, the plaintiff was examined as P.W.1 and the first defendant was examined as D.W.1. Ext.A1 to A4 were marked on the side of the plaintiff and Ext.B1 was marked on the side of the first defendant. Upon consideration of the evidence on record, the Trial Court disbelieved oral partition pleaded by the first defendant. It also found that the alleged Will said to have been executed by Sevi Gounder was not produced and proved in accordance with law.

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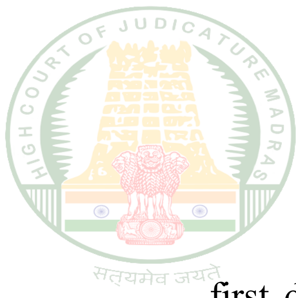

7.2 On the plea that Malliga, the second defendant had married the first defendant, the Trial Court found that since the second defendant had married the first defendant, she would not be entitled to a share in the properties of her deceased husband, Chinnaiyan. The settlement deeds said to have been executed by the first defendant in favour of the third defendant and the subsequent settlement deeds said to have been executed by the third defendant in favour of the fourth defendant, were disbelieved by the Trial Court as those documents were not produced and proved in accordance with law. On the aforesaid findings, the Trial Court decreed the suit, granting half share to the plaintiff in the suit Items 1 to 3. Aggrieved by the same, the second defendant has come up with this appeal.

8. Pending the appeal, the appellant, as well as the respondents 1 and 2 namely the second defendant, plaintiff and the first defendant respectively, died and their legal heirs were brought on record as respondents 1 to 5 and 6 to 10 respectively. The respondents 3, 4 and 13 who were brought brought on record as legal heirs were transposed as appellants on the death of the appellant.

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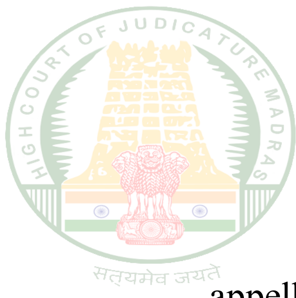

9. We have heard Mr.R.Nalliyappan, learned counsel for the appellants and Mr.R.Munusamy, learned counsel appearing for the respondents 1 to 5. Though notice was served on respondents 6 to 10, they have not appeared either in person or through a counsel duly instructed.

10.1 Mr.R.Nalliyappan, the learned counsel for the appellants would vehemently contend that the conclusion of the Trial Court that Malliga, the second defendant in the suit was disqualified from inheriting the properties of her husband because of her remarriage, is erroneous. He would submit that after coming into force of the Hindu Succession Act, 1956, a widow who remarries cannot be disqualified from succeeding to the estate of her first husband. The learned counsel also pointed out that the only ground on which the Trial Court has chosen to deny a share to the second defendant is the re-marriage. Once the disqualification is found to be erroneous, she would be entitled to 1/3rd share in the properties.

10.2 The learned counsel would also rely upon the judgement of the Hon'ble Supreme Court in the case of ***Cherotte Sugathan vs. Cherotte***

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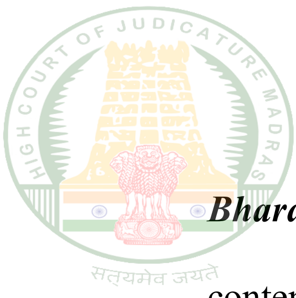

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Bharathi & others, reported in [(2008) 2 CTC 92], in support of his contention that the disqualification enacted by Section 2 of the Hindu Widow's Remarriage Act, 1856 ceases to apply upon enactment of Section 4 of the Hindu Succession Act, 1956. Inasmuch as Section 4 of the Act gives overriding effect to the provisions of the Hindu Succession Act as against any other text of Hindu law or enactment insofar as it is inconsistent with the provisions of the Hindu Succession Act.

10.3 Contending contra, Mr.R.Munusamy, the learned counsel appearing for the respondents 1 to 5 would submit that the Hindu Widow's Remarriage Act, 1856 would necessarily apply inasmuch as the father of Sevi Gounder namely Chinnu Gounder died prior to the commencement of the Hindu Succession Act and the succession opened on that date. He would also attempt to rely upon Section 24 of the Hindu Succession Act to contend that the widow on remarriage would incur a disqualification.

11. We have considered the rival submissions.

12. The first defendant has not chosen to challenge the decree and judgement of the Trial Court insofar as it disbelieves the theory of oral

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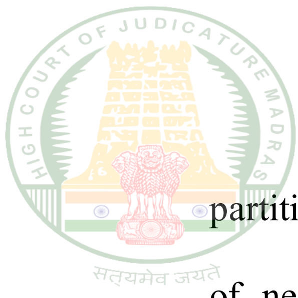
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partition. The claim of the first defendant that the suit is bad for non joinder of necessary parties also stands closed on the impleading of Malliga. Therefore, the only question that arises for determination in this appeal is "*whether Malliga, the second defendant would incur a disqualification because of her remarriage to the first defendant ?*"

13. The relationship between the parties is admitted. The manner in which the properties devolved is also admitted. The fact that Malliga had married Chinnaiyan, son of Sevi Gounder and the said Chinnaiyan died in the year 1968 is not in dispute. The fact that Malliga has been living with the first defendant after the death of her husband and she had also given birth to children through to the first defendant, is also not in dispute.

14. Item 1 of the suit property originally belonged to Chinnu Gounder, who had claimed it as a self acquisition and had settled it on his sons and his brother's sons for life. After their life time, the properties are to be taken by the male issues of the settlees. Therefore, after the execution of the settlement, as and when the male issues are born to the settlees, they become the vested remaindermen. If any of the male issues die, prior to the

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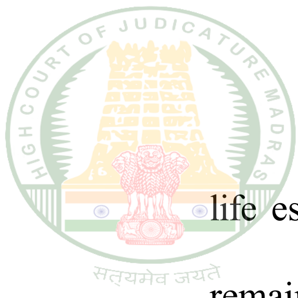

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life estate holder, they die possessed of the vested remainder. Such vested remainder, on the death of the remainderman, would naturally devolve on his heirs. Once it is admitted that Sevi Gounder had three sons namely the plaintiff, first defendant and Chinnaiyan, all the three of them would become remaindermen and each of them will have an equal share in the property. On the death of Chinnaiyan, his 1/3rd share in the property would devolve on his heir who is the second defendant. Therefore, on the death of Chinnaiyan in 1968, the plaintiff, first defendant and the second defendant would each be entitled to 1/3rd share in the property.

15. The contention of the learned counsel for the respondents 5 to 9 is that since Sevi Gounder died prior to the coming into force of the Hindu Succession Act, the provisions of Section 2 of the Hindu Widow's Remarriage Act would apply and therefore, upon remarriage, the widow will be disqualified from inheriting the share of her husband in the properties. There is a fallacy in the said argument of the learned counsel. It is settled position of law that the vested remaindermen get their right upon the execution of the document in their favour or if the document which confers a right on them is executed prior to their birth, they would take a right upon

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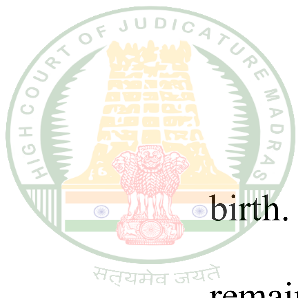

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birth. Therefore, Chinnaiyan, on his birth, had inherited 1/3 share as a remainderman and other two sons of Sevi Gounder namely the plaintiff and the first defendant would have the remaining 2/3rd shares.

16. On the death of Chinnaiyan in the year 1968, his share in the property would devolve on his heirs. The Hindu Succession Act came into force in 1956. Section 4 of the Hindu Succession Act reads as follows:

> *"4.Over-riding effect of Act. --(1) Save as otherwise expressly provided in this Act,--*
>
> *(a) any text, rules or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act ;*
>
> *(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus is so far as it is inconsistent with any of the provisions contained in this Act.*
>
> *(2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time*

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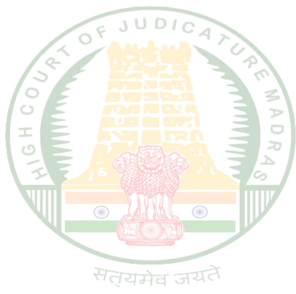
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being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings."

17. The above provision gives an overriding effect to the provisions of the Act over any other law that was in force immediately before the commencement of the Act insofar as it is inconsistent with any of the provisions contained in the Act. The Hindu Succession Act,1956 does not contain a provision, which disqualifies widows from inheriting their husband's properties or disqualifying the widows from taking a share in the husband's property upon remarriage. The only provision that imposed a disqualification on widows was Section 24 of the Hindu Succession Act which reads as follows:

"24. Certain widows remarrying may not inherit as widows.

Any heir who is related to an intestate as the widow of a predeceased son, the widow of a predeceased son of a predeceased son or widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date

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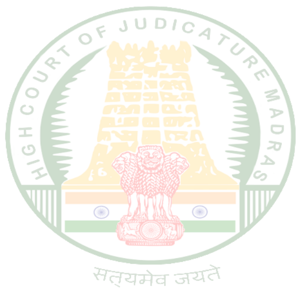

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the succession opens, she has remarried."

18. Even the above provision as it stood prior to its repeal by Act 39 of 2005, does not bar a widow from inheriting her husband's estate. A close reading of the above provision would show that only widows of a pre-deceased son or a pre-deceased son of a pre-deceased son or widow of a brother, would face a disqualification upon remarriage. Even that provision has now been repealed by the Hindu Succession Amendment Act, 39 of 2005. Therefore, when succession opened to the estate of Chinnaiyan in the year 1968, the Hindu Succession Act had come into force. Any text or rule of Hindu law or any statutory provision in any other enactment that is inconsistent with the provisions of the Act will cease to apply. Therefore, Section 2 of the Hindu Women's Right to Property Act, 1937 will cease to apply.

19. The said legal position has also been reiterated by the Hon'ble Supreme Court in ***Cherotte Sugathan's case*** *(supra)*. A Division Bench of this Court in ***Chinnappavu Naidu vs. Meenakshi Ammal and another***, reported in (AIR 1971 MADRAS 453), has also considered the effect of the

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overriding provision in the Hindu Succession Act as against Section 2 of the Hindu Widow's Remarriage Act. The conflict between Section 14(1) of the Hindu Succession Act and Section 2 of the Hindu Widow's Remarriage Act was examined by the Division Bench and it had held as follows:

> "2. *Section 2 of the Hindu Widows' Re-marriage) Act. 1856, provided that a Hindu widow on remarriage shall forfeit her right to the property which she had inherited from her husband. Now, does this provision affect the first plaintiff? Learned counsel for the appellant contends that Section 2 of the Hindu Widows' Re-marriage Act has not been expressly repealed by the Hindu Succession Act and that Section 24 itself shows that the legislature was conscious that in case of re-marriage by a widow she should not be able succeed to her husband. In view of this it is said that the forfeiture provided by Section 2 of the Hindu Widows' Re-marriage Act still obtains and it would deprive the first plaintiff of her right to still hold the property of her husband. Though the point is not free from doubt, a combined reading of Sections 4 (1) (b), 14, 27 and 28 leaves us with the impression that the provisions of the Hindu*

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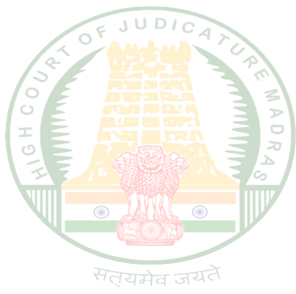

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Succession Act have overriding effect and Section 14 (1), which is absolute and unrestricted in its terms and sweep, enables the first plaintiff to hold the property as absolute owner thereof. The test for the application of Section 14(1) is whether, on the date of the commencement of the Hindu Succession Act, 1956, a Hindu female was in possession of any property as a limited owner. If she was, the limited estate would be converted into full ownership. There is nothing in Section 14(1) or any other section to qualify the absolute ownership or to forfeit her full ownership on her re-marriage. It is true the Legislature was certainly conscious of the disqualification based on re-marriage. Section 24 will incapacitate a widow on her re-marriage from succeeding to the property of her husband. But nowhere has it been stated in the Act that once she has succeeded, her subsequent marriage will forfeit her right to hold the property. On the other hand, clause (b) of Section 4(1) makes it clear that "any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act." Section 2 of the Hindu Widows' Remarriage Act 1856, is to our mind,

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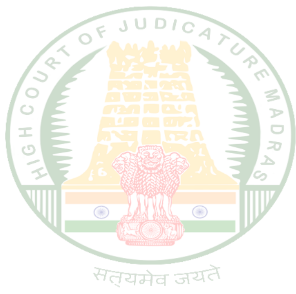
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definitely in conflict with Section 14 (1) which says that, if the widow was possessed of a limited estate at the commencement of the Act. It would be converted into a full ownership in her. The intention of the Hindu Succession Act, whether it is deliberate or not, appears to be as its provisions stand, that a subsequent remarriage will not work forfeiture. That is also consistent with authority. Ramaiya v. Mottayya. ILR (1952) Mad 187: (AIR 1951 Mad 954) (FB) held that subsequent unchastity will not make a widow forfeit the property which she has succeeded to her husband on his death. The view we have taken is also supported by a Judgment of a single Judge of the Rajasthan High Court in Bhuri Bai v. Champi Bai. AIR 1968 Raj 139. We are, therefore, of the view that the courts below came to the correct conclusion on this aspect of the matter."

20. The Hon'ble Supreme Court in the case of ***Cherotte Sugathan,*** had this to say in Paragraph 13:

"13. Succession had not opened in this case when the 1956 Act came into force. Section 2 of the

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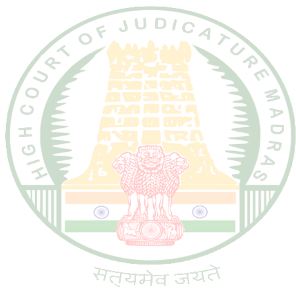
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1856 Act speaks about a limited right but when succession opened on 2.8.1976, first respondent became an absolute owner of the property by reason of inheritance from her husband in terms of subsection (1) of Section 14 of the 1956 Act.

Section 4 of the 1956 Act has an overriding effect. The provisions of 1956 Act, thus, shall prevail over the text of any Hindu Law or the provisions of 1856 Act. Section 2 of the 1856 Act would not prevail over the provisions of the 1956 Act having regard to Section 4 and 24 thereof."

21. Mr.R.Munusamy, the learned counsel for the respondents 1 to 5, would, however, rely upon a judgement of the Hon'ble Supreme Court in ***Kizhakke Vattakandiyil Madhavan (Dead) Thr. Lrs. vs. Thiyyurkunnath Meethal Janaki and others***, rendered in Civil Appeal No.8616 of 2017, wherein, the Hon'ble Supreme Court had invoked Section 2 of the 1856 Act to disqualify a widow who had remarried from succeeding to her husband's estate. But, the perusal of the judgement reveals that on the facts of that case, the succession had opened in the year 1910, much prior to the coming

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into force of the Hindu Succession Act,1956. Therefore, the said judgement may not, in our considered opinion, apply to the facts of the case.

22. In the light of the law declared by the Hon'ble Supreme Court, as well as the division bench of this Court as early as in 1971, the Trial Court was not right in concluding that the second defendant, widow of one of the sons of Sevi Gounder, is disqualified from inheriting as a widow of her husband because of her remarriage. Therefore, the second defendant would be entitled to $1/3^{rd}$ share in Items 1 and 3 of the suit scheduled properties.

23. Item 2 stands on a slightly different footing. The property in Item 2 was purchased by the two brothers namely the plaintiff and the first defendant under a sale deed of the year 1978. Therefore, the second defendant cannot claim a right over the said property, as it is a joint property. The second defendant, hence, will not be entitled to a share in Item 2.

24. In fine, the appeal is **partly allowed** in respect of **Item Nos.1**

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and 3 alone. As regard **Item No.2**, the appeal stands **dismissed**. There will be a preliminary decree in O.S.No.155 of 2013, declaring 1/3rd share of the plaintiff in suit Item Nos.1 and 3 and half share of the plaintiff in suit Item No. 2. The parties shall bear their own costs in the appeal. Consequently, the connected miscellaneous petitions are closed.

(R.S.M., J.) **(C.K., J.)**
13.11.2024

Anu
Index : Yes / No
Neutral Citation : Yes / No
Speaking order / Non-Speaking order

To

The III Additional District Judge, Salem

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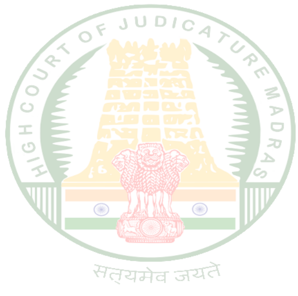

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Anu

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