



**THE GAUHATI HIGH COURT**  
**(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)**  
**PRINCIPAL SEAT AT GUWAHATI**

**RSA No. 60/2017**

On the death of Smti. Roma Roy, her legal heirs-

1(a). Shri Janmajit Roy,  
S/o Jitendra Mohan Roy.

1(b). Smt. Narayani Roy,  
D/o Jitendra Mohan Roy.

1(c). Smt. Kalyani Roy,  
D/o Jitendra Mohan Roy.

1(d). Smt. Chandrani Roy,  
D/o Jitendra Mohan Roy.

1(e). Smt. Mousumi Roy,  
D/o Jitendra Mohan Roy.

1(f). Smt. Panchami Roy,  
D/o Jitendra Mohan Roy.

All are residents of Digolbak,  
PO-Girishgarj Bazar, PS-Karimganj,  
Dist.-Karimganj, Assam.

2(i) Putul Roy,  
S/o Late Dharani Mohan Roy,  
Station Road, Madrasa Galli, PS-Karimganj.

2(ii) Dhiraj Roy,  
S/o Late Dharani Mohan Roy,  
Station Road, Madrasa Galli, PS-Karimganj.

3(i) Tanuj Roy,  
S/o Late Tarani Roy,  
Station Road, Ward No.18, Karimganj Town,  
PS-Karimganj, Dist.-Karimganj, Assam.

- 3(ii) Supta Roy,  
W/o Late Tarani Roy,  
Station Road, Ward No.18, Karimganj Town,  
PS-Karimganj, Dist.-Karimganj, Assam.
4. Shri Sagar Ch. Biswas,  
S/o Late Upendra Biswas,  
Village-Telikhalepar, PS-Karimganj,  
Dist.-Karimganj,  
Presently residing at Station Road,  
Ward No.18, Karimganj Town,  
PO, PS & Dist.-Karimganj, Assam.

.....Appellants.

**-Versus-**

1. Smt. Shipra Aditya,  
D/o Late Debeswar Choudhury,  
W/o Shri Mukulesh Aditya,  
Village-Pinnagar (Suprakandi),  
PS-Karimganj, Pin-788710.
2. Smt. Shibani Choudhury,  
D/o Late Debeswar Choudhury,  
Station Road, Karimganj Town,  
PS-Karimganj, Pin-788710.
3. Smt. Bhavani Choudhury,  
D/o Late Debeswar Choudhury,  
Station Road, Karimganj Town,  
PS-Karimganj, Pin-788710.
4. Smt. Bani Choudhury @ Lipu,  
D/o Late Debeswar Choudhury,  
Station Road, Karimganj Town,  
PS-Karimganj, Pin-788710.
5. Smt. Banani Choudhury @ Tukli,  
D/o Late Debeswar Choudhury,  
Station Road, Karimganj Town,  
PS-Karimganj, Pin-788710.

.....Respondents.

6. Dulan Paul,

W/o Moni Paul,  
D/o Late Dharani Mohan Paul,  
Station Road, Karimganj Town,  
PS-Kaimganj, Pin-788710,  
Dist. - Karimganj.

.....Added Respondent.

**BEFORE  
HON'BLE MR. JUSTICE ROBIN PHUKAN**

|                     |   |                                                                |                 |
|---------------------|---|----------------------------------------------------------------|-----------------|
| For the Appellants  | : | Mr. P.K. Roy, Sr. Adv.,<br>Mr. S.K. Chakraborty.               | .....Advocates. |
| For the Respondents | : | Mr. D. Mozumder, Sr. Adv.,<br>Mr. S. Biswas.                   | .....Advocates. |
| Dates of Hearing    | : | 03.09.2024, 10.09.2024, 17.09.2024,<br>04.10.2024 & 24.10.2024 |                 |
| Date of Judgment    | : | <b>29.11.2024</b>                                              |                 |

**JUDGMENT AND ORDER**

Heard Mr. P.K. Roy, learned Senior counsel assisted by Mr. S.K. Chakraborty, learned counsel for the appellants and also heard Mr. D. Mozumder, learned Senior counsel assisted by Mr. S. Biswas, learned counsel for the respondents.

**2.** This regular second appeal under Section 100 of the Code of Civil Procedure, 1908 is directed against the judgment and decree dated 13.12.2016 passed by the learned District Judge, Karimganj, in Misc.

Appeal No.01/2013. It is to be noted here that vide impugned judgment and decree 13.12.2016, the learned District Judge, Karimganj, has affirmed the order dated 08.02.2013 passed by the learned Civil Judge, Karimganj, in Misc. Case No.85/2011 arising out of Title Execution Case No.3/2007.

**3.** The background facts leading to filing of the present appeal is briefly stated as under:-

"The respondents herein are the decree-holders of Title Suit No.39/1984, who had instituted Title Execution Case No.3/2007 for khas possession of the decreetal land by evicting the judgment-debtors who were licensee of the decree-holders with respect to the decreetal land. While the Title Execution Case No.3/2007 was instituted for execution of the decree, the appellants herein as 3<sup>rd</sup> party resisted the execution of the decree and filed objection by filing the Petition No.140/2013 under Order 21 Rule 97 read with Section 151 of the CPC. Upon the said petition, the learned Executing Court (Civil Judge, Karimganj) registered a misc. case, being Misc. Case No.85/2011 and in the said misc. case, the respondents herein have filed written objection.

The contention of the appellants was that late Dinomoni Choudhury and his son Debeswar Choudhury became the owners of the land mentioned in the schedule of the petition including the suit land vide Deed of Exchange No.4260, dated 23.06.1952 of Karimganj Sub-Registry Office, executed between them in one part and one Najib Ali Choudhury on the other part. The said deed of exchange was executed after Dinomoni Choudhury and his son Debeswar Choudhury and daughters and his wife migrated to India

from Bangladesh. Jogeswar Choudhury and Mukteswar Choudhury were licensee under Dinomoni Choudhury and his son, and both Jogeswar Choudhury and Mukteswar Choudhury are residing in a house constructed on the land described in the schedule of the petition. Thereafter, Dinomoni Choudhury died leaving behind his son and 5 daughters and his wife. All the daughters migrated to India from Bangladesh in the first part of 1950 and by virtue of the deed of exchange, Dinomoni Choudhury and his son became the owners of the land to the extent of 50% each. Thereafter, the 3<sup>rd</sup> parties figuring as appellants stated that after the death of Dinomoni Choudhury in 1956, Debeswar Choudhury and his 5 sisters and mother inherited the schedule land jointly and acquired right, title, interest and possession thereon. Jogeswar Choudhury and Mukteswar Choudhury also continued to reside in the house as licensee under the descendants of Dinomoni Choudhury. Subsequently, Dinomoni Choudhury's wife died leaving behind Debeswar Choudhury and his 5 sisters and one of the sisters Malati Roy died leaving behind Sagar Chandra Biswas and Suchitra Bala Roy died leaving behind Roma Roy and Alpana Roy, Dharani Roy and Tarani Roy. Accordingly, Debeswar Choudhury and his sister Sukumari Roy and the appellants and another co-sharer Ranjit Roy continued to occupy and possess the suit land and the house standing thereon. As such, the appellants have claimed right, title and interest along with the decree-holder in ejmali, over the schedule land along with house standing thereon. They have claimed that they have constructive possession over the land and the house and that on 01.05.2007, the appellants, who are the 3<sup>rd</sup> parties, learnt that the decree-holder in collusion with his sister

Sukumari Roy and licensee Jyotirmoy Choudhury, filed the Title Suit No.39/1984 with false and concocted averments against the licensee Jyotirmoy Choudhury and others, and procured the decree with respect to the 3<sup>rd</sup> schedule land of the execution case and house mentioned in 4<sup>th</sup> schedule land without the knowledge of the appellants and their predecessor. They also came to know that in the Title Suit No.39/1984, the share of the mother of the decree-holder and his 5 sisters over the land of 1<sup>st</sup> schedule of the plaint of the suit were shown to be donated in his favour vide registered gift deed No.6390, dated 26.09.1962 of Karimganj Sub-Registry Office. It is also contended that the said gift deed is collusive and illegal as it has been mentioned therein that Suchitra Bala Biswas and Sukumari Biswas who were Debeswar Choudhury's sister were shown as residents of Nilambarpur of Sylhet district of Bangladesh and they were shown to be represented by their attorney – Sri Brojendra Chandra Deb and it is contended that at the time of alleged execution of the gift deed, Suchitra Bala Biswas and Sukumari Biswas were Indian citizens and the attorney had fraudulently represented them and both Suchitra Bala Biswas and Sukumari Biswas have denied execution of such gift deed or power of attorney in favour of Debeswar Choudhury.

It is further contended that by filing the Title Suit No.39/1984, which was subsequently renumbered as Title Suit No.279/1994 and thereafter, renumbered as Title Suit No.33/1995, a decree was obtained fraudulently and this decree was sought to be executed by the aforesaid Title Execution Case No.3/2007 with a view to grab the properties belonging to Debeswar Choudhury's sisters i.e. predecessor of the present appellants and 3<sup>rd</sup> parties. It

is also stated that the appellants are the legal heirs of deceased Sukumari Roy and they are entitled to  $1/10^{\text{th}}$  share each of the suit property and their brother Ranjit Roy is also entitled to a share of  $1/30^{\text{th}}$  each i.e.  $1/10^{\text{th}}$  jointly of the suit property and the share of the decree-holder i.e. Debeswar Choudhury and his legal heirs to the extent of  $6/10^{\text{th}}$  of the suit property. It is also stated that both the parties are in joint possession and occupation of the suit property, even though their status as licensee. And the decree-holders are trying to deprive of them the right, title and interest of the 3<sup>rd</sup> party/appellants over the land mentioned in the schedule of the petition and the house standing thereon and they have prayed for adjudication of their right, title, interest and possession over the property involved in the execution case.

The decree-holders on the other hand filed objection denying the claim and objection of the appellants and during pendency of the execution case, Debeswar Choudhury died and his legal heirs were substituted in his place and that the appellants in collusion with the judgment-debtors have tried to create an embargo in the lawful execution of the decree in favour of the decree-holders. Thereafter, the learned Executing Court has framed two issues:-

- (i) Whether the 3<sup>rd</sup> party/petitioners have right, title and interest over the decreetal land of the aforesaid Title Suit No.39/1984? and
- (ii) Whether the 3<sup>rd</sup> party/petitioners figuring as appellants in this case have right to resist or obstruct the delivery of the decreetal land in favour of the decree-holders figuring as opposite parties?

Thereafter, the learned Executing Court after hearing both the parties and considering the evidence adduced by the parties vide impugned judgment and order dated 08.02.2013 has decided both the issues against the appellants and being aggrieved, the appellants preferred the first appeal before the learned District Judge, Karimganj, being Misc. Appeal No.1/2013.

Thereafter, hearing both the parties, the learned First Appellate Court arrived at a finding that the learned Executing Court had rightly decided both the issues and thereby dismissed the appeal."

**4.** Being aggrieved, the appellants approached this Court by filing the present appeal, which was admitted on the following substantial questions of law:-

- (i) Whether the findings of the Learned courts below that Dinomoni Choudhury having died, prior to coming into force of the Hindu Succession Act, 1956, his widow or daughters did not inherit any of his properties, sustainable in law, being in conflict with the provision of Section 3 of the Hindu Women's Rights to Property Act, 1937, vesting limited interest on the Hindu widow, which having become a full-fledged, inheritable property right under Section 14 of the Hindu Succession Act, 1956, to the widow of Dinomoni, automatically devolved on the 3<sup>rd</sup> party?*
- (ii) Whether the Learned courts below were right in relying on the Exhibit-E, the written statement of Sukumari Roy filed in Title Suit No.6/2007, the contents of which being not tested in cross-examination?*

**5.** Mr. Roy, learned Senior counsel for the appellants firstly submits that Dinomoni Choudhury having died in February, 1956 and the Hindu Succession Act, 1956 having come into effect from 17.06.1956, the widow and daughters, i.e. the predecessor of the 3<sup>rd</sup> party petitioners could not have inherited any right, title in respect of his property, left behind by Dinomoni Choudhury.

**5.1** Secondly, Mr. Roy submits that the respondents/decreed-holders had never assailed the finding of the learned Executing Court that the execution or non-execution of Exhibit-13 is irrelevant by filing any cross-appeal or cross-objection, nor they had urged the same even orally before the learned First Appellate Court as is apparent from the judgment and decree dated 13.12.2016 and thereby abandoned the said plea, as the said question was not arisen out of the judgment of the lower court in view of the decision of Hon'ble Supreme Court in the case of **Mahant Dhangir & Anr. v. Madan Mohan & Ors.**, reported in **1987 Supp SCC 528**.

**5.2** Thirdly, Mr. Roy submits that the written statement of Sukumari Roy is not exhibited and proved by producing Smt. Sukumari Roy as witness either in Title Suit No.6/2007, or in Misc. Case No.85/2011, and such a pleading cannot become proof of its contents having not been admitted by the 3<sup>rd</sup> party.

**5.3** Fourthly, Mr. Roy submits that the thumb impression of Sukumari Roy in her written statement is not proved as required under Order 6 Rule 15(4) of the CPC and the affidavit in support of the said written statement was sworn by one Shri Chittaranjan Roy, the son of Sukumari Roy, which is not permissible under Order 6 Rule 15(4) of the CPC.

**5.4** Fifthly, Mr. Roy submits that Order 19 Rule 3 CPC provides that affidavits shall be confined to such facts as the deponent is able to prove from his own knowledge and since Shri Chittaranjan Roy did not disclose the source of his knowledge as regards the contention made in the written statement about the execution of gift deed by Suchitra Bala Roy and Sukumari Roy, the said written statement could not have been relied upon, being contrary to the provision of Order 6 Rule 15(4) of the CPC nor in terms of the provision of Order 19 Rule 3 CPC and on such count, the finding of the learned Appellate Court on irrelevant material is a perverse finding. As the requirement of verification to test the genuineness and authenticity of the allegation and also make the deponent responsible for the allegation and the same is required to enable the Court to find out as to whether it would be safe to act on such affidavit in evidence, as held by the Hon'ble Supreme Court in the case of **A.K.K. Nambiar v. Union of India & Anr.**, reported in (1969) 3 SCC 864 and in **State of Bombay v. Purushottam Jog Naik**, reported in (1952) 2 SCC 14.

**5.5** Sixthly, Mr. Roy further submits that Exhibit-13, the gift deed, was executed on 26.09.1962, and the age of the deponent Shri Chittaranjan Roy is given in the affidavit as 58 years on 28.01.2008, his age would be 12 years and in 1962 he was a minor on the date of execution of the gift deed and execution or non-execution of the gift deed cannot be therefore within his knowledge and which is absolutely improbable.

**5.6** Seventhly, Mr. Roy submits that Exhibit-13, the gift deed, does not in any manner show that Brojendra Chandra Deb had signed the gift deed on behalf of Suchitra Bala Biswas and Sukumari Biswas, on the basis of any deed of power of attorney either registered or otherwise,

allegedly executed by them. The said gift deed only named 'amoktar', Shri Brojendra Chandra Deb, Advocate and nothing more and on such count, the same cannot be relied upon.

**5.7** Eighthly, Mr. Roy submits that to establish that Smt. Suchitra Bala Biswas and Smt. Sukumari Biswas were permanent residents of India, is contrary to the recital made in the gift deed. The 3<sup>rd</sup> party petitioners have exhibited Exhibit-1 (Citizenship Certificate) and Exhibit-2 (Refugee Registration Card) together with other documents. But the learned Courts below did not consider the same so exhibited by the 3<sup>rd</sup> party petitioners and non-consideration of the said documents renders the judgment vitiated.

**5.8** Ninthly, Mr. Roy submits that the validity of the Exhibit-13 being put to challenge by the 3<sup>rd</sup> party petitioners on the ground of its fraudulent execution, and the 3<sup>rd</sup> party petitioners having been able to discharge their initial burden of proof by exhibiting certified copy of the said gift deed with other documents and the decree-holder being in fiduciary relationship and being in a position of active confidence in law, the burden of proving absence of fraud was upon the decree-holder being in the dominating position and therefore, the decree-holders were under the obligation to prove that there was fair play in the transaction which is genuine, as the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable as held by Hon'ble Supreme Court in the case of **Krishna Mohan Kul alias Nani Charan Kul & Anr. v. Pratima Maity & Ors.**, reported in (2004) 9 SCC 468 and reiterated in the case of **Anil Rishi v. Gurbaksh Singh**, reported in (2006) 5 SCC 558.

**5.9** Tenthly, Mr. Roy further submits that proviso to Section 68 of the Evidence Act does not require calling an attesting witness in proof of execution of any registered document, not being a will and when the legality and validity of a gift deed is under challenge for which the parties have led evidence, the proviso to Section 68 of the Act does not become operative and functional and in such cases, the gift deed was required to be proved in terms of Section 68 of the Act, which has not been done in the present case.

**5.10** Mr. Roy also submits that the decree-holder in his Title Suit No.39/1984 has pleaded in his pleadings that the plaintiff-decree holder and his father Dinomoni Choudhury became the owners of the suit property by virtue of the registered deed of exchange dated 26.05.1952, and following the death of his father Dinomoni Choudhury in 1956, the plaintiff-decree holder along with his mother and 5 sisters jointly became the successors-in-interest of the 50% of the property of late Dinomoni Choudhury and later his mother and sisters executed the deed of gift dated 26.09.1962 donating their shares of the property succeeded by them from Late Dinomoni Choudhury to the decree-holder late Debeswar Choudhury, as would be evident from Exhibit-14 of the judgment and decree dated 28.06.1999 passed by the learned District Judge, in Title Appeal No.1/1998. The First Appellate Court while deciding issue No.3 whether the suit is bad for defect of parties, has held that since the plaintiff has sought for no relief from their mother and sisters, they are not necessary parties in the suit and it was not the case of the plaintiff nor even held by the learned First Appellate Court that Dinomoni Choudhury died before the Hindu Succession Act, 1956 came into force and as such, Section 14(1) of the Hindu Succession Act, 1956 would not have been applied here in this case.

**5.11** Mr. Roy further submits that the written statement submitted by Sukumari Roy in Title Suit No.6/2007 a new case was made out that Dinomoni Choudhury died in February, 1956 and Sukumari Roy never came to the witness box to prove her pleaded statement of facts made in her written statement in the Title Suit No.6/2007 and as such, in view of Section 114(g) of the Evidence Act, the learned Courts below ought to have drawn presumption against Sukumari Roy as regards her statement made in the written statement and the 3<sup>rd</sup> party petitioner could not cross-examine Sukumari Roy to test the veracity of the statement.

**5.12** Mr. Roy also submits that the decision of the learned First Appellate Court is contrary to law and as such, the same is liable to be interfered with in view of the law laid down by the Hon'ble Supreme Court in the case of **Mattulal v. Radhe Lal**, reported in (1974) 2 SCC 365 and that the learned Courts below misdirected themselves in law while holding that Late Dinomoni Choudhury having been died before the Hindu Succession Act, 1956 came into force, his widow or for that matter, his daughters could not inherit the property, since even assuming that Dinomoni Choudhury died on any date prior to 17.06.1956, the date on which the Hindu Succession Act, 1956 came into force, the widow under the provision of Section 3 of the Hindu Women's Rights to Property Act, 1937 following death of her husband Dinomoni Choudhury would succeeded to his share of 50% of the property, as limited interest and following coming into effect of the Hindu Succession Act, 1956 on 17.06.1956, her said limited interest would by operation of law, blossom into full-fledged ownership right and not as a limited right, in view of the provision of Section 14(1) of the said Act and explanation thereunder and following the death of the widow of Late Dinomoni Choudhury after 1962, her said property, as per her share, had been succeeded by her

daughters, from whom the present appellants, the 3<sup>rd</sup> party petitioners have now succeeded.

**5.13** Under such circumstances, Mr. Roy submits that the findings so recorded by the learned Courts below are perverse and therefore, Mr. Roy contended to allow this appeal.

**6.** On the other hand, Mr. Mozumder, learned Senior counsel for the respondents has supported the impugned judgments so passed by the learned Courts below. Mr. Mozumder, firstly, submits that no substantial questions of law so framed are involved in the appeal, as the appellants in their petition filed under Order 21 Rule 97 of the CPC though alleged that the gift deed dated 26.09.1962 executed by their mother and the daughters of Late Dinomoni Choudhury, based on which Late Debeswar Choudhury became the sole owner of the property left behind by their predecessor is collusive, illegal, fraudulent, but they have failed to establish the case of fraud inasmuch as they have miserably failed to plead, as required under Order 6 Rule 4 of the CPC and also failed to adduce evidence as to how the gift deed in favour of Late Debeswar Choudhury is fraudulent. Mr. Mozumder pointed out that it is the burden of the party who asserts a fact to prove the same by cogent and reliable evidence and not by the party who denies it and as such, when the appellants have alleged fraud about execution of the gift deed, it is the burden of the appellants to plead and prove the same with cogent evidence and by virtue of gift deed, Exhibit-13, executed by the wife and daughters of Late Dinomoni Choudhury, Late Debeswar Choudhury would remain the sole owner of the property left behind by Late Dinomoni Choudhury and as such, the first substantial question of law is not involved in this appeal and in support of his submission, Mr. Mozumder

has referred to a decision of Hon'ble Supreme Court in the case of **Anil Rishi** (*supra*), specially upon paragraphs Nos.9 and 10, which are reproduced hereinbelow:-

“9. In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be an exception thereto. The learned trial court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.

10. Pleading is not evidence, far less proof. Issues are raised on the basis of the pleadings. The defendant-appellant having not admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship between the parties itself would be an issue. The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side.”

**6.1** Mr. Mozumder also relied upon paragraph Nos.31, 32 and 34 of the decision of Hon'ble Supreme Court in the case of **Shanti Budhiya Vesta Patel & Ors. v. Nirmala Jayprakash Tiwari & Ors.**, reported in (2010) 5 SCC 104, to substantiate the submission that the allegation of fraud must be laid out in full with all the material facts in

support of such allegations with a high degree of precision. The relevant paragraphs are-

“31. It is a settled position of law that the burden to prove that a compromise arrived at under Order 23 Rule 3 of the Code of Civil Procedure was tainted by coercion or fraud lies upon the party who alleges the same. However, in the facts and circumstances of the case, the appellants, on whom the burden lay, have failed to do so. Although, the application for recall did allege some coercion, it could not be said to be a case of established coercion. Three criminal complaints were filed, but the appellants did not pursue the said criminal complaints to their logical end.

32. It is a plain and basic rule of pleadings that in order to make out a case of fraud or coercion there must be (a) an express allegation of coercion or fraud, and (b) all the material facts in support of such allegations must be laid out in full and with a high degree of precision. In other words, if coercion or fraud is alleged, it must be set out with full particulars.

.....

34. In the present case, the appellants have, however, failed to furnish the full and precise particulars with regard to the alleged fraud. Since the particulars in support of the allegation of fraud or coercion have not been properly pleaded as required by law, the same must fail. Rather the affidavits-cum-declarations executed by the appellants indicate that no coercion or fraud was exercised upon the appellants by Respondents 8 or 9 at any point of time and thus the consent decree cannot be said to be anything but valid.”

**6.2** Further, Mr. Mozumder submits that with regard to the succession to the property left behind by Late Dinomoni Choudhury, before coming into force of the Hindu Succession Act, 1956 women had a limited right over the property of their deceased husband as per Hindu Women's Rights to Property Act, 1937. As per Section 3 of the Act of 1937, after the death of the husband, the widow was entitled in respect of the property of which he dies intestate to the same share as the son. In other words, if a male Hindu dies intestate, leaving any property, the same would be inherited equally by his son and widow and after the enactment of the Hindu Succession Act, 1956, as per Section 14, limited right of a widow under Section 3 of the 1937 Act has been recognized as an absolute right and in terms of Section 8 of 1956 Act, widow, daughter and son of a male Hindu dying intestate will inherit his property in equal shares as his Class-I legal heirs. As a result, if a male Hindu dies intestate before 01.07.1956, widow and son would inherit his property in equal shares, whereas, if a male Hindu dies intestate after 1956 Act comes into force, all the sons, daughters and widow being his Class-I legal heirs would inherit his property in equal shares and since in the case in hand, the gift deed was executed by the widow and all the daughters of Late Dinomoni Choudhury, the date of his death, whether it was before or after the 1956 Act came into force, would not make any difference and the same is totally irrelevant and even if it is established that Dinomoni Choudhury died before 01.07.1956, it would not affect the right of the predecessor-in-interest of the respondents to become the absolute owner of the entire land left behind by Late Dinomoni Choudhury, since gift deed was executed by the widow and all the daughters of Late Dinomoni Choudhury parting with their share of suit property inherited from Late Dinomoni Choudhury in favour of Debeswar Choudhury and conversely, if

it is proved that Late Dinomoni Choudhury died after coming into force of the Hindu Succession Act, 1956, the widow of late Dinomoni Choudhury would have had an equal right over the property left behind by her husband along with her daughters and by virtue of the gift deed executed in favour of Late Debeswar Choudhury by the widow and daughters of Late Dinomoni Choudhury, the predecessor-in-interest of the respondents i.e. Late Debeswar Choudhury would become the sole owner of the property and being the heirs of Late Debeswar Choudhury, the respondents would be the owners of the suit property. In support of his submission Mr. Mozumder has referred to a decision of Hon'ble Supreme Court in the case of **V. Tulasamma & Ors. v. Sesha Reddy (Dead)** By LRS., reported in (1977) 3 SCC 99.

**6.3** Mr. Mozumder further submits that the finding of the learned Courts below that Dinomoni Choudhury died in the month of February, 1956 and being the position, the widow and daughters, including the predecessors of 3<sup>rd</sup> party petitioners could not inherit any right, title and interest over the properties left by Dinomoni Choudhury as at that time the Hindu Succession Act, 1956 did not come into force and that execution and non-execution of Exhibit-13 by the widow and daughters of Dinomoni Choudhury in favour of the decree-holder Debeswar Choudhury is immaterial is not legally correct, as the gift deed, Exhibit-13, through which late Debeswar Choudhury become the sole owner of the property in question and Exhibit-13 is a relevant document.

**6.4** Mr. Mozumder further submits that the Executing Court being the Trial Court came to the finding of fact that Late Dinomoni Choudhury died before the Hindu Succession Act, 1956 came into force, which was affirmed by the Court of appeal below and nothing has been shown that

the finding of fact is perverse and since Dinomoni Choudhury died before the 1956 Act came into force, his widow alone could have half share of his property along with her son, Debeswar Choudhury and signatures of daughters in the gift deed are not required and if widow had parted with her share in favour of her son, Late Debeswar Choudhury became the absolute owner of the property and though the appellants in the petition under Order 21 Rule 97 of the CPC made a vague allegation regarding execution of Exhibit-13 being a fraudulent document, they never took any step for calling the original of Exhibit-13.

**6.5** Further, Mr. Mozumder submits that the judgment-debtors in Title Suit No.33/1995, who have been found to be permissive occupiers and liable to be evicted, have not vacated the suit property after the decree was passed and in fact, the heirs of one of the judgment-debtors, namely, Hironmoy Choudhury and Subrata Choudhury are creating all sorts of disturbances including filing of litigations based on false documents and also constructing a partition wall inside the suit property in order to unnecessarily harass the decree-holders who are all female heirs of the son of Late Dinomoni Choudhury and that the actual legal heirs of Late Dinomoni Choudhury were settled somewhere else and they are not interested in the suit property and under such circumstances, Mr. Mozumder submits that no substantial question of law is involved herein and as such, it is contended to dismiss the appeal.

**7.** Having heard the submission of learned Advocates of both the parties, I have carefully gone through the memo of appeal and the grounds mentioned therein and the impugned judgment and decree dated 13.12.2016, passed by the learned First Appellate Court and also the order dated 08.02.2013, passed by the learned Civil Judge,

Karimganj, in Misc. Case No.85/2011, arising out of Title Execution Case No.3/2007 and I find sufficient force in the submission of Mr. Mozumder, learned Senior counsel for the respondents.

**8.** In the instant case though much argument was advanced and emphasis was laid upon the date of death of Late Dinomoni Choudhury, yet, it appears that there is concurrent finding of fact by the learned Executing Court/Trial Court and also by the First Appellate Court that Dinomoni Choudhury died in the month of February, 1956 prior to coming into force of the Hindu Succession Act, 1956. And this Court sitting in second appeal cannot re-appreciate the aforesaid concurrent finding of facts by the learned Courts below in view of the decision of the Hon'ble Supreme Court in the case of **Narayanan Rajendran & Another vs. Lekshmy Sarojini & Others**, reported in (2009) 5 SCC 264, wherein Hon'ble Supreme Court in the Paragraph Nos. 66 & 69 held as under :-

**“66. When Section 100 C.P.C. is critically examined then, according to the legislative mandate, the interference by the High Court is permissible only in cases involving substantial questions of law.**

**\* \* \* \* \***

**69. The scope of interference by the High Court in second appeal under section 100 CPC after 1976 Amendment is strictly confined to cases involving substantial questions of law.”**

**9.** It is also to be noted here that in the case of **Thiagarajan vs. Sri Venugopalaswamy B. Koil**, reported in (2004) 5 SCC 762, Hon'ble Supreme Court has held as under :-

**“The High Court in its jurisdiction under Section 100 C.P.C. was not justified in interfering with the findings of fact. The court observed that to say the least the approach of the High Court was not proper. It is the obligation of the courts of law to further the clear intendment of the legislature and not frustrate it by excluding the same. This court in a catena of decisions held that where findings of fact by the lower appellate Court are based on evidence, the High Court in second appeal cannot substitute its own findings on re-appreciation of evidence merely on the ground that another view was possible.”**

**10.** Similar observation was made by Hon’ble Supreme Court, in the case of **State of Kerala vs. Mohd. Kunhi**, reported in (2005) 10 SCC 139, has held as under :-

**“The High Court is not justified in interfering with the concurrent findings of fact. This court observed that, in doing so, the High Court has gone beyond the scope of Section 100 of the Code of Civil Procedure.”**

**11.** In the case in hand, even the P.W.1, in Misc. Case No. 85/2011, arising out of the Title Execution Case No. 03/2017, namely, Tarani Roy, in his cross-examination admitted that Dinomoni Choudhury died in February, 1956. Thus, in view of the factum of death of Late Dinomoni Choudhury in the month of February, 1956, succussion of estate of Late Dinomoni Choudhury, who died intestate, will be governed by Hindu Women’s Rights to Property Act, 1937 which was in force at that point of time. Section 3 of the said Act provides as under:-

**“3. Devolution of Property:-**

(1) When a Hindu governed by the Dayabhaga School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow, all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son:

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son:

Provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son.”

- 12.** Whereas, the Section 14(1) of the Hindu Succession Act provides as under:-

**Property of a female Hindu to be her absolute property:-**

- (i) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

- 13.** Here in this case, admittedly, Late Dinomoni Choudhury left behind his widow and son Debeswar Choudhury and the daughters. In view of Section 3 of the Act, the widow and son had inherited the estate left behind by Dinomoni Choudhury. And having been gifted the share of the

widow, by virtue of Exhibit – 13, the Gift Deed, thereby parting shares in favour of Late Debeswar Choudhury, the predecessor-in-interest of the present respondent, namely, Late Debeswar Choudhury becomes the absolute owner of the said plot of land.

**14.** Even for the sake of argument if it is accepted that Late Dinomoni Choudhury dies after coming into force of the Hindu Succession Act on 01.07.1956, then also there would have been not much difference in as much as under Section 14(1) of the Hindu Succession Act, the limited right of the widow, under Section 3 of the Hindu Women's Right to Property Act, 1937 becomes absolute right. In terms of Section 8 of the Hindu Succession Act, 1956, widow, daughter and son of a male Hindu dying intestate will inherit his property in equal share as his Class-I legal heirs. And by virtue of the Gift Deed, Exhibit – 13, having been donated their share by the widow and daughter of Late Dinomoni Choudhury, in favour of Late Debeswar Choudhury, he became the absolute owner of the land. Thus, as submitted by Mr. Mazumder, the learned counsel for the respondent, the date of death of Late Dinomoni Choudhury before or after coming into force of Hindu Succession Act, 1956 would not make any difference. I find substance in the argument of Mr. Mazumder and the decision referred by him in **V. Tulasarma (supra)** also supported his submission. The submission of Mr. Roy, learned counsel for the appellant, on the other hand, is, thus, found to be irrelevant one.

**15.** Thus, it appears that the main question in this appeal revolves around the Gift Deed, Exhibit – 13. Though it is alleged by the appellants that Exhibit-13 is a fraudulent document, yet, the burden proving the same lies upon the appellants in view of the decision of Hon'ble Supreme Court in the case of **Anil Rishi (supra)**, wherein it has been held that

“when a party alleged fraud, the burden of proof lies upon him to establish the same by adducing cogent evidence.”

**16.** It is also to be noted here that Order 6 Rule 4 of the C.P.C. provides that in all cases, in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default or undue influence and in all other cases in which particulars may be necessary beyond such as are exemplified in the form of aforesaid, particular (with date and items if necessary) shall be stated in the pleading. In the instant case there is no specific pleading to that effect in the petition under Order 21 Rule 97 of the C.P.C., not to speak of any evidence to substantiate the same. And as such, the allegation remained unsubstantiated and the burden could not be discharged. By virtue of the said Gift Deed, Exhibit – 13, Late Debeswar Choudhury become the absolute owner of the suit property. Though it is contended by Mr. Roy, learned counsel for the appellants that the burden of proving the allegation that the Gift Deed, Exhibit – 13 lies upon the respondents, having been discharged the initial burden by the appellants, yet, such submission of Mr. Roy left this Court unimpressed in view of the ratio laid down by Hon’ble Supreme Court in the case of **Anil Rishi (supra)**.

**17.** In view of the aforementioned discussion and observation/finding so recorded by the learned Executing Court, in Misc. Case No. 85/2011, that the widow and daughters, including predecessor of 3<sup>rd</sup> party/petitioners, could not inherit any right, title interest over the properties left by Dinomoni Choudhury as at that time Hindu Succession Act, 1956 does not come into force, is not a correct observation/finding, as a bare perusal of the Section 3 of the Hindu Women’s Rights to Property Act indicates that a widow of a Hindu, governed by the

Dayabhaga School of Hindu, or by customary law, dies intestate leaving separate property, shall, subject to Sub-Section 3, be entitled in respect of property in respect of which dies intestate to the same as a son. On account of Section 3, Late Dinomoni Choudhury having been died in February, 1956, his wife was entitled to the same share with that of his son Debeswar Choudhury to the property left behind by Late Dinomoni Choudhury. And after coming into force of Hindu Succession Act, 1956, w.e.f. 01.07.1956, the right of a widow of Late Dinomoni Choudhury becomes an absolute right with that of her son in view of Section 14(1) of the Hindu Succession Act, 1956.

**18.** But, this Court is unable to accept the contention of Mr. Roy, learned counsel for the appellant that after the death of widow of Late Dinomoni Choudhury, the property inherited by her became automatically devolved upon the 3<sup>rd</sup> party/the appellants herein. It is, however, a fact that after the death of the widow, her share of property would have been devolved upon her daughters and son, being Class-I legal heirs in view of Section 8 of the Hindu Succession Act, 1956. But, before her death, the widow along with her daughters have donated their shares to Debeswar Choudhury by virtue of Gift Deed, Exhibit – 13. Therefore, nothing was left to succeed by the daughters of the widow after her death. And as such, there is no question devolving the property inherited by widow of Late Dinomoni Choudhury upon the third party.

**19.** That being so, the first substantial question of law is not involved herein and even if it is there the same has to be answered in negative, in terms of discussion and finding, recorded herein above. Mr. Mazumdar, learned counsel for the respondents has rightly pointed out this during

argument and the decisions referred by him al strengthened his submission.

**20.** I have considered the submission of Mr. Roy, learned Senior counsel for the appellants and also I have carefully gone through the decisions referred by him and in view of my above discussion and finding, the submission so advanced by Mr. Roy, is found to be bereft of merit and the decisions referred by him also would not come into his aid.

**21.** As regards the second substantial question of law, I find that the learned Trial Court had relied upon the certified copy of written statement of Late Sukumari Roy, filed in Title Suit No.6/2007, the contents of which are not tested in cross-examination. In the said written statement, it was stated that her father Late Dinomoni Choudhury died in the month of February, 1956 and that the widow of Late Dinomoni Choudhury and his five daughters executed a registered Gift Deed No. 6390, dated 26.09.1962, donating their shares to Debeswar Choudhury, their own brother.

**22.** It is a fact that Sukumari Roy never appeared in the witness box to state the said facts and to face cross-examination. It is well settled in the case of **Vidhyadhar vs. Manik Rao and Anr.**, reported in (1999) 3 SCC 573, that when a party to the suit does not appear in the witness box and state his own case on oath and does not offer himself to be cross-examined by the other side, presumption would arise that the case set up by him is not correct.

**23.** But, it appears from the impugned judgment of the learned First Appellate Court that it has also relied upon the evidence one Jyotirmoy Choudhury, who was examined as D.W.1 in the Title Suit No. 39/1984, which was exhibited as Exhibit – E, which indicates that Dinomoni

Choudhury died on 01.02.1956. The learned Court also found that there is ring of truth in the evidence of Jyotirmoy Choudhury. Though, the learned Executing Court has observed that execution or non-execution of Exhibit – 13 is immaterial, yet, the same is found to be not correct and the learned First Appellate Court has rightly held that the Gift Deed was indeed properly executed by all the donees. There is no infirmity or illegality in the same.

**24.** Thus, in view of the discussion made herein above, in respect of first substantial question of law and the finding so arrived at, this court is of the view that this second substantial question of law is not involved herein.

**25.** In the result, I find no merit in this appeal and accordingly, the same stands **dismissed**.

**26.** Send down the records of the learned courts below with a copy of this judgment. In the given facts and circumstances, the parties are left to bear their own cost.

**Sd/- Robin Phukan**  
**JUDGE**

**Comparing Assistant**