

GAHC010161102009



2026:GAU-AS:7366

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RSA/9/2009

NANEE BARUAH
D/O LT. HEM KANTA BARUAH, R/O VILL. PANIGAON, PS. NAGAON SADAR,
NAGAON, PIN-1, DISET. NAGAON, ASSAM.

2: MUKUL HAZARIKA
S/O DEBEN HAZARIKA
R/O VIL. PANIGAON POLY ROAD
PS. NAGAON SADAR
NAGAON
DIST. NAGAON
ASSA

VERSUS

ON THE DEATH OF DEENA NATH BARUAH, HIS LEGAL HEIRS and ORS
NAMELY-

1.1:UJJAL BARUAH
S/O LT. DEENA NATH BARUAH
R/O VILL. HAIBARGAON
LAWKHOWA ROAD
PO HAIBARGAON
PS. NAGAON SADAR
DIST. NAGAON
ASSAM
PIN 782002

1.2:SRI UTPAL BARUAH
S/O LT. DEENA NATH BARUAH
R/O VILL. HAIBARGAON
LAWKHOWA ROAD
PO HAIBARGAON
PS. NAGAON SADAR
DIST. NAGAON

ASSAM
PIN 782002

1.3:SMTI MEGHALI BARUAH
W/O SRI DEBA KANTA SARMAH
D/O LT. DEENA NATH BARUAH
R/O VILL AND P.O.-MAJPATHARI
PIN-782003
DIST-NAGAON
ASSAM

1.4:SMTI UPAMA BARUAH
W/O LATE BHUPEN SARMAH BARUAH
D/O LATE DEENA NATH BARUAH
R/O TILOK DEKA ROAD
NATUN BAZAR
PIN-782003
DIST- NAGAON
ASSAM

2:HARENDRA BORA

S/O LT. THAGIRAM BORA

3:JIBAN BORA

S/O LT. GULUK BORA

4:BIREN BORA

S/O LT. DHANIRAM BORA

5:LAXMI RAM BORA

S/O LT. KAMAL BORA

6:DULAN BORA

S/O LT. GULUK BORA.

7:MADHAB BORA

S/O TIPAI BORA
ALL ARE RESIDENTS OF VILL. PAMILAGAON
PS. KACHUWA
MOUZA-JARABARI
DIST. NAGAON
ASSAM.

8:GULAK BORA

R/O VILL. KAMPUR
SUB REGISTERAR OFFICE
MOUZA-KAMRUP
DIST. NAGAON
ASSA

- B E F O R E -

HON'BLE MR. JUSTICE ROBIN PHUKAN

Advocate for the appellants	:	Mr. D. Mozumdar (Sr. Adv.); Mr. P. Hazarika.
Advocate for the respondents	:	Mr. B.D. Konwar (Sr. Adv.); Ms. J.M. Konwar.
Date on which judgment is reserved	:	17.02.2026
Date of pronouncement of judgment	:	26.05.2026
Whether the pronouncement is of the operative part of the judgment?	:	N/A
Whether the full judgment has been pronounced?	:	Yes

JUDGMENT & ORDER (CAV)

Heard Mr. D. Mozumdar, learned Senior Counsel, assisted by Mr. P. Hazarika, learned counsel for the appellants. Also heard Mr. B. D. Konwar,

learned Senior Counsel, assisted by Mrs. J.M. Konwar, learned counsel for the respondents.

2. For the sake of convenience and to avoid confusion, the parties will be referred to by their original status in the Title Suit, before the learned trial Court.

3. This Regular Second Appeal, under Section 100 of the Code of Civil Procedure, is directed against the Judgment and Decree, dated 19.09.2008, passed by the learned Civil Judge, Nagaon, Assam, in Title Appeal No. 30/2003.

4. It is to be noted here that vide impugned Judgment and Decree, dated 19.09.2008, the learned Civil Judge, Nagaon, Assam (hereinafter, 'first appellate Court'); has dismissed the appeal and affirmed the Judgment, dated 25.04.2003, and Decree, dated 02.05.2003, passed by the learned Civil Judge (Jr. Div.) No. 2, Nagaon, Assam, (hereinafter, 'trial Court'); in Title Suit No. 70/1999.

Background facts :-

5. The background facts, leading to filing of the present appeal, are briefly stated as under:

“The plaintiff/respondent No. 1, namely, Sri Deena Nath Baruah, was the owner of a plot of land, measuring 22 Bighas 3 Kathas and 15 Lessas, covered by Patta Nos. 138, 139, 148 and 18; situated at Chitalmari and Pamulajarani kissam, under Garuhat Mauza, in the district of Nagaon, Assam. Out of these four Pattas, bearing P.P. No. 138, Dag Nos. 85 and 86, consists of 6 Bighas 8 Kathas and 4 Lessas; under P.P. No. 139, Dag No. 665, consists of 2 Bighas 1 Katha and 11 Lessas; P.P. No. 148, Dag No. 88, consists

of 9 Bighas 1 Katha 5 Lessas; and in P.P. No. 18, of Pamilajarani kissam, Dag No. 468, consists of 2 Bighas 3 Kathas, out of 4 Bighas 3 Kathas. However, out of the total 22 Bighas 3 Kathas 15 Lessas of land, the subject matter of this suit is 12 Bighas of land.

The plaintiff was in need of money, for which he was in search of prospective buyers of the land that was under his possession. Then, the defendants expressed their willingness to purchase the land of the plaintiff and accordingly, the plaintiff had agreed to sale the said plot of land, by executing a deed of agreement, dated 30.01.1999, in favour of the defendant Nos. 1, 3, 5 & 8, fixing a price consideration of Rs. 8,000/- (Rupees eight thousand) per Bigha. As per terms and conditions of the agreement, the defendants had initially paid Rs. 80,000/- and then Rs. 20,000/-, in total, Rs. 1,00,000/-; to the plaintiff as advance. However, out of the said amount, the defendant No. 1 had paid Rs. 55,000/- and defendant No. 3, on behalf of defendants No. 3, 4, 5, 6 & 7; had paid Rs. 45,000/-. Therefore, as per agreement, an amount of Rs. 82,000/- had remained as balance consideration amount and the defendants had agreed to pay the same at the time of execution of the Sale Deed, in the month of Bahag. As per the terms and conditions of the agreement, the defendant Nos. 1 & 2, had to pay a balance of Rs. 41,000/- and the defendant Nos. 3, 4, 5, 6 & 7, had to pay the remaining balance of Rs. 41,000/-.

The defendant Nos. 1 & 2 had decided to purchase the schedule 'ka' land of the plaintiff, measuring 12 Bighas and rest of the defendants had decided to purchase the remaining 10 Bighas, 3

Kathas 5 Lessas of land and accordingly, on 05.05.1999, both the defendants had filed applications before the Deputy Commissioner, Nagaon, for obtaining sale permission and the said permission was accorded, vide Letter Nos. NRX-7/99/620 and NRX-7/99/605.

As the plaintiff was an old man, he had instructed defendant Nos. 1 & 2 to make all necessary arrangements to sale such as obtaining sale permission of the land and accordingly, the defendants Nos. 1 & 2 had instructed the proforma defendant No. 9 to prepare 5 Nos. Sale Deeds and asked the plaintiff to register those Sale Deeds. Accordingly, on 15.05.1999, the defendant Nos. 3, 4, 5, 6 & 7 had cleared their balance amount of Rs. 41,000/- in the house of the plaintiff and the defendant Nos. 1 & 2 had also promised to clear their balance amount at Central Bank, Natun Bazar Branch. But, the defendant Nos. 1 & 2 could not withdraw the money on that day due to early closure of the bank, on account of Saturday. However, the defendant Nos. 1 & 2 had requested the plaintiff to execute the Sale Deeds in their favour, with a promise to clear the balance amount, on 17.05.1999. Thereafter, on good faith, the respondent/plaintiff had executed the sale deed in favour of the defendants in the Office of the Sub-Registrar, Kampur. But, the defendant Nos. 1 & 2 did not turn up to his house to clear the balance amount. When the plaintiff asked the defendant Nos. 1 & 2 to make payment of the balance amount, they delayed the same on one pretext or the other.

Then on enquiry, the plaintiff came to know that defendant Nos. 1 & 2, by playing fraud, got three Gift Deeds, executed,

instead of Sale Deeds, by showing the plaintiff to be their own brother. Then obtaining the certified copies of those deeds, being Deed Nos. 419/99, 420/99 and 421/99 from Sub-Registry Office, Kampur; the plaintiff had initiated a proceeding under Section 144 Cr.P.C., against the defendant Nos. 1 & 2, seeking to restrain the defendant Nos. 1 & 2 from entering into the suit land. Accordingly, the learned Executive Magistrate, vide order dated 01.06.1999, restrained defendant Nos. 1 & 2 from entering into the suit land.

The plaintiff denied having executed the Gift Deeds in favour of the defendant Nos. 1 & 2 and thereafter, the plaintiff had instituted a suit for declaration of his right, title and confirmation of his possession and for cancellation of Gift Deed, by declaring the same as illegal and non-enforceable.

The defendants had contested the suit by filing their written statements. They have not disputed the fact that the plaintiff was the absolute owner of the plot of land measuring 22 Bighas 3 Kathas 15 Lessas and they had entered into an agreement with the plaintiff to purchase the land of the plaintiff at a consideration of Rs. 1,80,000/-, and on 30.01.1999, they had executed a Bainanama with the intending purchaser, at a consideration of Rs. 8000/- per Bigha. The defendant Nos. 1 & 2 had decided to purchase 12 Bighas of land and rest 10 Bighas 3 Kathas and 15 Lessas were agreed to be purchased by the remaining defendants. After obtaining sale permission from the concerned authority on 15.5.1999, the plaintiff had asked the defendants to come to Sub-Registry Office, Kampur, to execute the Sale deeds and

accordingly, the defendants, on reaching the Registration office, Kampur; paid the entire consideration money to Sri Ujjal Barua, the son of the plaintiff; and after acknowledging the receipt of the consideration money, the plaintiff had executed the Sale Deeds in their favour and delivered the possession of the land.

According to the defendants, the plaintiff had delivered the possession of the suit land in their favour, at the time of execution of the Bainanama and since then, defendant Nos. 1 & 2 have been enjoying the suit land by constructing their houses thereon. They have also alleged that the plaintiff, even after receiving the entire consideration amount, had executed the Gift Deeds in their favour, instead of Sale Deeds.

Upon the aforementioned pleading, the learned trial Court has framed the following issues-

- 1) Whether there is any cause of action for the suit?
- 2) Whether the suit is maintainable in its present form?
- 3) Whether the plaintiff has right title and interest and possession over the suit land?
- 4) Whether Gift Deed Nos. 419/99, 420/99 and 421/99, were obtained fraudulently from the plaintiff and liable to be cancelled?
- 5) Whether the Suit is barred by waiver, estoppel and acquiescence?
- 6) Whether the suit land is under the possession of defendant Nos. 1 & 2?
- 7) To what relief/reliefs parties are

entitled to under the law and equity?

Then, after examining 6 witnesses of the plaintiff and 4 witnesses of the defendant, the learned trial Court has decided all the issues in favour of the plaintiff and thereafter, decreed the suit in favour of the plaintiff; by declaring that 'ka' schedule land belongs to the plaintiff and his possession over the same will continue and the deeds mentioned in schedule 'kha' is declared fraudulent and illegal and held to be non-enforceable. The defendants Nos. 1 & 2 are permanently restrained from disturbing peaceful possession of the suit land by the plaintiff and the defendants Nos. 1 & 2 are directed to bear the cost of the suit to the plaintiff and as there is no counter claim from the defendant Nos. 1 & 2, there is no order as to return the money paid by them to the plaintiff.

Being aggrieved, the defendants had preferred one Title Appeal, being Title Appeal No. 30/2003, before the Court of the learned Civil Judge, Nagaon (the learned first appellate Court).

Then, upon hearing the learned counsel for both the parties and also considering the evidence and materials placed on record, the learned first appellate Court had found no infirmity or illegality in the order, passed by the learned trial Court and thereafter, dismissed the appeal.

Being aggrieved, the defendant Nos. 1 & 2 have approached this Court, by filing the present Regular Second Appeal, under Section 100 of the Code of Civil Procedure, which was admitted for hearing on the following substantial questions of law –

- (i) Whether, in view of clear admission on the part of the plaintiff, as also the recitals in the Deeds that the same were executed in sound mind, health and understanding, the Learned Lower Appellant Court was justified in cancelling the said Deeds on the ground of undue influence and fraud when there was no pleading of fraud or undue influence by the plaintiff?
- (ii) Whether, even assuming it to be a case of fraud or undue influence the Learned Appellant Court was justified in shifting burden to the defendants/appellants to prove that the transaction was not induced by undue influence or fraud, in as much as the burden of prove is upon the party who seeks to avoid the transaction, on the ground of fraud or undue influence?
- (iii) Whether the Learned Lower Appellate Court without arriving at any finding as to whether the defendants were in a position to dominate the will of the plaintiff or as to the nature of fraud as required under Section 16 and 17 of Contract Act, respectively, was justified in declaring the Deeds in question to be invalid?"

Submissions:-

6. Mr. Mozumdar, learned Senior Counsel for the appellants, submits that there is concurrent finding of fact by both the learned Courts below, but despite concurrent finding of fact, this Court can interfere with the impugned judgment and decree if the findings, so arrived at by the learned Courts below are perverse. Mr. Mozumdar also submits that the appellants herein had agreed to

purchase the land of the respondent No. 1, and the intention of the parties are clear, and that the bainanama was executed and advance sum was paid and the possession was also delivered, and the possession was with the defendants/appellants. Mr. Mozumdar, by referring to Section 34 of the Specific Relief Act, 1963, submits that the maintainability of the suit ought to have been decided, as consequential relief as required under Section 34 of the said Act has to be pleaded and in absence of such pleading, declaratory relief cannot be granted. In support of his submission, he has referred to a decision of Hon'ble Supreme Court in the case of **Akkamma and Ors. Vs. Vemavathi and Ors.**, reported in **(2021) 18 SCC 371**.

6.1. Mr. Mozumdar, referring to a decision in **R. Kandasamy (since dead) and Ors. vs. T.R.K. Sarawathy and Anr.**, reported in **(2025) 3 SCC 513**, submits that the since there arises a question about the maintainability of the suit for absence of consequential relief, as required by Section 34 of the Act, the learned courts below ought to have address the same first. He also submits that even though the learned courts below had not considered and addressed the said issue of maintainability, this Court has the power to examine the same.

6.2. Referring to a decision of Hon'ble Supreme Court in the **Vidhyadhar vs. Manikrao and Anr.**, reported in **(1999) 3 SCC 573**, Mr. Mozumdar submits that that sub-section (4)(b) of Section 55 of the Transfer of Property Act, 1882, is attracted herein this case as ownership of the suit land has passed over to the defendants, and the intention of the parties to sell the suit land is clear and as such decreeing the suit by the courts below is illegal.

6.3. He also submits that there is no evidence of fraud, and the burden of proof of fraud is upon the party who pleads it, and that in the case in hand, the

respondents had admitted of receiving the advance amount, and under such circumstances, Mr. Mozumdar has contended to interfere with the impugned judgment and decree, so passed by the learned first appellate Court, as the substantial questions of law, so framed by this Court, are involved herein and in view of the facts and circumstances on the record the same have to be answered in affirmative and the appeal may be allowed by setting aside the impugned judgment and decree.

7. Per contra Mr. Konwar, learned Senior Counsel for the respondents, submits that there is concurrent finding of fact by the learned trial Court as well as the learned first appellate Court, and the impugned judgment and decree suffers from no illegality or irregularity giving rise to any of the substantial questions of law, so formulated in the case in hand.

7.1. Mr. Konwar, referring to three decisions of Hon'ble Supreme Court in -

(i) **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar and Ors.**, reported in (1999) 3 SCC 722.

(ii) **Krishna Mohan Kul alias Nani Charan Kul and Anr. vs. Pratima Maity and Ors.**, reported in (2004) 9 SCC 468.

(iii) **Hero Vinoth (minor) vs. Seshamma**, reported in (2006) 5 SCC 545.

-- submits that at page No. 9 of the plaint, the respondent No. 1 herein, had pleaded that the defendants were authorized to prepare the sale deed, but instead of the same, they prepared a gift deed and there is also mention about the consideration and if it was really a gift deed, then the question of consideration does not arise and this itself

is a testament of fraud.

7.2. Mr. Konwar further submits that Section 55(4)(b) of the Transfer of Property Act, 1882, is not attracted herein and that possession is still with the plaintiff/respondent No. 1 and the appellants are trying to dispossess the respondent No. 1. Referring to a decision of Hon'ble Supreme Court in **K.R. Suresh vs. R. Poornima and Ors.**, reported in **2025 SCC OnLine SC 1014**, Mr. Konwar also submits that though the appellants have paid the consideration to the respondent No. 1, yet there was no counter-claim, and as such, the question of returning of the advance sum does not arise and the learned Courts below had rightly refused the same.

7.3. In support of his submission, Mr. Konwar has referred to the following decisions:

- (i) **Narandas Karsondas vs. S.A. Kamtam and Anr.**, reported in (1977) 3 SCC 247.
- (iv) **State of Gujarat and Anr. vs. Mahendrakumar Parshottambhai Desai (Dead) by LRs.**, reported in (2006) 9 SCC 772.
- (v) **K. Simrathmull vs. Nanjalingiah Gowder**, reported in 1962 SCC OnLine SC 206.

8. Having heard the submissions of learned counsel for both the parties, this Court has carefully gone through the memo of appeal, the grounds mentioned therein, the substantial questions of law so formulated at the time of admission of the appeal and the impugned judgment and decree, so passed by the learned first appellate Court and also the judgment and decree so passed by the learned trial Court and the decisions referred by them.

Findings:-

9. In respect of the *first substantial question of law*, i.e. whether in view of clear admission on the part of the plaintiff, as also the recitals in the deeds that the same were executed in sound mind, health and understanding, the learned first appellate Court was justified in cancelling the said deeds on the ground of undue influence and fraud when there was no pleading of fraud or undue influence by the plaintiff, this Court, having gone through the pleadings, finds that in paragraph No. 6 of the plaint, the respondent No. 1/plaintiff had clearly mentioned that he came to know that the deeds were prepared fraudulently and collusively by the appellants/defendant Nos. 1 and 2 as gift deed in place of the sale deed, and without paying a sum of Rs. 41,000/-, to the plaintiff, the defendants taking the chance of the simplicity of the plaintiff, got the deeds registered in their own names. Also, in paragraph No. 8, the respondent No. 1 herein, as plaintiff, had pleaded that the gift deeds are baseless, fake and collusive and created by the defendant Nos. 1 and 2 collusively. Further, in prayer portion of the plaint also, in respect of prayer ‘*Kha*’, it has been pleaded for declaring the deeds, described in schedule ‘*Kha*’ in connection with the suit land, described in the schedule ‘*Ka*’ are illegal, collusive, baseless, fake and fraudulent.

9.1. Mr. Konwar, taking this Court through the plaint and also the evidence, has rightly pointed this out during argument and this Court finds force in the same. In view of above pleadings, this Court is of the view that the first substantial question of law, so framed herein, appears to be not at all involved in this appeal.

9.2. This Court finds substance in the submission of Mr. Konwar, learned Senior Counsel for the plaintiffs/respondents. And it appears that the plaintiff had pleaded fraud or undue influence in the plaint. Further, it appears that the

learned trial Court, having arrived at finding that there is fraud, had cancelled the gift deeds. And in the appeal, the learned first appellate Court had also upheld the finding of the learned trial Court after appreciation of facts, that have been pleaded and also proved by adducing evidence during trial.

9.3. It is a fact that there is recital in the deed to the effect that the same were executed in sound mind, health and understanding. But, there is evidence that the same were prepared by the defendants No.1 and 2, as per instruction of plaintiffs Nos. 1 and 2 and that before registration, the plaintiffs were not allowed to peruse the same. This piece of evidence is not disputed by the appellant/defendant, shows that the recital in the two sale deeds, described in the schedule '*Kha*' in respect of the suit land, described in the schedule '*Ka*', are not genuine.

10. Moving forward to the *second substantial question of Law*, this Court finds that in view of the decision of Hon'ble Supreme Court in the case of *Anil Rishi vs. Gurbaksh Singh*, reported in (2006) 5 SCC 558,

“8. The initial burden of proof would be on the plaintiff in view of Section 101 of the Evidence Act, which reads as under:

“101. *Burden of proof*.—Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

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.”

10.1. Further, how this burden has to be discharged, is dealt with by Hon’ble Supreme Court as under:

“19. There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to begin. Burden of proof is used in three ways: (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii)

to make that of establishing a proposition as against all counter-evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.”

10.2. Thus, it is well settled that the burden of proof is always lies upon the party who pleads a fact or asserts a fact. In the case in hand, from the pleading, from the evidence adduced and also from the findings, so recorded by the learned trial Court, it becomes apparent that the plaintiff/respondent, not only pleaded fraud, but also proved the same by adducing evidence. And the learned first appellate Court also, after appreciation of facts, affirmed the same. And when the plaintiff herein has discharged the initial burden, then it shifts to the defendant, which the defendant/appellant herein, had failed to discharge.

10.3. It also appears that the learned trial Court, while dealing with the issue, had categorically arrived at the finding that the evidence of P.W.1 clearly shows that defendant No. 2 had tactfully obtained the signatures of the plaintiff over the deed Nos. 419/99, 420/99 and 421/99, without giving an opportunity to him to go through the contents of the deeds, and in view of the above categorical finding of the learned trial Court and also going through the findings, so recorded by the learned first appellate Court, in respect of issue No. 4, this Court is unable to record concurrence with the submission of Mr. Mozumdar that in this appeal, the second substantial question of law is also involved.

10.4. Though the learned first appellate Court observed that the onus is on

the appellants to discharge the burden relating to undue influence, yet the context, under which the said observation was made, has also to be looked into. It is to be noted here that while dealing with the issue No. 4, the learned first appellate Court had observed that since the appellants (defendants) claimed that the respondent (plaintiff) No. 1 had executed the gift deed, being deed Nos. 419/99, 420/99 and 421/99, in respect of the suit land, it was his duty to prove that the respondent/vendor had executed the same voluntarily, and it further observed that the record did not disclose that the vendor (plaintiff/respondent) had executed the same voluntarily or the gift property was accepted by the donee/appellants for completion of the process of alleged gift.

10.5. The learned first appellate Court also observed that since the plaintiff No. 1 denied to have executed the gift deed, and proved by adducing evidence that his signature on the deeds were taken tactfully and without giving him an opportunity to read the contents of the deeds, and also did not pay the remaining consideration and as such, the fraud as alleged, stands proved now. The onus is on the defendants/appellants to discharge their burden relating to undue influence. But, the appellants have failed to discharge their liability.

10.6. While the findings, so recorded by the learned first appellate Court are examined, in the light of the given facts and circumstances on the record, this Court is of the view that the burden to prove undue influence is always upon the appellants herein, as initial burden is discharged by the plaintiff, not upon the plaintiffs/respondents. Therefore, this second substantial question of law is also found to be not at all involved herein.

11. Moving forward to the *last substantial question of law*, this Court finds from the pleadings of the parties and the evidence on record, and

also from the submissions of learned counsel for both the parties, that the respondent No. 1/plaintiff was an old person and he endorsed the appellants/defendant Nos. 1 and 2 to do the work of registration of sale deed such as obtaining permission etc., and taking the chance of his simplicity, they had prepared the gift deed, instead of sale deed, and avoided making payment of rest of the part of sale consideration i.e. Rs. 41,000/-. It is a settled proposition of law that in gift deed, the question of consideration does not arise. Moreover, it must be voluntary and the property must be transferred to the donee and also there should be acceptance of the same by the donee, as provided under Section 122 of the Transfer of Property Act.

11.1. Thus, the nature of the fraud is apparent on the face of the record and in that view of the matter, the learned first appellate Court is fully justified in declaring the gift deed Nos. 419/99, 420/99 and 421/99, as invalid which to the considered opinion of this Court rightly held the same.

11.2. Further, it appears that there is concurrent finding of fact by both the learned Courts below and such finding is binding upon this Court. Reliance in this context may be made to the decision of Hon'ble Supreme Court in the case of **Santosh Hazari vs. Purushottam Tiwari (Dead) By LRs.**, reported in (2001) 3 SCC 179. Similar proposition is also laid down in the case of (i) **Kondiba Dagadu Kadam (supra)**, (ii) **Krishna Mohan Kul alias Nani Charan Kul (supra)** and (iii) **Hero Vinoth (minor) (supra)**, so referred by Mr. Konwar, learned counsel for the plaintiffs/respondents.

11.3. In the case of **Hero Vinoth (supra)** Hon'ble Supreme Court has held as under:-

“24. The principles relating to Section 100 CPC

relevant for this case may be summarised thus:

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to “decision based on no evidence”, it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.”

12. Now, in respect of the submission of Mr. Mozumdar, learned counsel for the defendants, that a mere declaratory decree without there being consequential relief is non-executable in view of Section 34 of the Act, it appears from the cause title and also from prayer portion of the plaint that the plaintiff, though prayed for granting permanent injunction, has not prayed for consequential relief(s) such as recovery of possession. According to Mr. Mozumdar the possession of land in question was handed over to the defendants and now they are in possession of the same, and since consequential relief of recovery of possession has not been sought for in this case, the decree which is a mere declaratory one, is not executable, and also barred by Section 34 of the Act.

12.1. The proviso to Section 34 of the Act bars a court from granting a bare declaratory decree, when the plaintiff is in a position to ask for additional consequential reliefs, such as recovery of possession, injunction etc. It is, now,

well settled proposition that a suit for declaration of title to immoveable property is not maintainable under Section 34 of the Act if the plaintiff is not in possession and does not seek recovery of possession and in such a case, a mere declaratory suit is barred.

12.2. In the instant case the plaintiff has, admittedly, not prayed for consequential relief(s) such as recovery of possession, though he prayed for a decree of permanent injunction. Thus, there appears to be force in the submission of Mr. Mozumdar, learned counsel for the defendants. And the decisions referred by him in **Akkamma** (supra) also supported his contention. Now, the question is, whether possession of the suit land was handed over to the defendants after execution of the alleged deeds, so as to seek such a consequential relief for recovery of possession by the plaintiff.

12.3. However, Mr. Konwar, learned counsel for the plaintiff, taking this Court through the pleadings and the evidence adduced by the parties, has pointed it out that the plaintiffs are in possession of the suit land and the possession had never been handed over to the defendants. Rather possession, in respect of the land purchased by the pro-forma defendant Nos. 3, 4, 5, 6 & 7, who had cleared their balance amount of Rs. 41,000/- in the house of the plaintiff, was handed over. There appears to be substance in the submission of Mr. Konwar, learned counsel for the plaintiffs/respondents. If the possession is not at all handed over to the defendants, Section 34 does not bar a declaratory suit, and the question of seeking consequential of recovery of possession does not arise, while the plaintiff had prayed for the consequential relief of permanent injunction.

12.4. Thus, the question of maintainability of the suit, in view of the proviso to

Section 34 of the Act, does not arise. And that being so the submission of Mr. Mazumdar in this regard cannot be accepted and decision in **R. Kandasamy (supra)** would also not come into his assistance.

12.5. Further, it appears that it is, entirely, a new plea, neither raised before the learned trial Court, nor before the learned first appellate Court. It is well settled in the case of **Panchugopal Barua vs. Umesh Chandra Goswami**, reported in (1997) 4 SCC 713, that new plea cannot be raised in the second appeal for the first time.

13. This Court has also carefully considered the submission of Mr. Mozumdar, learned counsel for the defendants in respect of applicability of Section 55(4)(b) of the Transfer of Property Act, and also gone through the decision referred by him in **Vidhyadhar(supra)**. Section 55 of the Transfer of Property Act read as under:-

“55. In the absence of a contract to the contrary, the buyer and seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

(1)-(3)***

(4) The seller is entitled—

(a)***

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of the non-payment, for the amount of the purchase money, or any part thereof remaining unpaid, and for interest on such amount or part from the date on which possession has been delivered.

(5)-(6)***”

13.1. In the case of **Vidhyadhar (supra)** Hon'ble Supreme Court has held that Clause (b) extracted above provides that where the ownership of the property is transferred to the buyer, before payment of the whole of the sale price, the vendor is entitled to a charge on that property for the amount of the sale price as also for interest thereon, from the date of delivery of possession. It has also been held that this clause obviously applies to a situation where the ownership in the property has passed to the buyer, before the whole of the purchase money was paid to the seller or the vendor. Further, it has also been held that the real test is the intention of the parties entering into the transaction. In order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in praesenti or in future. The intention is to be gathered from the recital in the sale deed, the conduct of the parties and the evidence on record.

13.2. However, in the instant case, as held in the foregoing para, the possession of the suit land was never passed over to the defendants. Therefore, this Court afraid the submission of Mr. Mozumdar cannot be accepted and the ratio laid down in the case of **Vidhyadhar (supra)**, so referred by him, would not advance his argument. It is fact that intention of the plaintiff was to sell the suit land. And the same is clear from his conduct. But, instead of preparing the sale deed the defendants, more particularly defendant No.2 had prepared the gift deed, which has already been held by the learned courts below as sham.

14. This Court has also gone through the decisions referred by Mr. Konwar, learned Senior Counsel for the defendants/respondents. There is no quarrel at the bar, about the proposition laid down in the said cases. But, in order to deal with the substantial questions of law, so formulated herein above, detailed

discussion of the same are found to be unwarranted. Thus, none of the substantial questions of law, so formulated herein, is found to be involved in this appeal.

15. In the result, this Court finds no merit in this appeal and accordingly, the same stands dismissed, leaving the parties to bear their own costs.

16. Registry shall send back the records of the learned Courts below, along with a copy of this judgment and order.

J U D G E

Comparing Assistant