

**\* IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Date of decision: 6<sup>th</sup> December, 2021

+ RFA 165/2020, CM No. 26028/2021

RAJEEV KAPOOR

..... Appellant

Through: Mr. Pramod Ahuja, Adv.

versus

JANAK KAPOOR & ANR.

..... Respondents

Through: Mr. Jai Sahai Endlaw and  
Mr. Ashish Kumar, Advs. for R-1  
Mr. R. K. Saini and Mr. Ankit Singh,  
Advs. for R-2

**CORAM:**

**HON'BLE MR. JUSTICE V. KAMESWAR RAO**

**V. KAMESWAR RAO, J. (ORAL)**

1. This appeal has been filed by the appellant against the order dated December 17, 2019 whereby the Trial Court had rejected the counter-claim filed by the appellant, who is defendant No.1 in a Suit filed by the respondent No.1 Smt. Janak Kapoor (Janak Kapoor) before it.

2. The brief facts leading to the filing of this appeal are that Late Kewal Krishan Kapoor, the father of the appellant and the respondent No.2 and the husband of the respondent No.1 had purchased a property bearing No.8A/140, WEA, Karol Bagh, New

Delhi ('suit property', for short) from one Dhruv Kumar in the year 1974. It was his self-acquired property. He had, by a Will dated August 22, 1994, bequeathed the property to his wife Janak Kapoor / respondent No.1 herein, with the observation that if she is not alive at the time of his death, the suit property would be inherited equally by his two sons, i.e., Rajeev Kapoor (appellant) and Amit Kapoor (respondent No.2). On November 21, 1994, Delhi Development Authority ('DDA', for short) mutated the suit property in the name of Janak Kapoor / respondent No.1. The property stood transferred in the name of the Janak Kapoor / respondent No.1 with the 'No Objection' from all her children and a conveyance deed was executed by the DDA on June 01, 2012. Janak Kapoor / respondent No.1 became the absolute owner of the suit property.

3. It is noted from the record that the suit property being old, Janak Kapoor / respondent No.1 thought it appropriate to rebuild the property. A builder was engaged, to whom one floor i.e. the Second floor of the proposed new building was allocated. In other words, the suit property comprising of stilt parking, the upper ground floor, first floor, third floor and the roof rights would come to the share of Janak Kapoor / respondent No.1, whereas the Second floor would

be appropriated by the builder. After the super structure of the new building was built, due to delay in the completion of the project, the same was taken over and completed by Janak Kapoor / respondent No.1. The second floor was peacefully handed over to the property developer, who further sold it to a third party. After the building was completed, her sons, Rajeev Kapoor / appellant and Amit Kapoor / respondent No.2 occupied the upper ground floor and the first floor of the suit property. Janak Kapoor / respondent No.1 gifted the third floor to her married daughter Roma Malhotra vide gift deed dated November 04, 2015 who was living in her matrimonial home and Janak Kapoor occupied the top floor, herself.

4. In the above background, Amit Kapoor / respondent No.2, had on April 17, 2017, filed a suit with the following prayers:

*“a) To cancel the Gift Deed dated 4.11.2015 executed by Defendant No. 1 in respect of 3rd floor of the suit property No. 8A/140, W.E.A. Karol Bagh, New Delhi-110 005, in favour of defendant no. 2 and registered vide Registration No. 8463 in Book No. 1, Volume No. 16222 on pages 1 to 8 before the subRegistrar-III, Delhi ;*

*b) To pass Money Decree in favour of the plaintiff and against the defendant no.1 & 2, thereby directing her to pay to the plaintiff his share of an amount of Rs.20,00,000/- (Rupees Twenty lacs only) with interest @18% per annum for the entire period till its realization and also to pay the amount of joint fixed deposits which she got illegally encashed;*

*c) To pass a Decree of Permanent Injunction in favour of the plaintiff and against the defendant no.1 and 2 their agents, assignees and associates, thereby restraining them from dispossessing the plaintiff and also from selling or creating any third party interest in the aforesaid suit property and from encashing the remaining fixed deposits which are in the joint name of the plaintiff and defendant no. 1.*

*d) To Award the cost of the suit in favour of the plaintiff and against the defendants no. 1 & 2.”*

5. The suit was dismissed by this Court in terms of order dated May 30, 2019, in FAO No.469/2017, which was filed by Janak Kapoor/respondent No.1 herein and Roma Malhotra, against the dismissal of their application under Order VII Rule 11 CPC, in the suit filed by Amit Kapoor/respondent No.2. The review petition filed by Amit Kapoor/respondent No.2 seeking review of order dated May 30, 2019 was also dismissed. The Special Leave Petitions filed by Rajeev Kapoor/appellant and Amit Kapoor/respondent No.2 were also dismissed by the Supreme Court on October 18, 2019 and January 07, 2020 respectively. On April 21, 2017, Janak Kapoor/respondent No.1 filed a Suit being CS 42/2019 (Old No.1515/2017) for different prayers including for Mandatory Injunction praying for a direction to Rajeev Kapoor / appellant and Amit Kapoor/respondent No.2 to remove themselves from the upper ground floor and first floor of the suit property. The said Suit is

pending consideration before the Trial Court. Along with the written statement, Rajeev Kapoor/ appellant had filed a counter-claim. The prayers in the counter-claim are the following:

*“(a) That a Declaratory decree may please be passed in favor of Defendant No.1 and against the Plaintiff declaring that the Mutation dated 21.11.1994 carried out by D.D.A. may please be cancelled & declared null & void and not liable to be operative as all the legal heirs have not signed the documents for Mutation. That the Mutation has been carried out against all norms procedures, rules & regulations of the D.D.A. and were not followed by the Plaintiff as well as by the D.D.A. in carrying out the Mutation in favor of the Plaintiff.*

*(b) That a Declaratory decree may please be passed in favor of Defendant No.1 and against the Plaintiff declaring that Conveyance Deed dated 01.06.2012 is also illegal & void and ordered to be cancelled, not liable to be operative because the same was also executed on the basis of illegal document i.e. Mutation letter dated 21.11.1994 and cannot be allowed to be implemented by the Plaintiff against the Defendant No.1 as the Plaintiff played fraud with the Defendants. The same may be declared null & void as the same was got executed in her favor on the basis of wrong facts & misrepresentation by the Plaintiff before the D.D.A.*

*(c) To cancel the Gift Deed dated 02.11.2015 executed by the Plaintiff in favor of Mrs. Roma Malhotra for the third floor of the Suit property bearing No.8A/140, W.E.A, Karol Bagh, New Delhi and registered with the office of Sub-Registrar vide Registration No.8463 in Book No.1 Volume No. 16222 on Page No. 1 to 8 registered on 04.11.2015 be declared as null & void as Plaintiff was not owner nor competent to execute the Gift Deed in favor of her daughter as the subject matter of the property belongs to the Defendants and not to the Plaintiff.*

*(d) It is therefore prayed to this Hon'ble Court that the Counter claim for a sum of Rs.24 Lacs be decreed in favour of Defendant No.1 and against the Plaintiff. The said*

*amount is claimed by the Defendant No.1 uptill the date of filing the Suit with future interest at the rate of 12% p.a. till realization be also passed in favour of the Defendant No.1 and against the Plaintiff with cot of the Suit along with the cost of Counter claim.*

*(e) That a decree for Rendition of accounts be passed in favor of Defendant No.1 and against the Plaintiff and the Plaintiff should be directed to submit to this Hon'ble Court, true & correct Accounts of the amount i.e. Rs.60 Lacs received by her from the Builder and thereafter to submit accounts and also to give the details of the Interest so received by her on the F.D.s in the Oriental bank of Commerce and Union Bank of India, Karol Bagh branch as well as in the other banks for which no account has been given by the Plaintiff to the Defendant No.1 as on date. The Plaintiff is also liable to give account of the amount so received by her from the girls to whom she has been keeping as "Paying Guest" on Third floor of the Suit property which portion belongs to the Defendants. The Defendant No.1 will pay the requisite Court fee after the true & correct accounts are placed before this Hon'ble Court by the Plaintiff and Defendant No.1's specific share comes in his hand, thereafter the appropriate Court fee will be paid at that time.*

*(f) That a declaratory decree may please be passed in favor of the Defendant No. 1 declaring him that he is in Adverse Possession of the property for the last more than 20 years without any interruption from any one adverse to the Plaintiff. As he has been living in the property as his own right and not with the permission of the Plaintiff.*

*The Counter Claim of the Defendant No.1 may please be decreed on all the Reliefs as prayed from para No. (a) to (f) of Counter Claim as prayed in the different paras of the Prayer Clause. The Counter Claim of the Defendant No.1 may please be decreed in favor of Defendant No.1 and against the Plaintiff with Cost of the Counter Claim and of the Suit.*

*Or this Hon'ble Court may grant such other relief in favour of the Defendant No.1 and against the Plaintiff as may deem fit and proper."*

6. Janak Kapoor/respondent No.1 herein has filed an application under Order VII Rule 11 CPC seeking rejection of the counter-claim. No reply to the application was filed either by Rajeev Kapoor/appellant herein nor by Amit Kapoor/respondent No.2. The Trial Court, after noting the fact that in the Suit filed by Amit Kapoor/respondent No.2 wherein he had sought the cancellation of the Gift Deed dated November 4, 2015, executed by Janak Kapoor/respondent No.1 in favour of Roma Malhotra, wherein against the dismissal of her application under Order VII Rule 11 CPC, Janak Kapoor/respondent No.1 has filed an appeal being FAO 469/2017 before this Court, which was decided on May 30, 2019, whereby this Court has accepted the Appeal and dismissed the Suit filed by Amit Kapoor/respondent No.2, dismissed the counter claim of Rajeev Kapoor/appellant herein. Rajeev Kapoor (appellant) who is defendant No.1 in the suit, had sought declaration to the effect that the mutation dated November 21, 1994 be cancelled and declared as null and void. Similarly, the Conveyance Deed dated June 1, 2012 and Gift Deed dated November 2, 2015 be also declared as null and void. The Trial

Court vide the impugned order on a finding in respect of mutation, conveyance deed and gift deed and also the challenge, being beyond the period of three years, inasmuch as the counter-claim having been filed in 2017, rejected the same / counter-claim.

**SUBMISSIONS:**

7. The submission of Mr. Pramod Ahuja, learned Counsel for Rajeev Kapoor/appellant herein is, the impugned order has been passed by the Trial Court dismissing the counter-claim in the absence of the counsel for Rajeev Kapoor/appellant as by mistake the counsel did not note the date in his diary. Further, the Trial Court having on May 21, 2019 framed nine issues which includes an issue that the Trial Court does not have pecuniary jurisdiction, inasmuch as Janak Kapoor/respondent No.1 having filed a Suit for Mandatory Injunction with respect to two floors and had affixed a Court Fee of ₹13/- only, though the value of each floor is ₹2,25,00,000/- which has to be decided as a preliminary issue, could not have rejected the counter claim.

8. He fairly stated that though the challenge to the mutation order / conveyance deed / gift deed by Rajeev Kapoor/appellant, shall be unsustainable, in view of the order passed by this Court in

FAO No.469/2017 dated May 30, 2019, still the claim of adverse possession of the suit property for the last 47 years since 1973-1974, i.e., from the period, the father of the appellant purchased the property, the counter claim could not have been dismissed. He did state even if the Trial Court did not frame any issue of adverse possession but the fact the Supreme Court has held that the plea of adverse possession can also be taken now, the counter-claim was maintainable and could not be rejected. He seeks the payer as made in the appeal.

9. On the other hand Mr.Jai Sahai Endlaw and Mr.Anuj Gupta, learned counsel appearing for Janak Kapoor/respondent No.1 had at the outset stated that, Mr. Ahuja having fairly conceded before this Court that in view of the Judgment dated May 30, 2019 passed in FAO No.469/2017, it stood adjudged that the Will dated August 22, 1994 of Kewal Kishore Kapoor gives the sole and absolute right in the Suit property to Janak Kapoor/ respondent No.1, the counter claim was rightly rejected. The claim of Rajeev Kapoor/appellant regarding the suit property and rights arising therefrom are without any cause of action. According to them, similarly the claim of Rajeev Kapoor/ appellant with regard to money received from the

builder and rendition of accounts of rent, are without any cause of action and is hit by *res-judicata*. They have also stated that it is a settled position of law in terms of Order VIII Rule 6(A) to 6(G) of CPC a counter-claim is a separate suit and can be decided separately. In the counter-claim Rajeev Kapoor / appellant had sought declaration, as the owner of the suit property on the strength of Will dated August 22, 1994. Simultaneously, they also took the plea of ownership by adverse possession, which is unsustainable in view of the position of law on adverse possession being well-settled inasmuch as; (i) the plea of title and adverse possession are mutually inconsistent; (ii) mere long occupation does not amount to adverse possession; (iii) the person who claims title over the property on the strength of adverse possession must necessarily first admit the ownership of the true owner; (iv) the person raising a plea of adverse possession need to prove wrongful dispossession of the original owner; (v) the action of adverse possession commences in a wrongful act of taking possession of the property of another person and such wrongful possession is maintained against a right being the ownership right of the owner of the property. The propositions of law being not pleaded and no issue on adverse possession having

been framed, by the Trial Court, the prayer in the counter claim in that regard is also not sustainable.

10. They further stated that from the appellant's own averments in Para 18 of the appeal, Rajeev Kapoor/appellant is not in permissive occupation of the suit property as Janak Kapoor/respondent No.1 is in occupation and residing therein. According to them it is a matter of record that both, i.e., appellant and respondent No.2 herein gave NOC in favour of Janak Kapoor/respondent No.1, meaning thereby that till June 01, 2012, the appellant and respondent No.2 raised no objection to the title of Janak Kapoor/respondent No.1 over the suit property. In the light of these admissions the basic ingredient of lapse of 12 years since the date of possession becoming adverse, is missing. The counter-claim is dated July 1, 2017, i.e., filed after 5 years from the date of Rajeev Kapoor/appellant recognizing his mother as true owner of the suit property. Hence, the plea of adverse possession is futile and not maintainable. Thus the counter-claim lacks cause of action, substance, merit and also suffers from bar of limitation qua mutation dated November 21, 1994 and conveyance deed dated June 1, 2012. Further, if such claim of adverse possession of

Rajeev Kapoor/appellant is approved, then every-one who is staying in the property of the parents under permissive occupation from his parents will become owner within 12 years.

11. Further a claim of so-called ownership by adverse possession is totally inconsistent to the object and spirit of provisions of Maintenance and Welfare of Parents and Senior Citizens Act, 2007. They seek the dismissal of the appeal. In support of their submissions, they have relied upon the following Judgments:

1. ***Narasamma and Ors. v. A. Krishnappa (Dead) Through LRs., 2020 AIR (SC) 4178;***
2. ***Pankaj Shah and Anr. v. Rafat, 2018 (170) DRJ 346;***
3. ***Dagadabai (Dead) by Lrs. v. Abbas @ Gulam Rustam Pinjari, 2017 (5) SLT 433;***
4. ***Kirti Pradeep Sood and Ors. v. Keshav Sood 2017 (238) DLT 52;***
5. ***Chattar Singh Matharoo v. Ashwami Mudgil and Ors. 2015 (10) AD Delhi 508; and***
6. ***T. Anjanappa v. Somalingappa 2006 (7) SCC 570.***

12. Mr.R.K. Saini, learned Counsel appearing for Amit Kapoor/respondent No.2 in his submissions stated that the findings of this Court in FAO No.469/2017 dated May 30, 2019 with regard to the Conveyance Deed and mutation in favour of Janak Kapoor/respondent No.1, mother of the appellant, cannot be called as “*findings*” in law as they are not only *per-incuriam* but also not ratio *decidendi* binding the parties as these were not issues directly involved or arising for determination in the appeal, which was not filed against a final order / decree passed in the suit but only against an order passed in an application under Order VII Rule 11 CPC. Therefore, it could not have decided anything more than that. He stated a decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not other observations found therein nor what logically follows from the various observations made in it. In this regard, Mr. Saini has relied upon the following Judgments:

1. ***Krishena Kumar v. UOI, AIR 1990 SC 1782;***
2. ***The State of Orissa v. Sudhansu Sekhar Misra and Ors. 1968 SCR (2) 154; and***

3. ***Dalbir Singh and Ors. vs. State of Punjab, 1979 (3) SCC 748.***

13. In support of his submission that the findings being are *per-incuriam* because if an issue is neither raised nor argued, the same would not be a precedent to be binding on the Courts, Mr. Saini has relied upon ***N. Bhargavan Pillai v. State of Kerala, AIR 2004 SC 2317 & Brahma Prakash v. State of UP 2006 (2) ESC 1017.***

14. That apart, Mr. Saini has relied upon the judgment in ***Ashok Chaudhary v. Inderjit Sandhu, 1998 (47) DRJ 575;*** wherein it was held that the true criterion for determining the question of court fee in such cases is the substance of the relief claimed as disclosed by the plaint taken as a whole and not merely the form in which the relief claimed is expressed.

15. That apart, he stated, it is a settled law that the dismissal of SLP in *limini* does not amount to a final adjudication of the issues raised by the parties involved in the case, as it is actually and is only the refusal on the part of the court to exercise its special and discretionary jurisdiction to hear the case further, and nothing more. It is not and cannot be an adjudication of the issues involved in the case on merits after application of mind thereon. In support of his

submission, Mr. Saini has relied upon the Judgment in the cases of *State of Punjab v. Davinder Pal Singh, (2011) 14 SCC 113 & Supreme Court Employees Welfare v. Union of India, AIR 1990 SC 334*. He also stated that the proposition advanced by Mr. Endlaw and Mr. Gupta that the issues raised / framed can be decided in the Suit for Mandatory Injunction and Recovery filed by respondent No.1, is fallacious and wholly illegal because Janak Kapoor/respondent No.1 by way of Permanent Injunction is seeking eviction of Rajeev Kapoor/appellant and Amit Kapoor/respondent No.2 from two floors of the suit property and each floor is worth Rs.2.5 Crores, which can only be done in a Suit for Possession and paying ad-valorem Court Fees on the current market value of the property. Moreover, if the stand of Mr. Endlaw and Mr. Gupta, that the issues raised / framed in the counter-claim filed by Rajeev Kapoor/appellant, can be decided in the Suit for Permanent Injunction and Recovery filed by her, then what is the difficulty / harm / prejudice caused, if both the Suit and counter-claim are tried together which in any case was going to happen. It is settled law that the issue of limitation is a mixed question of fact and law and it cannot and need not be decided in an application under Order VII

Rule 11 CPC and at the most to be just and fair to the parties, it could have been decided by framing a preliminary issue, to that effect and giving an opportunity to Rajeev Kapoor/appellant to prove it in his favour with the help of evidence, if required and after decision thereupon the suit would have proceeded further accordingly. According to him, the onus to prove that the suit is barred by limitation would be upon the appellant and respondent No.2 and to first raise such an objection in the written statement and get an issue framed to that effect and request the Court for treating it as a preliminary issue and decide it first before proceeding with the suit would have been appropriate, rather than take a short cut and avoid a proper determination of the said issue by filing an application under Order VII Rule 11 CPC and that too after filing of written statement and framing of the issues. In fact, in such a situation, the application itself was unwarranted and obviously was not bona fide and not liable to be maintained by the Court. Moreover, the Trial Court by way of the impugned order dated December 17, 2019 could not have allowed the application by merely stating that they are beyond the period of three years. It was not a case of three years inflexible statutory period for limitation

and Section 3 (2) (b) of the Limitation Act applicable to it provides as under:

*“(b) any claim by way of a set off or a counter claim, shall be treated "as a separate-suit and shall be deemed to have been instituted-*

*(i) In the case of a set off, on the same date as the suit in which the set off is pleaded;*

*(ii) In the case of a counter claim, on the date on which the counter claim is made in court; (three years from the date when the right to sue first accrues)”*

16. He referred to the Judgment of the Supreme Court in the case of **Ashok Kumar Kalra v. Surendra Agnihotri (2020) 2 SCC 394**. According to Mr. Saini without first deciding and giving a finding that the cause of action to file a suit accrued to Janak Kapoor/respondent No.1 within the last three years or not and knocking out the appellant at the threshold without trial and opportunity to prove his case is totally illegal, erroneous and unjust. According to him, right to sue had accrued to Janak Kapoor/respondent No.1 for mandatory injunction and for possession in the year 2017 and Rajeev Kapoor/appellant filed his counter-claim along with written statement in July, 2017 itself. Therefore, it was within time. He stated that it is a cardinal principle of civil law that every litigant has a right to have his day in

the Court and the Courts should endeavour to decide cases on merit after trial and avoid disposing them off on technicality. The approach of Janak Kapoor/respondent No.1 was only to ensure that the case filed against her by Rajeev Kapoor/appellant and Amit Kapoor/respondent No.2 did not see the light of the day and they do not get an opportunity to prove their case. It is also proved that earlier in the Suit for Declaration filed by Amit Kapoor/respondent No.2, declaring the Gift Deed dated November 4, 2015 as illegal, null and void in regard to third floor of the property executed by Janak Kapoor/respondent No.1 in favour of her married daughter and also Janak Kapoor/respondent No.1 filed an application under Order VII Rule 11 CPC to get the suit dismissed at the threshold in the Trial Court in which she succeeded. He also stated that the following facts show the unfortunate aspect of the case:

*“(a) The R-1 mother is 84 years old and has no other sons. The property' is not the self acquired of the R-1 mother but is self acquired' property of her husband and the father of the appellant and'R-2, which he clearly Intended to give and go to his two sons, in equal share and nothing out of that to his married daughter (to whom the R-2 has recently gifted one floor already belonging to . her) to create artificial shortage of accommodation with her and to create grounds for eviction of the Appellant and R-2 from the 2 floors in the possession In a pre-planned manner and in furtherance of the conspiracy hatched by her married daughter n and son-in-law, .*

*(b) The R-1 mother is aware that her two sons Appellant and R-2 are not owning any property in Delhi where they could go and reside, if god forbid they are directed to or have to vacate two floors in their Occupation of property along with their 4 children (2 minor daughters and one marriageable age daughter and one minor son) and why does she need and would do with the said two floors when it is her self made claim that she cannot live alone and is depended 'upon her married daughter (who is allegedly looking after her from her separate and independent matrimonial house owned by her husband) and to whom she has already gifted one floor (third) in the property from where itself she can easily be looked after by her married daughter.*

*(c) It is unimaginable and inconceivable that a grandmother would be least concerned with the marriage of and settling down of her marriageable age granddaughter and would not want to give her even a penny and would rather throw her out on road along with her father (her son) and other 3 minor grand children including 2 daughters, especially when her grandfather died even before her birth and her father got only a right in the property which also the grand mother is trying to take away."*

Accordingly, he prays the impugned order be set aside.

17. Having heard the learned counsel for the parties and perused the record, the issue which arises for consideration is whether the Trial Court is justified in dismissing the counter claim of Rajeev Kapoor/appellant in a suit filed by Janak Kapoor/respondent No.1, being CS No.42/19 (1515/17 old) Janak Kapoor v. Rajeev Kapoor and Anr. The suit filed by Janak Kapoor/respondent No.1 is for a decree of permanent injunction against Rajeev Kapoor/appellant

and Amit Kapoor/respondent No.2 herein restraining them from creating third party interest or part with possession, of the upper ground floor and the first floor of the suit property i.e. 8A/140, W.E.A., Karol Bagh, New Delhi, and also seeking a direction against them to vacate the upper ground floor and first floor of the suit property etc. Rajeev Kapoor/appellant had filed a counter claim with the prayers which have already been noted above. In substance, Rajeev Kapoor/appellant had filed counter claim seeking declaration with regard to mutation dated November 21, 1994; conveyance deed dated June 01, 2012 executed by the DDA; gift deed dated November 02, 2015 executed by Janak Kapoor/respondent No.1 in favour of Roma Malhotra (her daughter) with regard to third floor of the suit property, be treated as null and void. The prayer in the counter claim is also for recovery of ₹24 Lacs; rendition of accounts against Janak Kapoor/respondent No.1 herein with regard to ₹60 Lacs received by her from the builder; the interest received by her on the FDRs; amount received from the girls who were kept as paying guest on the third floor; further a declaration in his favour that he is in adverse possession of the property for last more than 20 years without interruption from

anyone, adverse to Janak Kapoor/respondent No.1 as he is living in the property on his own right and not with the permission of Janak Kapoor/respondent No.1.

18. There is no dispute that the impugned order has been passed in an application under Order VII Rule 11 CPC filed by Janak Kapoor/respondent No.1 (plaintiff in the suit). The ground on which the application has been filed is that in view of the judgment of this Court in FAO 469/2017 dated May 30, 2019 by which the appeal filed by Janak Kapoor/respondent No.1 against the order of the Trial Court rejecting her application under Order VII Rule 11 CPC; was allowed whereby this Court dismissed the suit filed by the brother of the appellant namely Amit Kapoor/respondent No.2 herein.

19. The findings of this Court in the order dated May 30, 2019 in FAO No.469/2017 are the following:

*“3. The appellants i.e. the mother and daughter had contested the maintainability of the suit and sought its dismissal under Order 7 Rule 11 CPC on the ground that i) the absolute right having been conveyed to the mother in terms of the Will and accepted without any demur by the respondents – Mr. Amit Kapoor and Mr. Rajiv Kapoor, resulting in the Conveyance Deed in favour of the mother, it had extinguished all rights, if any, in favour of the sons; ii) that after the execution of the Conveyance Deed dated 01.06.2012 by the DDA, appellant no.1 – Ms.*

*Janak Kapoor became the absolute owner of the suit property, it was for her to use, develop or dispose-off as she desired; iii) the Collaboration Agreement with the property developer did not create or suggest any rights in favour of the sons and iv) the mother's share would come to her except for the second floor, which was to be given to the property developer for his investment in developing the property.*

*4. The learned counsel for the appellants submits that even the farfetched argument, that a limited right was granted to the mother is not made out, because the plain language of the Will. It is argued that therefore, the suit is baseless and should be rejected/dismissed. The Will reads as under:-*

*“ I, Kewal Kishan Kapoor Son of Shri Babu Lal Kapoor Resident of 8A/ 140, W.E.A., Karoi Bagh, New Delhi - 110005, Aged 59 years, make this Will and Testament on this 22nd August 1994 at New Delhi of my own free will and pleasure and in full possession of my senses.*

*I have made this testamentary or deposition of any kind as far as any assets are concerned but in case any such deposition has been made the same is hereby revoked and cancelled. My family consist of myself, wife and my following children:*

*Wife - Smt. Janak Kapor*

*Sons :*

*1. Shri Rajeev Kapoor*

*2. Shri Amit Kapoor Daughter: Mrs. Roma Malhotra*

*I have been living all along with my wife and sons who have been looking after me.*

*I own following assets and after my death these assets shall be given as follows :-*

I own a house no. 8A/140, W.E.A. Karol Bagh/ New Delhi - 110005 which is my self acquired property which I bequeath to my wife after my death and after her death or if she is not alive at the time of my death the property will be inherited by my two sons equally.”

(emphasis supplied)

5. The language of the bequeathal is clear and unambiguous. The plain reading of the same implies that the self acquired property i.e. the suit property of the Testator Mr. Kewal Krishan Kapoor would be inherited, after his death, by his wife and in the event that she predeceased him, it would go in equal share to his sons. In other words, the sons would inherit the suit property only if their mother was not alive. Fortunately, the mother is alive and she would inherit the suit property. The sons would have no rights at all. The aforesaid bequeathal does not give the mother a limited right but an absolute right and she would be free to utilise the same and dispose it off at her free will. The impugned order refers to the Will, which in any case was superseded and had an implicit acceptance of the plaintiff inasmuch as he had given his consent to the DDA for transferring the property exclusively in the name of the mother, which resulted in the Conveyance Deed in her favour. The Conveyance Deed is not disputed and is not under challenge. Therefore, once the suit property has been conveyed to the mother and then she transferred a portion thereof to her daughter by way of a Registered Gift Deed, the same cannot be challenged. That she is the absolute owner of the suit property stands duly established and accepted by the plaintiff himself. That being the position, the plaintiff would have no cause of action or basis to file the suit. In the circumstances, the suit would not be maintainable.

6. Mr. Pramod Ahuja, the learned counsel for respondents, relies upon the judgment of the Supreme Court in P.V. Guru Raj Reddy vs. P. Neeradha Reddy & Ors., (2015) 8 SCC 331, which held, inter alia, that the

*plaint could be rejected only if it ex facie did not disclose a cause of action or on the reading thereof, the suit appears to be barred by any law. Indeed, that is the position in this case because the plaint itself discloses that the Conveyance Deed dated 01.06.2012 had been issued to the mother after 'No Objection' by the plaintiff – Mr. Amit Kapoor and the other son Mr. Rajiv Kapoor, who were the purported beneficiaries of the Will i.e. they knew the import of the Will and voluntarily gave consent of issuance of the aforesaid Conveyance Deed in favour of the mother. Having done so, reference to the Will or any other document prior thereto would be of no consequence. Therefore, once the absolute right of the mother has been accepted by the sons, there will be no cause of action for filing the suit.*

*7. Mr. Anuj Gupta, the learned counsel for the appellants, submits that the rights of a Hindu woman are secured under section 14 (1) of the Hindu Marriage Succession Act, 1956, which reads as under:-*

***“14. Property of a female Hindu to be her absolute property***

*(1) 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.*

*Explanation: In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.”*

8. *In other words, once the DDA had executed the Conveyance Deed, the right of appellant no. 1 – Ms. Janak Kapoor in the said suit property becomes absolute.*

9. *Mr Ahuja further submits that the mother has filed a suit for mandatory injunction for possession of suit property from her sons, Mr. Amit Kapoor and Mr. Rajiv Kapoor. The suit is pending. He refers to section 14(2) of the Hindu Marriage Succession Act, 1956, to claim right of residence in the suit property. However, the right of residence would commence only if it was a joint property, whereas the suit property was self acquired by late Shri Kewal Krishan Kapoor and bequeathed absolutely to his wife Ms. Janak Kapoor. This fact has already been accepted by the respondent including the plaintiff. He cannot resile from it, just to manufacture a cause of action.”*

20. A review of the aforesaid judgment dated May 30, 2019 was sought by Amit Kapoor/respondent No.2 which was also dismissed on September 20, 2019. The SLP's filed by Rajeev Kapoor/appellant herein and also by Amit Kapoor, were also dismissed by the Supreme Court. The findings in the order dated May 30, 2019 of this Court are very clear wherein this Court has in clear unequivocal terms held that once the DDA has executed the conveyance deed, the right of Janak Kapoor/respondent No.1 in the suit property becomes absolute and there was no cause of action or basis for Amit Kapoor/respondent No.2 to file a suit.

21. The prayers in the suit filed by Amit Kapoor/ respondent No.2 are also challenging the Gift Deed dated November 04, 2015;

seeking recovery of amount of ₹20 Lacs etc. In other words, Amit Kapoor/respondent No.2 had claimed a right in the suit property. In fact, Mr. Ahuja during his submissions has in view of the conclusion of this Court in judgment dated May 30, 2019 in FAO No.469/2017 as upheld by the Supreme Court has clearly stated that the appellant herein cannot challenge the mutation / conveyance deed / gift deed. If that be so, the prayers of Rajeev Kapoor/appellant, who is also brother of Amit Kapoor/respondent No.2 and similarly placed like respondent No.2 in the counter claim, have been rightly rejected.

22. The plea of Mr. Ahuja is primarily that the Trial Court has no pecuniary jurisdiction to entertain the suit seeking mandatory injunction with regard to two floors, the value of each floor being ₹2.25 Crores, when a court fee of ₹13 only has been affixed. Similar was the submission of Mr. Saini appearing for the respondent No.2. Additionally, Mr. Saini stated Janak Kapoor/respondent No.1, in her suit has in effect, sought eviction of Rajeev Kapoor/ appellant and Amit Kapoor/respondent No.2, from two floors of the suit property, which can only be done in a suit for possession and by paying *ad valorem* court fee on the current

market value. I am not impressed by the submissions made for more than one reason, inasmuch as, the Trial Court has framed issues which include the issue whether the Trial Court does not have pecuniary jurisdiction to try the suit. The same shall be decided by the Court after a trial and the conclusion thereof shall have a bearing on the suit and not on the counter claim.

23. It is settled law [Ref: ***Jag Mohan Chawla and Ors. v. Dera Radha Swami Satsang and Ors., (1996) 4 SCC 699***] in view of the provision of Rules 6(A) to 6(G) of Order VIII CPC that a party can bring his / her own independent cause of action in respect of claim that could be a subject matter of an independent suit. In other words, the defendant can make a claim not related to or connected with the original cause of action or matter pleaded by the plaintiff. The counter claim is treated as a cross suit / plaint having all ingredients of pleading, including the duty to aver cause of action, also payment of court fee thereon. The intent of the provisions is instead of relegating the defendant to an independent suit, to avoid multiplicity of the proceeding and needless protraction, the legislature intended to try both the suit and the counter claim in the same suit, as the suit and cross suit and have them disposed of in the same trial. The

Supreme Court held, a defendant can claim any right by way of a counter claim, that is in respect of any cause of action that has accrued to him even though it is an independent cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit.

24. In the said case, the Supreme Court was concerned with a counter claim in respect of a different property which was held to be maintainable for the reasons noted above. It is clear from the above that counter claim, being a counter suit, could be decided on the same parameters as a suit, including an application under Order VII Rule 11, CPC provided the grounds exit. The framing of the issue with regard to maintainability of the suit filed by Janak Kapoor/ respondent No.1 has no bearing on the counter claim. The decision on the issue of the maintainability of the suit on the ground of pecuniary jurisdiction need not await a decision on the application under Order VII Rule 11 CPC which is filed on the ground the counter claim lacks cause of action. Similar shall be the position on the objection of Mr. Ahuja and Mr. Saini with regard to the issue whether a suit for mandatory injunction is maintainable or not. It is not the case of Mr.Ahuja and Mr.Saini, that the Trial Court does not

have jurisdiction to try the subject matter of counter claim. In fact, there is no objection nor any issue framed in that regard.

25. In fact, in a given situation even if the plaintiff i.e. respondent No.1 herein withdraws her suit, being a *dominus litis*, the counter claim can still be decided independently. On similar reasoning, if it held that the Trial Court does not have pecuniary jurisdiction still the Court can decide the counter claim. In this regard, I may refer to the judgment of the Madras High Court in ***M.S. Miganed Jaffar v. M.S. Mohamed Yahya & Anr., 1987 SCC OnLine Mad 169***, wherein in paragraph 4 the Court held as under:

*“4. In a suit in which counter claim had been filed, by virtue of the amendment now enacted by Amendment Act, 1976, under O. 8 R. 6-D, C.P.C., even if the suit is dismissed, the defendant can pursue the counter-claim put forth by him. By seeking the withdrawal of the suit, it results in the suit being dismissed; and inspite of it, on the counter claim already filed by the second defendant the court will nevertheless, proceed with that claim in view of O. 8 R. 6-D, C.P.C. Hence the second defendant would not in any manner be prejudiced by the suit being allowed to be withdrawn, because the resultant effect will be, the counter-claim made by the second defendant will be numbered as a suit and proceeded with further.”*

26. Insofar as the plea of Mr. Saini that the conclusion of this Court in FAO No.469/2017 being *per incuriam* and it would not have precedential value, is without any merit. In fact, I have been

informed during hearing that Amit Kapoor/respondent No.2 has not even filed a written statement in the suit filed by Janak Kapoor/respondent No.1. So, Amit Kapoor/respondent No.2, is precluded to even make submissions on the impugned order more so on a similar cause of action, on which counter claim is filed by Rajeev Kapoor/appellant, the suit filed by Amit Kapoor/respondent No.2 has been dismissed, which dismissal has attained finality till Supreme Court.

27. In fact, not only Amit Kapoor/respondent No.2 even the appellant herein Rajeev Kapoor, had also filed an SLP against the orders dated May 30, 2019 and September 20, 2019 which was also dismissed. In other words, the conclusion of this Court in order dated May 30, 2019 in FAO No.469/2017 is final, insofar as Rajeev Kapoor/appellant and Amit Kapoor/respondent No.2 are concerned.

28. If that be so, the challenge to the mutation / conveyance deed / gift deed is liable to be rejected. Even the claim of Rajeev Kapoor/appellant in the counter claim with regard to recovery of ₹24 Lacs, as was claimed by Amit Kapoor/respondent No.2 (₹20 Lacs), was also rejected with the dismissal of his suit, in terms of order dated May 30, 2019, which order has been upheld by the

Supreme Court. Even the SLP filed by Rajeev Kapoor was dismissed by the Supreme Court.

29. Insofar as the prayer / plea of adverse possession of Rajeev Kapoor/appellant, is concerned, in view of the finding of this Court vide order dated May 30, 2019 in FAO No.469/2017 that Janak Kapoor/respondent No.1 being absolute owner of the suit property and also she is living in the same property this plea shall also be unsustainable.

30. I agree with the submission made by Mr. Endlaw that the plea of adverse possession shall be unsustainable when the appellant herein, is seeking a title in the property, which stood decided in favour of Janak Kapoor/respondent No.1 in FAO No.469/2017 just two years back on May 30, 2019. In other words, the plea of adverse possession can only succeed if the appellant sets out a case of disposition of the rightful owner (respondent No.2) for a period of 12 years or more, i.e., the adverse possession commence in a wrongful act of taking possession of the property of another person and such wrongful possession is maintained against a right being the ownership right of the owner of the property. Surely, the facts herein does not suggest so. In fact, no issue has been framed by the

Trial Court with regard to the plea of adverse possession of Rajeev Kapoor/appellant. Hence, the reliance placed by Mr.Endlaw on the judgments referred to for the propositions, as noted in paragraph 9 above, is justified.

31. Insofar as the plea of Mr. Saini that the SLP having been dismissed in *limine* does not amount to final adjudication of the issues raised by the parties involved in the case by relying upon the judgment in *State of Punjab (supra)* and *Supreme Court Employees Welfare (supra)* is concerned, there is no dispute on the proposition advanced but with the dismissal of the SLP's, the conclusion of this Court in FAO No.469/2017 qua the parties has attained finality. The parties therein are the same as the parties herein. The plea is rejected.

32. The plea of Mr. Saini that the findings of this Court in order dated May 30, 2019 in FAO No.469/2017 are not only *per-incuriam* but there is no ratio *decidendi*, which is binding on the parties, as the issues which arise for consideration were not the issues directly involved or arising for determination for a decision, and was not against a final decree / decree passed in the suit but only against an order passed on application under Order VII Rule 11, is also

unmerited as the issue with regard to the title of Janak Kapoor/ respondent No.1 having been decided in the FAO No.469/2017 and as reiterated in the review petition and upheld by the Supreme Court, to that extent the finding is final and binding and shall have a bearing on the prayers made in the counter claim filed by the appellant. The same has been rightly dismissed by the Trial Court. Mr. Ahuja had also challenged the impugned order on the ground that the Trial Court had decided the counter claim in his absence being the counsel for the appellant. In view of the fact that I have heard Mr. Ahuja in detail and deciding the appeal, I do not see any reason to advert to the said submission made by him.

33. One of the submissions of Mr. Saini is that the issue of limitation on which the counter claim is rejected is a mixed question of fact and law and could not have been decided in an application under Order VII Rule 11 CPC. Suffice to state, the conclusion drawn by me above, clearly establish that there is no cause of action for the appellant to file the counter claim and was rightly rejected in an application under Order VII Rule 11 CPC.

34. The reliance placed by Mr. Saini in support of his aforesaid submissions in *Krishena Kumar (supra)*, *The State of Orissa*

*(supra)*, *Dalbir Singh and Ors. (supra)*, *N. Bhargavan Pillai (supra)*, *Brahma Prakash (supra)* and also *Ashok Chaudhary (supra)* is misplaced, as they have no applicability in the facts of this case.

35. In view of my above discussion, the present appeal is unmerited, the same is dismissed.

**CM No. 26028/2021**

Having heard and decided the appeal with the consent of the parties, the application has become infructuous. The same is dismissed.

**V. KAMESWAR RAO, J**

**DECEMBER 06, 2021/jg/aky**