A VISHRAM @ PRASAD GOVEKAR & ORS.

v.

SUDESH GOVEKAR (D) BY LRS. & ORS.

(Civil Appeal Nos. 12068-12070 of 2016)

DECEMBER 14, 2016

B **[A. K. SIKRI AND N.V. RAMANA, JJ.]**

Suit – Ownership and possession – Property dispute between the parties related to each other – Suit property acquired by the father as a permanent grant for the construction of the house – Suit for specific performance and mandatory injunction by C *respondents(children and son-in-laws of the owner) against the appellants(owner's brother and others) – Sought demolition of the construction carried out by the appellants on the suit property – Dismissal by trial court, however, allowed by first appellate court and High Court – On appeal, held: Respondents successfully* D *discharged their onus of proving the ownership by filing appropriate documents – Statement about the respondents and appellants as co-owners in title and in possession pertains to adjoining property not suit property –Plea of the appellants that relief for possession should have been sought is clearly untenable – Respondents sought relief of mandatory injunction seeking demolition of the construction* E *carried out by the appellants on the suit property as it was illegally put up by the appellants – Appellants have made new construction on the suit property and its demolition would result in wastage of the expenditure incurred on the construction – To balance the equities, in exercise of powers u/Art.142, respondents to take* F *possession of the house without its demolition, and, at the same time, compensate the appellants by paying the cost of construction – Constitution of India – Art. 142.*

Dismissing the appeals, the Court

HELD: 1.1 The first appellate court as well as the High G **Court held that the plaintiffs are the owners of the suit property, which rights they have inherited from VG, father of plaintiff Nos.1-3. Findings of the courts below are that the suit property, was acquired by VG from Communidade of Anjuna as a permanent grant for the construction of the house. In order to prove the ownership, the said grant was produced on record as also the** H

plaintiffs filed evidence of the Inventory Proceedings initiated upon the death of VG which described the suit property. Duly promulgated survey records showing the property standing in the name of VG were also produced. While holding that conclusion of the first appellate court that the said documents clearly evinced the ownership of VG, the High Court analysed these documents, coupled with the defendants' admission. [Para 15] [184-F-H; 185-A]

1.2 A closer and minute look into the pleadings would show that there is no admission on the part of the plaintiffs about the co-ownership insofar as suit property is concerned. In the plaint, the plaintiffs have given the description of the suit property as bearing Survey No. 251/2. It is mentioned that VG acquired this property from Communidade of Anjuna; and that on this suit property, incomplete structure was raised by VG which the plaintiffs referred to as the 'suit house'. Thus, the ownership is claimed by the plaintiffs through VG who acquired the property bearing Survey No. 251/2 (the suit property) on which he constructed incomplete structure (the suit house). The plaintiffs have stated that towards the eastern side of the suit property, there exists another property bearing Survey No. 251/4. The plaintiffs pleaded that on this land, whereupon a house is also constructed, belonged to their grandfather JG (father of defendant No.1) and it is this property which the plaintiffs say is in the co-ownership of the plaintiffs and defendants. Thus, the statement about the plaintiffs and defendants as co-owners in title and in possession pertains to property bearing Survey No. 251/4 which is not the subject matter of the suit. As far as the suit property is concerned, it bears Survey No. 251/2, in respect of which, there is no admission on the part of the plaintiffs. [Para 16] [186-G-H; 187-A-E]

1.3 Once this aspect of so-called admission of the plaintiffs is found to be non-existing, the entire edifice of the argument of the defendants crumbles down. This is also a complete answer to the argument that the suit of the plaintiffs was not maintainable in the absence of any declaration as to title. The plaintiffs had categorically claimed in the plaint that insofar as suit property bearing Survey No. 251/2 is concerned, they are the owners

A thereof. Of course, they had to prove the ownership by filing appropriate documents because of the reason that the defendants in their written statement denied plaintiffs' ownership claiming that the property covered by Survey No. 251/2 was, in fact, allotted to JG and not VG. The plaintiffs successfully discharged their onus. [Para 17] [187-E-H]

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1.4 There is no dispute that in the revenue records property stood in the name of VG and not JG. The first appellate court rightly held that the plea with regard to the real owner of the property being JG could not be gone into as it was barred by the provisions of Section 4(2) of the Benami Act. Though there is no merit in the arguments of the appellants that the Benami Act is not applicable, in any case there is hardly any material produced by the defendants to support that real owner was JG. This claim is made only on the ground that it is JG who had got the suit property acquired in the name of his son VG. That by itself would not make JG as the owner of the suit property. [Para 18] [188-A-C]

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1.5 The defendants relied upon the pleadings in the suit and submitted that the plaintiffs were not in possession of the suit property as in the plaint the plaintiffs have themselves stated that they were residing at different places in Goa and not in the suit property. However, that is a distorted reading of the plaint. Therein, it is only stated as a fact that for the purpose of employment, these plaintiffs were residing at Margao, Goa or Ponda, Goa. At the same time, it is nowhere stated or admitted that they were not in possession of the suit property. On the contrary, it is specifically stated that since they were staying away from the suit property, they used to visit the suit property occasionally. This makes the stand of the plaintiff categorical to the effect that they claimed their possession over the suit property. On the other hand, insofar as defendants are concerned, the plaint averred that they were residing in property bearing Survey No. 251/4 and the house situated therein. In fact, co-ownership and co-possession of that property is also claimed. It is in this backdrop the case made out by the plaintiffs is that when plaintiff Nos. 1, 3 and 5 visited the suit property on December 30, 2006, they found that the 'suit house' had been demolished by the defendants on

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which they were carrying a new construction. In the light of these pleadings, the plaintiffs sought the relief of mandatory injunction seeking demolition of the construction carried out by the defendants on the suit property bearing Survey No. 251/2 as it was illegally put up by the defendants on plaintiffs' land. Therefore, the submission that relief for possession should also have been sought is clearly untenable. [Para 20] [188-D-H; 189-A]

1.6 The defendants have made new construction on the property of the plaintiffs. Demolition of the said construction is not going to help any party. It would result in wastage of the expenditure incurred on the construction. No doubt, the structure is constructed illegally by the defendants. Nevertheless, plaintiffs can make use thereof. Therefore, equities can be balanced if the plaintiffs take possession of the house in question without its demolition, but, at the same time, compensate the defendants by paying the cost of construction. In these circumstances, in the execution petition which is filed, or ought to be filed by the plaintiffs, the executing court would appoint a Surveyor/Valuer who would fix the cost of construction that would be reimbursed by the plaintiffs to the defendants. These directions are given in exercise of powers under Article 142 of the Constitution of India in order to do complete justice in the matter and to see that the defendants also do not suffer and the structure put by them is not wasted. [Paras 22, 23] [190-C-F]

Anathula Sudhakar v. P. Buchi Reddy (Dead) By Lrs. & Ors. **(2008) 4 SCC 594 : 2008 (5) SCR 331 – held inapplicable.**

State of Punjab & Ors. v. Rafiq Masih (Whitewasher) **(2014) 8 SCC 883 : 2014 (8) SCR 228;** *Gaiv Dinshaw Irani & Ors. v. Tehmtan Irani & Ors.* **(2014) 8 SCC 294 – relied on.**

Case Law Reference

2008 (5) SCR 331	held inapplicable	Para 11
2014 (8) SCR 228	relied on	Para 23
(2014) 8 SCC 294	relied on	Para 24

A CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 12068-12070 of 2016.

From the Judgment and Order dated 29.11.2013 of the High Court of Bombay at Goa in Second Appeal No. 138 of 2012 with Stamp Number (Appln) No. 2279 of 2013 and Civil Application No. 193 of 2012.

B Huzefa Ahmadi, Sr. Adv., Ninad Laud, Karan Mathur, Anjuman Tripathy, Jayant Mohan, Advs. for the Appellants.

Ms. A. Subhashini, Adv. for the Respondents.

The Judgment of the Court was delivered by

C **A.K. SIKRI, J.** 1. Leave granted.

2. It is a property dispute between the parties who are related to each other. It becomes desirable to take note of their relationship before proceeding with the factual background that led to the dispute. Following is the sketch of the family tree which describes the parties:

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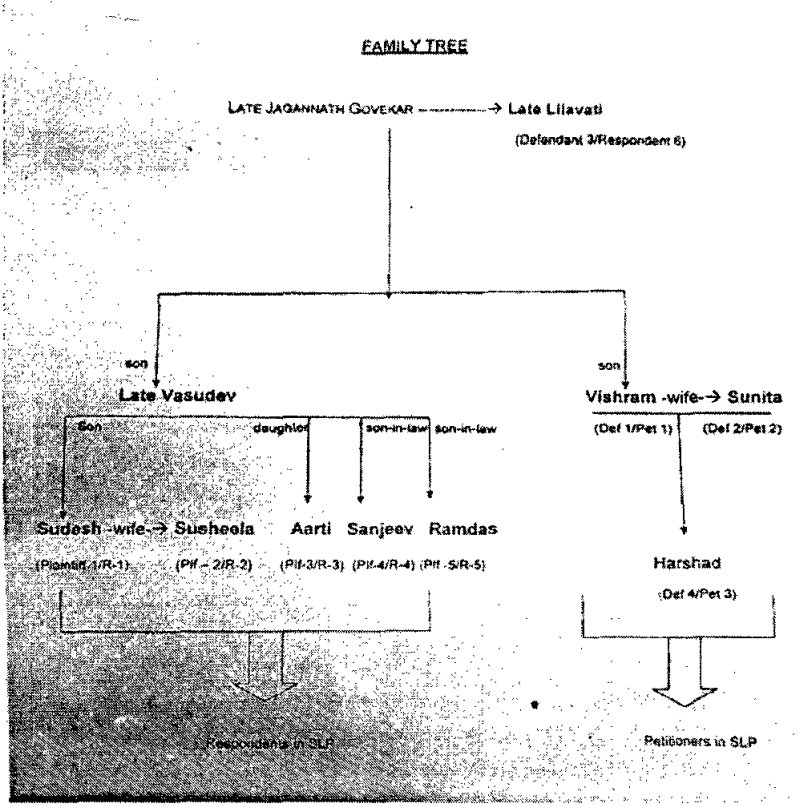

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3. As can be gathered from the above, respondent Nos. 1 to 3 are the children and respondent Nos. 4 and 5 are the sons-in-law of late Vassudev Govekar. On the other hand, appellant No.1 is the uncle (brother of late Vassudev Govekar) of the respondents. Appellant No.2 is the wife of appellant No.1 and appellant No.3 is their son. Vassudev Govekar and Vishram (appellant No.1) are the sons of late Shri Jagannath Govekar, whose wife Lilavati (since deceased) was also arrayed as defendant No.3 in the suit that was filed by respondent Nos. 1 to 5. The three appellants herein were respondent Nos. 1, 2 and 4 in the said suit.

THE SUIT

4. The suit filed by respondent Nos. 1 to 5 (hereinafter referred to as the 'plaintiffs' for the sake of convenience) against the appellants (hereinafter referred to as the 'defendants') was for specific performance and mandatory injunction. It pertained to the property known as *'Devalvadi'* bearing Survey No. 251/2 situate at Chinvar in the village of Anjuna, Bardez, Goa, having an area of 1000 sq. mts. (hereinafter referred to as the 'suit property'). It was averred in the plaint filed by the plaintiffs that this property was acquired by late Shri Vassudev Govekar from the Communidade of Anjuna, Bardez, Goa under file No. 131/1963 on February 24, 1970 as a permanent grant for the construction of the house. Towards the eastern side of the suit property there exists another property bearing Survey No. 251/4 which belonged to their grandfather late Shri Jagannath Govekar and thereupon a house was constructed by him. It was further averred that the plaintiffs and defendants are the co-owners in title and in possession of the said property bearing Survey No. 251/4 as well as the house situtated thereupon. Defendants have been residing in the suit property and insofar as plaintiffs are concerned, they were residing away from the suit property to earn their livelihood. It was also averred that late Shri Vassudev Govekar, during his lifetime, was enjoying the suit property and after his death the plaintiffs and other co-owners were enjoying the said property and the house without interruption. However, when plaintiff Nos. 1, 3 and 5 visited the suit property on December 13, 2006, at about 5:00 p.m., they were shocked to see that the suit house was demolished and in its place a new construction of structure having 18 sq.mts. length and 12.20 sq.mts. width, comprising 219.60 sq.mts. area, was being constructed and the construction had reached from ground level to slab level height. The plaintiffs protested this kind of invasion by the defendants with a request

A for them to stop the construction of the said illegal structure. It did not yield any result. They even complained to the Village Panchayat and police station, but without any positive effect. This led them to file the aforesaid suit with following prayers:

> "(a) the Defendants, their family members, agents, servants
B and/or any person acting on their behalf and/or under their instructions be restrained by way of permanent injunction from interfering with the suit property and to the suit illegal structure in whatsoever nature;
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> (b) the Defendants be directed by way of mandatory
C injunction to demolish the suit illegal structure;
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> (c) the temporary injunction in terms of prayer (a) above be granted;
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> (d) ad-interim ex-parte relief in terms of prayer (c) above granted;
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> (e) any other reliefs which deem fit and proper be kindly be granted in favour of the Plaintiffs;
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> (f) costs of the suit be awarded to the Plaintiffs."

5. The defendants contested the suit by filing their written
E statement and, *inter alia*, contended that during the lifetime of Vassudev Govekar itself, he had precluded himself from enjoying the suit property. It was pleaded that Talhao No. 168 of Communidade of Anjuna was actually acquired by Jagannath Govekar (father of defendant No.1 and Vassudev), who had constructed a house, which was in occupation of the defendants since its construction in the year 1969. It was further
F pleaded that insofar as property bearing Survey No. 251/4 is concerned, that belonged to defendant Nos.1 and 2, who were in exclusive possession thereof. It was also denied that Vassudev had made any construction in the suit property as he had left the family to go to Vasco Da Gama in the year 1957 where he was employed in Kamat Garage.

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JUDGMENT OF THE TRIAL COURT

6. The trial court, after framing the issues, recording the evidence and hearing the arguments, dismissed the suit filed by the plaintiffs vide its judgment dated March 30, 2012. The plaintiffs challenged this judgment by preferring first appeal under Section 96 of the Code of Civil Procedure,

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1908, which was heard by the learned Additional District Judge, who, vide his judgment dated July 24, 2012, allowed the appeal of the plaintiffs and decreed the suit. It was now the turn of the defendants to challenge the said decree passed by the first appellate court and, thus, second appeal was filed by them in the High Court. The High Court, vide impugned judgment dated November 29, 2013, dismissed the appeal thereby affirming the decree passed by the lower appellate court.

7. We may mention at this stage that the decree which is passed by the first appellate court is in the following terms:

> "It is ordered that appeal is allowed. Consequently, the impugned Judgment and Decree is quashed and set aside. Hence, the suit filed by the plaintiffs stands decreed, with costs. The defendants, their family members, agents, servants and/or under their instructions are hereby restrained, by way of permanent injunction, from interfering with the suit property and the suit illegal structure. The defendants are also directed, by way of mandatory injunction, to demolish the suit illegal structure, within three months from the date of this Judgment."

8. Insofar as the trial court is concerned, it had returned the findings that a cloud was raised over the title of the plaintiffs and further that they were not in possession of the suit property. The trial court also recorded a finding to the effect that it is the defendants who were in possession of the suit property. In view thereof, as per the trial court, in the absence of prayer for seeking possession, the plaintiffs were not entitled for an injunction simpliciter. As regards the ownership, the trial court held that though Vassudev Govekar did not have title to the suit property, the said property came to be enlisted in Inventory Proceedings which does not create any title in favour of the plaintiffs. The suit house stands in the name of Lilavati (defendant No.3), who is the wife of Jagannath Govekar and, therefore, plaintiffs were not the sole owners of the said property.

From the aforesaid, it is clear that as per the trial court, Vassudev Govekar was not the owner; plaintiffs were not in possession; and defendants were found in possession. In these circumstances, the suit for injunction simpliciter was not maintainable without there being a relief seeking possession of the suit property as well.

A **JUDGMENT OF THE FIRST APPELLATE COURT**

9. The first appellate court overturned the aforesaid findings by coming to the conclusion that the plaintiffs were able to successfully prove that they were the owners of the suit property and further that defendants had no right therein. For arriving at this conclusion, the learned B Additional District Judge took note of survey records which stood in the name of Vassudev Govekar. Even, receipts of payments to the Communidade in respect of the suit property stood in the name of Vassudev Govekar. According to the learned Additional District Judge, defendants had even admitted that the grant of suit property by Communidade was in the name of Vassudev Govekar. The learned C Judge rejected the contention of the defendants that the plaintiffs could not prove the ownership in the absence of title documents and only on the basis of Inventory Proceedings. According to him, allotment in the Inventory Proceedings could not be said to be a nullity, more so, when plaintiffs had proved on record that grant was in the name of Vassudev D Govekar and further that survey records were also standing in the name of the plaintiffs, which led to presumption of ownership in their favour. No doubt, it was Jagannath Govekar (father of Vassudev Govekar) who had applied for grant in the name of Vassudev Govekar. However, as per the learned Additional District Judge, when the property stood in the name of Vassudev Govekar, Section 4 of the *Benami* Transactions E (Prohibition) Act, 1988 (hereinafter referred to as the '*Benami* Act') precluded the defendants from taking such a defence that the property in fact belonged to Jagannath Govekar.

As far as possession of the suit property is concerned, the learned Additional District Judge found that though the defendants claimed that F they were in possession of house bearing No. 1653(1), in the electoral roll, against the name of defendant No.1, house No. 1653 was mentioned.

On the aforesaid basis, the first appellate court proceeded further to hold that since the plaintiffs had succeeded in proving that they are the owners of the suit property, the construction put up by the defendants G in the said property was illegal. Therefore, the plaintiffs were also entitled to the relief of mandatory injunction and passed the decree for demolishing the illegal construction. It was further held that relief for demolishing of illegal construction in substance was for possession of the property and, thus, the suit in the said form was maintainable.

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10. The High Court has concurred with the aforesaid approach of the first appellate court.

ARGUMENTS OF THE APPELLANTS/DEFENDANTS

11. Before us, following contentions were raised by Mr. Huzefa Ahmadi, learned senior counsel appearing for the defendants (appellants herein):

(1) The suit filed by the plaintiffs is not maintainable for the reason that they did not pray for the decree of possession, despite admitting that it is the defendants who were in possession of the suit property. It was, thus, argued that in the absence of any relief for possession, such a suit could not have been filed. For this, he placed reliance on the judgment of this Court in ***Anathula Sudhakar*** v. ***P. Buchi Reddy (Dead) By Lrs. & Ors.***[1]

(2) Maintainability of the suit was questioned on the ground that the plaintiffs did not even seek any declaration as to title and had made a prayer simpliciter for injunction even when there was cloud over the title.

(3) Findings of the High Court to the effect that the owner of the property as per the records is Vassudev Govekar and plea of the defendants that it actually belonged to Jagannath Govekar was hit by the provisions of Section 4(2) of the *Benami* Act was challenged on the ground that the *Benami* Act came into force only on May 19, 1988, whereas the transaction in question was prior to the said date and, therefore, the *Benami* Act was not applicable in the instant case.

12. In respect of the aforesaid arguments, the learned senior counsel submitted that in para 10 of the plaint, the plaintiffs had themselves admitted that they were not residing in the suit property and, thus, not in possession. Further, in para 5 of the plaint, the plaintiffs had admitted that the plaintiffs and defendants were co-owners in title and in possession of the suit property. It was, thus, argued that in view of these admissions, the findings of the courts below about joint possession or that the plaintiffs were the exclusive owners of the suit property was clearly erroneous.

ARGUMENTS OF THE PLAINTIFFS/RESPONDENTS

13. Ms. A. Subhashini, learned counsel appearing for the plaintiffs

[1] (2008) 4 SCC 594

A (respondents herein), on the other hand, submitted that the suit was maintainable in the form in which it was filed in view of specific findings recorded by the two courts below that the plaintiffs were in possession of the suit property which was sought to be interfered with by the defendants. She further argued that the approach of the two courts below that relief of mandatory injunction was in fact in the nature of B seeking possession was correct in fact and in law and, therefore, no interference was called for. Likewise, it was argued that the title to the property in question was clearly proved on the basis of documents showing that owner of the property was Vassudev Govekar and as successors thereof, the ownership devolved upon them. Therefore, it C was not necessary for the plaintiffs to have sought for the relief of declaration and possession. It was submitted that the trial court had committed a grave error in observing that there was a cloud raised over the plaintiffs title or that they were not in possession, which was rightly rectified by the first appellate court and these findings were upheld by the High Court. Thus, according to the learned counsel, no substantial D question of law arises and appeals be dismissed.

OUR DISCUSSION

14. Since the objection of the defendants to the maintainability of the suit is founded on two aspects, namely: (i) the ownership of the suit E property in question, and (ii) possession thereof, it becomes necessary to deal with these aspects. We shall first take up the issue of ownership.

RE.: OWNERSHIP

15. We have already noticed above, the basis on which the first appellate court as well as the High Court has held that the plaintiffs are F the owners of the suit property, which rights they have inherited from Vassudev Govekar, father of plaintiff Nos. 1 to 3. Findings of the courts below are that the suit property, viz. Talhao No. 168 of Communidade of Anjuna, was acquired by Vassudev Govekar from Communidade of Anjuna under No. 131/1963 on February 24, 1970 as a permanent grant G for the construction of the house. In order to prove this ownership, not only the said grant was produced on record, the plaintiffs also filed evidence of the Inventory Proceedings initiated upon the death of Vassudev Govekar which described the suit property. Additionally, duly promulgated survey records showing the property standing in the name of Vassudev Govekar were also produced. While holding that conclusion of the first appellate

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court that the aforesaid documents clearly evinced the ownership of Vassudev Govekar, the High Court has analysed these documents, coupled with the admission of the defendants themselves on these aspects, in the following words:

> "11...On the basis of such pleadings, the Lower Appellate Court was justified to come to the conclusion that the fact that the property was granted by the Communidade in favour of said Vassudev, who is the father of the Respondents – original Plaintiff nos. 1 and 3, undisputed by the Appellants. This admission is coupled with the receipts from the Communidade produced by Dw.1 in the cross at exhibit 78 colly which stand in the name of said Vassudev as well as the Survey Records and the earlier house tax records. As the fact that the property was granted by the Communidade in favour of the said Vassudev has not been disputed, the Lower Appellate Court was justified to come to the conclusion that the findings of the learned Trial Court that there was a cloud raised in the title of the Respondents could not be sustained. An admission made by a party is not conclusive but a decisive fact in a case unless the other party successfully withdraws the same or proves it to be erroneous. What has to be considered is what effect is to be given to such admission and whether such admission read with other material on record would lead to an unambiguous and relevant piece of evidence to establish a fact. In the present case, apart from the said admission which can be curled out from the pleadings, as even in the deposition of Dw.1, he has not disputed that the final grant was given by the Communidade to Vassudev though he contended that it was at the instance of the father of the Appellant no.1, Jaganath. Apart from that, Article 338 of the Code of Communidade clearly provides that the provisional delivery of the land granted, as emphyteusis, cannot be considered in legal relations between the communidade and the lease holder, as there is an optional act of mere tolerance, and only the definitive possession confers to the emphyteuta the rights that the civil law recognizes and assures. This aspect has to be further read

A along with the duly promulgated Survey Records which are also standing in the name of Vassudev besides the other material produced in the cross examination of Dw.1 at exhibit 78 colly which conclusively established that the suit property was granted to the said Vassudev and which devolved upon the Respondents after his death. The duly promulgated Survey Records in respect of the suit property surveyed under no. 251/2 stands in the name of said Vassudev which draws a presumption of possession in his favour. When it is not in dispute that the grant was in favour of said Vassudev who is the father of the Respondent nos. 1 and 3, such presumption of possession was in continuation of the title vested in him. The Respondents have also produced the allotment of the Inventory Proceedings upon the death of said Vassudev which discloses that the suit property devolved upon the Respondents. Article 2158 of the Portuguese Civil Code, inter alia, provides that the partition of the properties legally made in respect of which there had not been any objection, confers on the co-heirs exclusive ownership of the properties partitioned among them. Hence, the Lower Appellate Court was justified to hold that said Vassudev was the owner in possession of the suit property."

16. Pertinently, learned counsel appearing for the appellants could not contest the aforesaid approach of the courts below. It is for this reason, he took an altogether different route by arguing that joint ownership in the property in question wad admitted by the plaintiffs themselves for which purpose he referred to the averments made in the plaint filed by the plaintiffs. In the first instance, we find that no such argument predicated on such pleadings have been taken in the courts below. Be as it may, since the defendants rely upon the pleadings of the plaintiffs themselves, we proceed to examine the weight in this submission. A closer and minute look into the pleadings would show that there is no admission on the part of the plaintiffs about the co-ownership insofar as suit property is concerned. In para 3 of the plaint, the plaintiffs have given the description of the suit property which is popularly known as *'Devalvadi'* bearing Survey No. 251/2 situate at Chinvar in the village of Anjuna, Bardez, Goa, having an area of 1000 sq. mts. What is significant

is that this property bears Survey No. 251/2 and the plaintiffs described the same as the *'suit property'*. In para 4, it is mentioned that Vassudev Govekar acquired this property from Communidade of Anjuna. In para 6 it is mentioned that on this suit property, incomplete structure was raised by Vassudev Govekar which the plaintiffs referred to as the *'suit house'*. Thus, the ownership is claimed by the plaintiffs through Vassudev Govekar who acquired the property bearing Survey No. 251/2 (the suit property) on which he constructed incomplete structure (the suit house). At the same time, in para 5, which is relied upon by the defendants in their attempt to show admission of the plaintiffs as to co-ownership, the plaintiffs have stated that towards the eastern side of the suit property, there exists another property bearing Survey No. 251/4. The plaintiffs pleaded that on this land, whereupon a house is also constructed, belonged to their grandfather Jagannath Govekar (father of defendant No.1) and it is this property which the plaintiffs say is in the co-ownership of the plaintiffs and defendants. Thus, the statement about the plaintiffs and defendants as co-owners in title and in possession pertains to property bearing Survey No. 251/4 which is not the subject matter of the suit.

It is once again emphasised, as far as the suit property is concerned, it bears Survey No. 251/2. Therefore, in respect of the suit property, we find that there is no admission on the part of the plaintiffs. Thus, we do not find merit in this argument, which was hammered by the learned counsel for the appellants time and again.

17. Once this aspect of so-called admission of the plaintiffs is found to be non-existing, the entire edifice of the argument of the defendants crumbles down. In these circumstances, reliance placed by the learned counsel on the judgment of this Court in the case of ***Anathula Sudhakar*** would be of no avail. This is also a complete answer to the argument that the suit of the plaintiffs was not maintainable in the absence of any declaration as to title. The plaintiffs had categorically claimed in the plaint that insofar as suit property bearing Survey No. 251/2 is concerned, they are the owners thereof. Of course, they had to prove the ownership by filing appropriate documents because of the reason that the defendants in their written statement denied plaintiffs' ownership claiming that the property covered by Survey No. 251/2 was, in fact, allotted to Jagannath Govekar and not Vassudev Govekar. The plaintiffs successfully discharged their onus.

18. In this context, the question of *benami* ownership also surfaced.

A There is no dispute that in the revenue records property stood in the name of Vassudev Govekar and not Jagannath Govekar. The first appellate court rightly held that the plea with regard to the real owner of the property being Jagannath Govekar could not be gone into as it was barred by the provisions of Section 4(2) of the *Benami* Act. Though we do not find any merit in the arguments of the appellants that the *Benami* B Act is not applicable, in any case there is hardly any material produced by the defendants to support that real owner was Jagannath Govekar. This claim is made only on the ground that it is Jagannath Govekar who had got the suit property acquired in the name of his son Vassudev Govekar. That by itself would not make Jagannath Govekar as the C owner of the suit property.

RE.: POSSESSION

19. We now advert to the issue of *'possession'* and the question as to whether the suit was not maintainable in the absence of any relief *qua* possession. D

20. Once again, the defendants relied upon the pleadings in the suit. It is argued that the plaintiffs were not in possession of the suit property as in the plaint the plaintiffs have themselves stated that they were residing at different places in Goa and not in the suit property. However, that is a distorted reading of para 10 of the plaint. Therein, it E is only stated as a fact that for the purpose of employment, these plaintiffs were residing at Margao, Goa or Ponda, Goa. At the same time, it is nowhere stated or admitted that they were not in possession of the suit property. On the contrary, it is specifically stated that since they were staying away from the suit property, they used to visit the suit property F occasionally. This makes the stand of the plaintiff categorical to the effect that they claimed their possession over the suit property. On the other hand, insofar as defendants are concerned, the plaint averred that they were residing in property bearing Survey No. 251/4 and the house situated therein. In fact, co-ownership and co-possession of that property is also claimed. It is in this backdrop the case made out by the plaintiffs G is that when plaintiff Nos. 1, 3 and 5 visited the suit property on December 30, 2006 at about 5:00 p.m., they found that the *'suit house'* had been demolished by the defendants on which they were carrying a new construction. In the light of these pleadings, the plaintiffs sought the relief of mandatory injunction seeking demolition of the construction H carried out by the defendants on the suit property bearing Survey No.

251/2 as it was illegally put up by the defendants on plaintiffs' land. The matter is to be examined in this hue and, therefore, the argument that relief for possession should also have been sought is clearly untenable. This aspect has been touched upon and dealt with by the High Court, with which we concur, in the following manner: A

> "17. The next contention of Shri S.G. Desai, learned Senior Counsel, is with regard to the reliefs sought by the Respondents-Plaintiffs. The lower Appellate Court has relied upon the Judgment of this Court to inter alia hold that as mandatory injunction has been sought by the Respondents- Plaintiffs in substance, it amounts to relief of possession. There is nothing on record to suggest that on the date of the filing of the suit, the Appellants have exercised any legal right of possession in the disputed house and the suit property. A sporadic act of trespass by the Appellants in demolishing the existing structure and attempting to put up a new construction therein cannot be held to be in possession of such structure. Apart from that, the records reveal that the original house of the Respondents-Plaintiffs was in an incomplete state and occupied from time to time by the Respondents. As referred to herein above, the said incomplete house was standing in the name of said Vassudev. Even the Appellants do not dispute that the said construction was standing in the name of said Vassudev though it was claimed that the real owner was the father late Jaganath which contention cannot be accepted. A person who has unlawfully interfered with a construction existing in the suit property, cannot claim any equities. In view of what has been stated herein above, the Appellants do not have any ownership over the suit property. An act of trespass by putting an illegal construction in a portion of the suit property which otherwise admeasures an area of 1000 square metres, cannot establish that the Appellants are in possession of the suit property as nothing has been disclosed what is the nature of the possession in respect of the remaining portion of the suit property. As pointed out herein above, the promulgated Survey Records stand in the name of the father of the Respondent no.1, said Vassudev. In such circumstances, merely putting up an illegal structure B C D E F G H

A in a portion of the suit property, can by no stretch of imagination, be assumed that the Appellants were in possession of the suit property as sought to be contested by Shri Desai, learned Senior Counsel appearing for the Appellants."

B On these facts, we again reiterate that judgment in the case of ***Anathula Sudhakar*** has no application.

21. We, thus, do not find any merit in these appeals, which are accordingly dismissed with costs.

22. However, before we part with, we have to take into C consideration one more development. As noted above, the defendants have made new construction on the property of the plaintiffs. Demolition of the said construction is not going to help any party. It would result in wastage of the expenditure incurred on the construction. No doubt, the structure is constructed illegally by the defendants. Nevertheless, D plaintiffs can make use thereof. Therefore, equities can be balanced if the plaintiffs take possession of the house in question without its demolition, but, at the same time, compensate the defendants by paying the cost of construction. In these circumstances, in the execution petition which is filed, or ought to be filed by the plaintiffs, the executing court shall appoint a Surveyor/Valuer who would fix the cost of construction that would be E reimbursed by the plaintiffs to the defendants.

23. We are giving these directions in exercise of our powers under Article 142 of the Constitution of India in order to do complete justice in the matter and to see that the defendants also do not suffer and the structure put by them is not wasted. Such a power in this behalf can be F exercised as per settled law. In this respect, we would like to usefully refer to the following passage from the judgment of this Court in ***State of Punjab & Ors.*** v. ***Rafiq Masih (Whitewasher)***[2]:

"12. Article 142 of the Constitution of India is supplementary in nature and cannot supplant the substantive provisions, G though they are not limited by the substantive provisions in the statute. It is a power that gives preference to equity over law. It is a justice-oriented approach as against the strict rigours of the law. The directions issued by the Court can normally be categorised into one, in the nature of

H [2] (2014) 8 SCC 883

moulding of relief and the other, as the declaration of law. "Declaration of law" as contemplated in Article 141 of the Constitution: is the speech express or necessarily implied by the highest court of the land. This Court in *Indian Bank* v. *ABS Marine Products (P) Ltd.*, (2006) 5 SCC 72, *Ram Pravesh Singh* v. *State of Bihar,* (2006) 8 SCC 381, and in *State of U.P.* v. *Neeraj Awasthi,* (2006) 1 SCC 667, has expounded the principle and extolled the power of Article 142 of the Constitution of India to new heights by laying down that the directions issued under Article 142 do not constitute a binding precedent unlike Article 141 of the Constitution of India. They are direction issued to do proper justice and exercise of such power, cannot be considered as law laid down by the Supreme Court under Article 141 of the Constitution of India. The Court has compartmentalised and differentiated the relief in the operative portion of the judgment by exercise of powers under Article 142 of the Constitution as against the law declared. The directions of the Court under Article 142 of the Constitution, while moulding the relief, that relax the application of law or exempt the case in hand from the rigour of the law in view of the peculiar facts and circumstances do not comprise the ratio decidendi and therefore lose its basic premise of making it a binding precedent. This Court on the qui vive has expanded the horizons of Article 142 of the Constitution by keeping it outside the purview of Article 141 of the Constitution and by declaring it a direction of the Court that changes its complexion with the peculiarity in the facts and circumstances of the case."

24. Almost somewhat similar approach was adopted by this Court in ***Gaiv Dinshaw Irani & Ors.*** v. ***Tehmtan Irani & Ors.***[3], which is clear from the following discussion:

"47. Since the lease of 1152 sq m executed by BMC in favour of Dinshaw is rendered void ab initio, the construction by the appellants on the said plot is also illegal. The position as it exists today is that the remaining portions of Irani Wadi

[3](2014) 8 SCC 294

A have been acquired by BMC; and on the other portion, the structure erected by Dinshaw exists and the portion being the residential bungalow occupied by the respondents may also be acquired by BMC in due course.

48. Considering the aforementioned changed circumstances, B the High Court taking note of the subsequent events moulded the relief in the appeal under Section 96 of the Code of Civil Procedure and the same has been challenged by the appellants before us. In ordinary course of litigation, the rights of parties are crystallised on the date the suit is instituted and only the same set of facts must be considered. C However, in the interest of justice, a court including a court of appeal under Section 96 of the Code of Civil Procedure is not precluded from taking note of developments subsequent to the commencement of the litigation, when such events have a direct bearing on the relief claimed by a D party or on the entire purpose of the suit, the courts taking note of the same should mould the relief accordingly. This rule is one of ancient vintage adopted by the Supreme Court of America in *Pattersonv. Alabama* [79 L Ed 1082 : 294 US 600 (1935)] followed in *Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chaudhuri* [(1941) 53 LW 373 : AIR 1941 E FC 5] . The aforementioned cases were recognised by this Court in *Pasupuleti Venkateswarlu* v. *Motor and General Traders,* (1975) 1 SCC 770."

25. The only difference is that the construction carried out in the present case, at the time of filing of the suit, had started but was incomplete F and this construction got completed during the pendency of the suit. Be as it may, as pointed out above, this approach of ours in moulding the relief is to balance the equities and do complete justice to both the parties.

Nidhi Jain Appeals dismissed.