

**IN THE HIGH COURT OF BOMBAY AT GOA**

**SECOND APPEAL NOS. 41 & 49 OF 2004**

**SECOND APPEAL NO. 41 OF 2004**

- Xec Mohidin  
( since deceased )  
represented by his heirs :
- a. Smt. Latifa Bi,
  - b. Shri Shaikh Abdul Wahab,
  - c. Smt. Razia Bi Abdul Wahab,
  - d. Shaikh Abdul Hafiz,
  - e. Shaikh Abdul Rahim, ( since deceased )
  - ee. Mrs. Farzana Bi,  
major, widow of the deceased  
Resident of House No. PMC N4-153/81  
Durgabhat,  
Ponda Goa.
  - f. Shaikh Abdul Majid,
  - g. Shaikh Abdul Azim ( since deceased )
  - h. Miss Nasima Begam,  
all residents of House No.PMC N4-153/81.  
Durgabhat,  
Ponda Goa.
  - i. Smt. Nazbunissa Bi Shaikh Kassim,
  - j. Shaikh Kassim ( since deceased )  
Both residents of House No.156,  
Durgabhat,  
Ponda Goa.
  - ja. Mrs. Nazbunissa Bi Shaikh Kassim,  
wife of the deceased,  
major,  
( already on record as appellant i )
  - jb. Mrs. Shaikh Harifa Bi Livakhat Ali,

:2:

major,  
daughter of the deceased.

- jc. Mr. Shaikh Liyakhat Ali,  
major,  
Son-in-law of the deceased,  
Both resident of  
House No.39, Rawa Bhat,  
Deulmol, Quepem Goa.
- jd. Mr. Shaikh Mustaq,  
major,  
son of the deceased
- je. Mr. Shaikh Irshad,  
major,  
son of the deceased,
- jf. Mr. Shaikh Ashpak,  
major,  
son of the deceased.
- jg. Mr. Shaikh Istiyak,  
major,  
son of the deceased,
- jh. Mrs. Shaikh Asifa Bi,  
major,  
daughter of the deceased.
- k. Smt. Mumtaz Bi Kutibuddin,
- l. Kutubuddin Bichunnavar,  
Both residents of Mormugao Harbour Jetty,  
Vasco-da-Gama, Goa.
- m. Smt. Rashida Bi Shaikh Latif,
- n. Shaikh Latif ( since deceased )  
Both resident of plot no.114, Habiba Manzil,  
Housing Board, Gogol,  
Margao Goa.  
1(n) 1. Shaikh Habiba Sallam,  
major of age,  
daughter of Shaikh Habiba Sallam,  
  
1(n)2. Shaikh Abdul Sallam,

:3:

major of age,  
husband of Shaikh Habiba Sallam,

1(n)3. Shaikh Husain Sab,  
major of age,

1(n)4. Sharika Bi,  
major of age,  
daughter of Shaikh Habiba Sallam,  
All resident of plot no.114,  
Housing Board, Gogal,  
Margao Goa.

.... Appellants

### **V e r s u s**

1. Xec Mamod Babar,  
( since deceased )  
represented by his heirs:
  - a. Shaikh Yassim Muhammad  
( since deceased )
    - a(a) Hanifa Bi Shaikh,  
wife of deceased,  
respondent No.1(a)  
Already on record as respondent no.1(b)
    - a(b) Fatima Bi Shaikh,  
daughter of deceased respondent no.1(a),  
and her husband.
    - a(c) Shri Akbar Abbas Shaikh,  
Both r/o Cuncolem,  
Caroza, South Goa.
    - a(d) Aziza Bi Shaikh,  
daughter of deceased respondent no.1(a),  
and her husband.
    - a(e) Nisar Shaikh,  
both r/o Ghogol,  
Margao Housing board,  
Amina Manzil, South Goa
    - a(f) Irfan Shaikh,  
son of deceased respondent no.1(a),  
R/o Ponda, Betoda Road,  
Opp. Kirti Hotel,

a(g) Barkat Shaikh,  
son of deceased respondent no.1(a),  
and his wife,

a(h) Shabana Shaikh,  
Both r/o Ponda, Betoda road,  
Opp. Kirti Hotel,

a(i) Shaira Shaikh,  
daughter of deceased respondent no.1(a),  
and her husband,

a(j) Mr. Taufiq,  
both r/o Ponda, Betoda Road,  
Opp. Kirti Hotel,

- b. Hanifa Bi,  
both residents of Near Kirti Hotel,  
Nirankar Road,  
Ponda Goa.
- c. Shaikh Babar ( since deceased, through his Lrs.)  
ca. Sheikh Farooq,  
r/o Near Municipality,  
Ponda Goa.
- cb. Hasmad Bi,  
r/o House No.323,  
Amarad wada,  
Taleigao, Panaji Goa.
- cc. Xec Hussein  
r/o House No. 323,  
Amarad wada,  
Taleigao, Panaji Goa.
- cd. Sultana Sheikh,  
major, resident of near Municipality,  
Ponda Goa.
- d. Dominga Filomana Fernandez ( since deceased )  
both residents of House No.39(2)  
Kazi wada,  
Ponda Goa.
- e. Shaikh Hassan,

f. Nassem Shaikh,  
Both residents of House No.47,  
Ward No.9, Near Ponda Municipal Council,  
Ponda Goa.

... Respondents

Mr. S. D. Lotlikar, Senior Advocate with Ms. G. Xettigar, Advocate for the appellants.

Mr. V. P. Thali, Advocate for the respondents.

**AND**

**SECOND APPEAL NO. 49 OF 2004**

Shri Xec Mamod Babar  
since deceased now his heirs  
(a) Shaikh Yassim Muhammad  
( since deceased )

(a1) Shri Shaikh Irfan,  
34 years of age, bachelor, businessman,  
son of deceased appellant no.(a),

(a2) Shri Shaikh Barkar,  
36 years of age, married, businessman,  
son of deceased appellant no.(a) and his wife

(a3) Smt. Shabana Shaikh,  
26 years of age, married, housewife,  
All residing at House No.142,  
Silva Nagar, Opposite Rajiv Gandhi Kala Mandir,  
Ponda Goa.

(a4) Smt. Aziza Bi,  
32 years of age, married, housewife,  
daughter of deceased appellant no.(a),  
and her husband,

(a5) Shri Nisar Shaikh,  
39 years of age, married,  
businessman,  
son in law of the deceased appellant no.(a),  
Both residing at Building no.2, Flat No.1,  
Co-op. Housing Society, Sapana Park,  
Bethoda Road, Ponda Goa.

(a6) Smt. Fatima Shaikh,  
35 years of age, married, housewife,  
daughter of deceased appellant no.(a),  
and her husband

(a7) Shri Akbar Shaikh,  
37 years of age, married, businessman,  
son in law of the deceased appellant no.(a),  
Both residing at House No.2564,  
Carojin, Cuncolim, Salcete Goa.

(a8) Smt. Shaira Bi Shaikh,  
30 years of age, married, housewife,  
daughter of deceased appellant no.(a),  
and her husband

(a9) Shri Tousif Ansari,  
32 years of age, married, businessman,  
son in law of the deceased appellant no.(a),  
Both residing at H.No.61, Saudagar Mohalla,  
Bundar Road, Bhiwandi, District Thane.

b) Hanifa Bi,  
both r/o near Kirti Hotel,  
Nirankal Road, Ponda Goa.

c) Shaikh Babar ( since deceased )  
(c1) Shri Shaikh Farooq,  
major, bachelor,  
son of deceased appellant no.(c),  
residing at House No.39(2),  
Kazi wada, Ponda Goa.

(c2) Smt. Hasmat Bi,  
major, married,  
daughter of deceased appellant no.(c)  
and her husband

(c3) Shri Xec Hussain  
major, married,  
son in law of the deceased appellant no.(c)  
both residing at House No.323,  
Amarad Wada, Taleigao, Panaji Goa.

d) Dominga Filomena Fernandes,  
Both r/o House No.39(2),  
Kazi wada, Ponda Goa

e) Shaikh Hassan,

f) Naseem Shaikh,  
both r/o House No.47,  
Ward No.9 near Ponda  
Municipal Council,  
Ponda Goa.

.... Appellants

**V e r s u s**

1. Shri Xec Mohidin since deceased  
now his heirs,
  - a) Smt. Latifa Bi, ( since deceased )
  - b. Shri Shaikh Abdul Wahab,
  - c. Smt. Razia Bi Abdul Wahab,
  - d. Shaikh Abdul Hafiz,
  - dd. Ms Shainur Shaikh,
  - e. Sahikh Abdul Rahim ( since deceased )
  - ee. Mrs. Farzana Bi  
major widow of the deceased,  
resident of House No.PMC N4-153/81  
Durgabhat, Ponda Goa.
  - f. Sahikh Abdul Majid,
  - g. Sahikh Abdul Azim ( expired)
  - h. Miss Nasimq Begam,
  - hh.Shaikh Sayeed,  
all r/o House No.PMC N4-153/81,  
Durgabhat, Ponda Goa.
  - i) Smt. Nazbunissa Bi Shaikh Kassim,
  - j) Shaikh Kassim ( since deceased )  
Both r/o House No.156, Durgabat,  
Ponda Goa.
  - ja) Shaikh Harifa Bi Liyakhat Ali,  
daughter of Shri Shaikh Kassim,  
wife of Shaikh Liyakhat Ali,  
major, married,

jb) Shaikh Liyakhat Ali,  
major,  
Both (ja) and (jb) residing at House  
No.39, Rawa Bhat, Deulmol,  
Quepem Goa,

jc) Shaikh Mustaq,  
son of Shaikh Kassim,  
major, married,

jd) Shaikh Nasrin,  
wife of Shaikh Mustaq,  
major, married,

je) Shaikh Irshadi,  
son of Shaikh Kassim,  
major, unmarried,

jf) Shaikh Asphak,  
son of Shaikh Kassim,  
major, unmarried,

yg) Shaikh Istiyak,  
son of Shaikh Kassim,  
major, unmarried,

jh) Sheikh Asifa Bi,  
daughter of Shaikh Kassim,  
All the proposed respondents no.  
(ja) to (jh) are resident of  
House No.156, Durgabhat,  
Ponda Goa.

k) Smt. Mumtaz Bi Kutibuddin,  
l) Kutubuddin Bichunnavar,  
both r/o Murmugao, Harbour Jetty,  
Vasco-da-Gama, Goa.

m) Smt. Rashida Bi Shaikh Latif,  
n) Shaikh Latif,  
both r/o Plot No.114, Habiba Manzil,  
Housing Board,  
Gogol, Margao Goa.

... Respondents

Mr. V. P. Thali, Advocate for the appellants.

Mr. S. D. Lotlikar, Senior Advocate with Ms. G. Xettigar, Advocate for the respondents.

**CORAM : F. M. REIS, J**

**DATE : 15<sup>th</sup> January, 2016**

**ORAL JUDGMENT**

Heard Mr. S. D. Lotlikar, learned Senior Counsel appearing for the appellants and Mr. V. P. Thali, learned counsel appearing for the respondents.

2. Both the above appeals were taken up together as they challenge the same judgment and decree passed by the Lower Appellate Court. The parties shall be referred to in the manner they so appeared in the cause title of the suit.

3. Second Appeal No. 41 of 2004 came to be admitted by order dated 24.06.2004 on the following substantial questions of law.

(i) Whether the First Appellate Court could have dismissed the counter-claim of the appellants, seeking recovery of possession of a part of the suit house, and permanent injunction to restrain them from interfering with the suit property, as being not maintainable, after the appellate Court recorded a

finding that the appellants were the owners of the suit house and owners in possession of the suit property and that the respondents had failed to establish that they had acquired title to the suit house or the suit property by adverse possession ?

(ii) Whether in view of the finding recorded by the trial Court that the possession of the respondents was permissive in nature, the first appellate Court could have held that the whole of the counter-claim could not be granted, after having endorsed the conclusion of the trial Court that the respondents had failed to establish that their possession of the suit house was adverse and without reversing the finding of the trial Court that it was merely permissive in nature ?

(iii) Whether in the absence of a plea of limitation being raised by the respondents, the first appellate Court was justified in rejecting the counter-claim as barred by limitation when neither the facts stated in the counter-claim, nor the evidence on record, showed that as a pure question of law, the counter-claim was barred by limitation ?

(iv) Whether the conclusion reached by the first appellate Court that the counter-claim was not maintainable is perverse ?

4. Second Appeal No. 49 of 2004 came to be admitted by order dated 30.07.2004 on the following substantial questions of law.

(i) Whether the concept of acquiring the title by prescription contemplated by Article 510 to Article 529 of the Portuguese Civil Code, as applicable to the State of Goa is distinct and different to the concept of adverse possession contemplated by the Indian Law ?

(ii) Whether to claim the acquisition of title to an immovable property by prescription under Article 529 of Portuguese Civil Code, as applicable to the State of Goa, is incumbent on the part of the claimant to plead exclusive possession by specifically importing the word "exclusive" in the pleadings, even though the entire plaint, read as a whole indicated the plea of such exclusive possession ?

(iii) Whether the first appellate Court misread the pleadings of the appellant, which contained all the material facts constituting ingredients of prescription, as held by this Hon'ble Court in the case of Anant Laximan Lad and others, reported in 1990(1) Goa L. T. 264, thereby rendering the impugned judgment and decree perverse ?

(iv) Whether the Court below misread, misconstrued and misinterpreted the document at

Exh. DW1/B, viz. a certificate issued by the clerk of Comunidade of Quela on 2.8.95 to be the document of respondent's title, when :-

(i) The said document pertained to the property "Thican Ghorbhat" and not to the suit property "Ghorbhat".

(ii) The certificate does not reflect or establish that the property to which it pertains to, refers to or relates to is the suit property bearing survey under 153/2 nor such a relationship was established by the defendants.

(iii) The certificate does not show that any grant was made to the predecessor in the interest of the defendant viz. Xec Amod and the defendants did not establish first that they were successors of the said Xec Ibrahim Moniar and that they had inherited the property through Shri Xec Moniar whose name is referred to in the certificate.

(iv) The certificate also does not show that the grant if any, made in the name of Shri Xec Moniar as alleged, the same was after following the procedure for such a grant as prescribed under the Code of Comunidade.

(v) The certificate refers to an inscription under

item no.297, which document was not at all produced ?

5. Mr. S. D. Lotlikar, learned Senior Counsel appearing for the original defendants has pointed out that the suit filed by the plaintiffs is on the basis that they were owners of half of the suit house situated on the northern side and that the southern side belonging to the defendants. The learned Senior Counsel further pointed out that the plaintiffs have also claimed that they had become owners of such portion based on prescription/adverse possession. The learned Senior Counsel further pointed out that the plaintiffs have failed to produce any documents to substantiate their claim of title nor the alleged claim of prescription/adverse possession and as such the suit filed by the plaintiffs was rightly dismissed. The learned Senior Counsel further pointed out that the fact finding Courts below have come to the conclusion that the plaintiffs have failed to establish their title over the suit property. The learned Senior Counsel further submitted that the defendants who are the appellants in Second Appeal No. 41 of 2004 had filed a counter claim inter-alia contending that they are the owners of the southern portion as well as for restoration of possession of the southern portion of the disputed house. The learned Senior Counsel further submitted that the defendants also sought for a permanent injunction to restrain the plaintiffs from interfering with the land surrounding the disputed house. The learned Senior Counsel thereafter

has taken me through the judgment of the learned Lower Appellate Court to point out that the findings with regard to the title of the defendants has been accepted but however, the defendants have been non suited in the counter claim as barred by limitation. The learned Senior Counsel further submitted that the reliefs sought by the defendants are for restoration of possession and for rejection of the suit and as such once the Courts have come to the conclusion that the alleged claim of the plaintiffs has been rejected there was no reason for the learned Lower Appellate Court to refuse the relief of restoration of possession. The learned Senior Counsel further pointed out that the findings of the learned Judge that the relief of declaration is barred by limitation is also erroneous as according to him, once the title of the defendants has been established, it is well settled that the possession follows title and as such the refusal of the relief of restoration of possession is totally erroneous. The learned Senior Counsel as such points out that the substantial questions of law framed in the appeal filed by the defendants deserve to be answered in favour of the defendants and the counter claim be decreed.

6. On the other hand, Mr. V. P. Thali, learned counsel appearing for the plaintiffs has submitted that though the plaintiffs have claimed that they were the title owners of the northern portion of the disputed house nevertheless, the plaintiffs have not produced any title document in support thereof. The learned counsel further

submitted that the plaintiffs were in possession of such portion of the house as well as the appurtenant land and as such, possession was for a period of more than 50 years, the right of prescription/adverse possession has accrued in favour of the plaintiffs. The learned counsel further pointed out that as the plaintiffs are in possession of the disputed portion by way of prescription, the question of granting any restoration of possession in favour of the defendants in the counter claim would not arise. The learned counsel further pointed out that there are specific particulars disclosing possession of the plaintiffs in the plaint and as such the learned Lower Appellate Court has failed to scrutinize such material while coming to the conclusion that the plaintiffs have failed to establish their claim of prescription/adverse possession. The learned counsel further pointed out that the finding of the learned Lower Appellate Court that there is no averment that the plaintiffs were in exclusive possession of the property does not by itself non suit the plaintiffs from raising the claim of prescription as it is well settled that the plaint has to be read as a whole and as such according to him, reading the plaint, it can be deduced that the plaintiffs are claiming right to occupy the disputed house by way of prescription/adverse possession. The learned counsel in support of his submissions has relied upon the judgment of the Apex Court reported in **1990(1) GLT 201** in the case of **Jose Da Costa & Anr v/s Bascora Sadashiva Sinai Narcornim and Anr** as well as the judgment of this Court reported in **1990(1) GLT 264** in the case of

**Anant Lakshiman Lad and others V/s Yeshodi Deuli and others.**

The learned counsel as such points out that the substantial questions of law framed in the appeal preferred by the plaintiffs being Second Appeal No. 49 of 2004 are to be answered in favour of the plaintiffs and the substantial questions of law framed in the appeal preferred by the defendants being Second Appeal No. 41 of 2004 are to be answered against the defendants.

7. Mr. S. D. Lotlikar, learned Senior Counsel in reply to the contention of Mr. Thali, has pointed out that there is no material on record to show as to when the claim of adverse possession had started in favour of the plaintiffs. The learned Senior Counsel further pointed out that the plaintiffs have been taking self destructive plea that they are the title holder of the substantial part of the suit house by prescription/ adverse possession. The learned Senior Counsel further pointed out that the learned Trial Judge has come to the conclusion that the alleged possession of the half portion of the suit house by the plaintiffs has not been proved and as such according to him unless there is any prescriptive title established the question of claiming any right of prescription and/or adverse possession cannot be accepted. The learned Senior Counsel further pointed out on perusal of the plaint as well as the evidence on record, both the Courts below have rightly rejected the alleged claim of prescription/adverse possession. The learned Senior Counsel further submits that these concurrent findings

cannot be re-appreciated by this Court in Second Appeal as there is no perversity in such findings and consequently, the appeal preferred by the plaintiffs deserves to be dismissed.

8. I have given my thoughtful consideration to the rival contentions and I have also gone through the records. On perusal of the judgment passed by the learned Trial Judge dated 04.02.2002 in the suit filed by the plaintiff wherein the defendants have filed the counter claim, it is the case of the plaintiff that he is the owner of the northern half of the house existing in the property known as "Gorbhat" surveyed under No.153/2 and old cadastral survey No. 325 along with the corresponding surrounding area of the said property and the remaining southern half of the suit house belonging to the defendant. It is further the case of the plaintiff that his father was in possession of the said northern half of the house for more than 55 years and after his death the same is in possession of the plaintiff and his family for about 40 years. It is further contended that on 19.02.1974 the defendants illegally and high handedly tried to store the timber in the northern half of the plaintiff and when obstructed by the sons of the plaintiff, the defendant and the family members assaulted them. It is further his case that the defendant destroyed the shed which was constructed prior to the filing of the suit. It is further his case that when the plaintiff along with his family had gone to Vasco for a change in May, 1978, in the first week of June, 1978 the plaintiff along with some labourers

went to the said house for the purpose of retiling the roof but the defendant and his family members forcibly obstructed the plaintiff from carrying out retiling. It is also contended that 15 days prior to the filing of the suit when the plaintiff went to the suit house, he saw that the lock put up by the plaintiff on the entrance door of the northern half of the suit house was removed and in its place a new lock was put and that the rear wall of the northern half of the suit house had collapsed due to the rain as the plaintiff could not retiling the roof. The defendants filed their written statement and contended that the entire suit property along with the ancestral house and the other things existing therein belonged exclusively to the defendants and the other lawful successors of the late father of the defendant and that a small part of the ancestral house was allowed to be occupied by the father of the plaintiff and his family in the act of tolerance and permissiveness. It is further their case that after the death of his father, the plaintiff continued to occupy a small part of the suit house and that all the structures existing in the suit property belonging to the defendants. It is also contended that after the death of the wife of the plaintiff, the plaintiff ceased to live in the said part of the house and has been living at Khadpaband and one of the sons of the plaintiff is living at Vasco. The other is residing at Kajiwada, Ponda. It is also contented that the said part of the house is locked for more than five years and the plaintiff has neglected the said part of the house. Consequently, the counter claim came to be filed and the plaintiff filed the written statement to the said counter claim.

9. The learned Trial Judge has framed the issues and while examining the issue nos. 1, 2, 3, 5 and 6 came to the conclusion that the plaintiff has failed to prove that he is in possession of the northern half of the suit property and as such the Court found that the claim of the plaintiff that he is in adverse possession of the suit property cannot be accepted. As far as the residential house is concerned, the learned Judge noted that it is an admitted position that the plaintiff is in possession of the northern portion while the defendants are in possession of the southern portion. The learned Judge further noted that the extent of their possession has not been established. The learned Judge also noted that adverse possession must be adequate in continuity, publicity and consequently, the learned Judge found that the claim of adverse possession by the plaintiff cannot be sustained and as such found that the defendants have proved that the entire suit property along with the ancestral residential house and the other things belonging to the defendants exclusively including the structure and further that a small portion of the suit house was given to the plaintiff upon mere permissiveness. While deciding the issue no.4, the learned Judge came to the conclusion that the plaintiff has failed to establish the cause of action as pleaded in the suit. The learned Judge by the said judgment dismissed the suit filed by the plaintiff and partly decreed the counter claim filed by the defendant and declared that the plaintiff is not entitled to continue as an occupant in the property surveyed under no.153/2 of Village Ponda and consequently, directed to

give to the defendants vacant possession of the part of the suit house under his lock within a period of 30 days and further restrained the plaintiff by a permanent injunction from interfering in any manner with the defendants' possession in relation with the entire suit property bearing survey No.153/2.

10. The appeal preferred by the plaintiff came to be disposed of by judgment dated 08.01.2004. The learned Lower Appellate Court has framed two points for determination. While deciding the first point for determination, the learned Judge came to the conclusion that the claim of the plaintiffs that they have acquired ownership right on the northern portion by way of prescription came to be rejected. But however, the counter claim filed by the defendants was held untenable. While discussing the second point for determination, the learned Judge found that the relief in the counter claim cannot be granted as there was no pleading about the dispute raised in the counter claim and as such the counter claim would not lie.

11. From the foregoing findings of the Courts below, both the Courts have concurrently come to the conclusion that the defendants are the owners of the subject property as well as the suit house. The findings that the defendants were in permissive occupation of the part of the house have also been accepted by the learned Trial Judge. It is also found that the plaintiff has failed to establish his claim that he has right to the northern portion by prescription and/or adverse possession.

The suit of the plaintiff for injunction as such came to be dismissed by the Courts below. The relief in the counter claim is essentially to direct the plaintiff to give to the defendants the vacant possession of the part of the house under his lock. Such relief was granted by the learned Trial Judge which came to be set aside by the learned Lower Appellate Court by the impugned judgment. The learned Lower Appellate Court has essentially rejected the claim on the ground that the relief of declaration was barred by limitation but losing sight of the fact that the suit was also for restoration of possession based on title. Once both the Courts have come to the conclusion that the defendants were the owners in possession of the property, the relief of restoration of possession could be refused only in case the plaintiff had established his claim of adverse possession. Both the Courts below have concurrently rejected such claim of the plaintiff and consequently, there is no reason to refuse a relief of possession sought by the defendants in the counter claim. Merely because there is a dispute with regard to the entries in the survey records cannot be a ground to refuse a relief of restoration of possession based on the title as it is well settled that entries in the survey records do not confer title.

12. The contention of Mr. Thaly, learned counsel appearing for the plaintiff that the findings arrived at by the Courts below refusing the claim of adverse possession are unsustainable cannot be accepted. As already pointed out herein above, the ownership of the defendants

came to be accepted. The only aspect which would remain to be considered was whether the claim of the plaintiff that he has acquired title by prescription is sustainable in law. Before I proceed to examine the said aspect, it would also be relevant to note that the learned Lower Appellate Court has non suited the defendants on the ground that the claim is barred by limitation. The relief of declaration of title cannot be said to be barred by limitation unless the opposite side has established their claim of adverse possession in the present case. The learned Judge was not justified to dismiss the suit as barred by limitation when the Court has come to the conclusion that the plaintiffs have failed to establish their claim of prescription/adverse possession. To that extent, the findings of the learned Lower Appellate Court deserves to be quashed and set aside. Considering the said aspect, the only matter to be examined is whether the plaintiffs have established their claim of prescription/adverse possession. On perusal of the records, it is the case of the plaintiffs that they are title holder of the disputed house as well as the appurtenant land. As already pointed out herein above, Mr. Thali, learned counsel appearing for the plaintiffs has fairly conceded that the plaintiffs have failed to produce any document of title to establish such claim of ownership over the disputed property. On perusal of the plaint, I find that without renouncing their claim of title, the plaintiffs have proceeded to claim that they were owners of the disputed house by prescription/adverse possession. It is well settled that when a person claims title to himself, he cannot claim

prescription/adverse possession unless it renounces such title claimed by him. In this connection, this Court in the judgment reported in **2010(6) Mh.L.J. 931** in the case of **Vincentinho Gomes and others V/s Shree Mahadeo Devalya of Kakoda**, dealing with the aspect of prescription and adverse possession and whether a person who claims title can claim such relief without renouncing title has observed at paras 14, 15, and 16 thus :

“**14.** Considering the written statements filed by the Appellants, I find that the Appellants were claiming title unto themselves in the suit property. The Appellants never renounced their claim of title over the suit property. The Appellants also did not admit the title of the Respondents over the suit property. In (2009) 13 S.C.C. 229 in the case of L. N. Aswathama & anr. vs. P. Prakash, the Apex Court has held at para 17 thus :

“17. The legal position is no doubt well settled. To establish a claim of title by prescription, that is, adverse possession for 12 years or more, the possession of the claimant must be physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding twelve years. It is also well settled that long and continuous possession by itself would not constitute adverse possession if it was either permissive possession or possession without *animus possidendi*. The pleas based on title and adverse possession are mutually

inconsistent and the latter does not begin to operate until the former is renounced. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period for prescription will not commence. (*Vide P. Periasami v. P. Periathambi, Md. Mohammad Ali v. Jagdish Kalita and P. T. Munichikkanna Reddy v. Revamma*)."

**15.** In view of the said Judgment of the Apex Court, it is obvious that considering the pleadings in the written statements, the plea based on title by adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. The Appellants have failed to plead any animus to possess the suit property hostile to the title of the true owner and, consequently, the period of prescription will not even commence.

**16.** In the Judgment passed by this Court in Second Appeal no. 22/1990, dated 20.08.1996, dealing with the claim of adverse possession, it has been held at paras 8 and 9 as follows :

"8. To establish prescription, it is now well settled that the onus lies on the person pleading prescription, who must not only specifically plead the ingredients of prescription but must prove that the party exercised such possession which possession was

hostile to the right of the person claiming ownership. Shri Usgaonkar naturally relies on paragraph 9 of the pleadings to show that in paragraph 9 all the essential averments have been pleaded insofar as prescription is concerned.

9. I am, however, not impressed by the submission of the learned Counsel. Pleadings have to be taken in their totality. If one goes through the plaint, in paragraph 2 the specific averment is that the property in which the house stands was Government land. In paragraph 8 this has been further elaborated that the land on which the house stands belongs to the Government and that the ancestors of the plaintiffs have occupied and appropriated the same, making therein the construction of the house and possessing it as their own. In paragraph 9 thereafter it is set out that the plaintiffs acquired ownership by prescriptive title, being in possession for over 30 years. The said pleadings are merely consequential to the earlier pleadings set out in paragraphs 2 and 8. If these pleadings are read together what emerges is, that, the case of the original plaintiffs was precisely that the plaintiffs claimed adverse possession insofar as the Government is concerned qua the property on which the house stood. It is true that the plaintiffs have nowhere admitted the title and/or possession of the land on which the house stood as belonging to the original defendants. But this by itself would not however be sufficient to arrive at the conclusion that even if the plaintiffs did not prove that the land belongs to the Government, the very fact that they had proved that the house

belongs to them, the conclusion must follow that they have proved adverse possession against the defendants. As already pointed out nowhere in the plaint did the plaintiffs aver hostile title vis-a-vis the defendants. If this had been pleaded, then there ought to have been a specific issue based on which parties could have led evidence and the issue could have been then decided."

13. Taking note of the observations of this Court relying upon the judgments of the Apex Court as well as the learned Single Judge of this Court, it is clearly held therein that unless there is cogent evidence of hostile title, the question of claiming any adverse possession does not arise. In the present case, as pointed out herein above, there is a specific finding of the learned Judge that the plaintiffs was permitted to occupy the disputed house. Though the learned Lower Appellate Court has come to the conclusion that the date and the manner in which such occupation has started has not been established by the defendants nevertheless found that the findings of the Courts below to the effect that the plaintiffs were occupying the disputed house at the instance of the defendants has to be accepted. Hence, mere user or occupation without the animus to claim ownership or mere use at sufferance will not be sufficient to create any right adverse to the true owner. In order to defeat the title of the true owner, the claimant has to establish a clear title which is superior to or better than the title of the true owner or establish perfection of title by adverse possession/prescription for

the prescribed period with the knowledge of the true owner. To claim adverse possession, the possession of the claimant must be actual, open and visible, hostile to the owner and therefore, necessarily to the knowledge of the owner and continued during the entire period necessary to create a bar under the law of limitation. In the present case, as already pointed out herein above, there are no pleadings nor any material adduced by the plaintiffs to establish their claim of adverse possession/prescription. It is now well settled that the possession follows title and in the present case once title of the defendants has been established and accepted any occupation by the plaintiffs has to be treated as on behalf of the true owner.

14. In such circumstances, on bare reading of the plaint and the findings of the Courts below, I find that the conclusion drawn by the Courts below that the plaintiffs have failed to establish their claim of prescription/adverse possession cannot be faulted. There is no perversity in the findings and consequentially, the substantial questions of law framed in the appeal preferred by the plaintiffs are to be answered against the plaintiffs. The Judgment of the learned Single Judge of this Court reported in **1990(1) GLT 264** in the case of **Anant Lakshiman Lad and others V/s Yeshodi Deuli and others** relied upon by Mr. Thaly, learned counsel appearing for the plaintiff is not applicable to the facts of the present case. As pointed out herein above, there are no pleadings in the plaint or in the written statement

to the counter claim which could advance the case of the plaintiff that he has acquired title by prescription and as such the said judgment is not applicable to the facts of the present case. The judgment of the Division Bench of Apex Court reported in **1990(1) GLT 201** in the case of **Jose Da Costa and Anr V/s Bascora Sadashiva Sinai Narcornim and another**, clearly provides that even in the Portuguese Civil Code, permissive possession is not sufficient to prescribe title of the ownership of the land. In the present case, the learned Trial Judge while deciding issue no.6 has found that the claim of the defendants that the father of the plaintiff was allowed to occupy a portion of the house on humanitarian ground has to be accepted. There is a specific finding that the occupation of the plaintiff of such portion was permissive in nature. Though the learned Lower Appellate Court has found that there was no conclusive evidence to establish who had actually permitted the father of the plaintiff to occupy such portion, nevertheless, the learned Lower Appellate Court did not interfere in the findings of the learned Trial Judge on this aspect and found that the claim of the plaintiff that his right of prescription is devoid of substance. In such circumstances, the contention of Mr. Thaly, learned counsel appearing for the plaintiff based on prescription cannot be accepted as permissive occupation cannot confer a right of prescription.

15. In view of the above, I find that the learned Lower Appellate Court was not justified to dismiss the counter claim of the

defendants seeking recovery of possession of a part of the house as well as the permanent injunction as decreed by the learned Trial Judge. As far as the second substantial question of law is concerned, once it is held that the title of the property is in favour of the defendants, any occupation by the plaintiff has to be permissive possession on behalf of the real owner and as such the claim of the plaintiff of prescriptive title is devoid of any merit. Consequently, the conclusion drawn by the learned Lower Appellate Court that the counter claim was not maintainable is without any substance as the learned Lower Appellate Court has failed to note that the counter claim was also for the restoration of possession based on the title which has been accepted by both the Courts below.

16. The substantial questions of law framed in Second Appeal No. 49 of 2004 are answered against the plaintiff. For the reasons stated herein above, the claim of the plaintiff that he has acquired title to the property based on prescription has no substance. The findings of fact of the Courts below with regard to the title of the property based on the documentary evidence cannot be re-appreciated by this Court. Both the Courts below have rightly examined the documents at Exhibit DW1/B which is a public document which clearly establishes the title of the defendants. The contention of the plaintiff that both the Courts have misread document cannot be accepted. Both the Courts below have rightly examined such document to come to the conclusion that

the defendants were the owners and in possession of the disputed property.

17. For the reasons stated herein above, the substantial questions of law framed in Second Appeal No. 41 of 2004 are to be answered in favour of the defendants.

18. In view of the above, I pass the following :

**O R D E R**

- (i) Second Appeal No. 49 of 2004 is dismissed.
- (ii) Second Appeal No. 41 of 2004 is allowed. Consequently, the impugned judgment and decree passed by the learned Lower Appellate Court dismissing the counter claim of the defendants is quashed and set aside.
- (iii) The counter claim filed by the defendants is partly allowed in terms of the prayer clauses (a) and (b).
- (iv) Both the appeals stand disposed of accordingly with no order as to costs.
- (v) Decree to be drawn accordingly.

**F. M. REIS, J**

**at\***

