

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.61 OF 1992

1. Pathan Khan s/o Bale Khan
(Since dead through his legal representatives) :-
 - 1A. Hashmat Bee w/o Pathan
Age – years, Occ – Household
 - 1B. Nabee Khan s/o Pathan Khan
Age – 60 years, Occ – Agriculture
 - 1C. Rasool Khan s/o Pathan
Age – 58 years, occ – Agriculture

All R/o village Khojewadi,
Taluka – Gangapur, District - Aurangabad
 - 1D. Habibkha s/o Pathankha Pathan,
Age – years, Occ – Agriculture
(Since deceased through his LRs)
 - 1D I. Rashad Bee w/o Habibkha Pathan
Age – 52 years, Occ – Household
R/o Choti Mandi, Daulatabad,
District – Aurangabad
 - 1D II. Abeda Bee Sk. Shabbir,
Age – 36 years, Occ – Labour
R/o Jatwada, Daulatabad
District – Aurangabad
 - 1D III. Ayub Kha Habib Kha
Age – 32 years, Occ – Labour
R/o Choti Mandi, Daulatabad,
District – Aurangabad
 - 1D IV. Ahmed Kha Habib Kha
Age – 30 years, Occ – Labuor
R/o Choti Mandi, Daulatabad
District – Aurangabad

1D V. Sajeda Bee Sk. Asif,
Age – 28 years, Occ – Household
R/o Rajerat Takli, Khultabad
District – Aurangabad

1D VI. Yakub Kha Habib Kha
Age – 18 years, Occ – Household
R/o Choti Mandi, Daulatabad
District – Aurangabad

2. Kadubee w/o Sayed Hasan,
Patel, Age – 85 years, Occ – Household
R/o Karegaon, Taluka – Patoda,
District Beed .. Appellants

versus

1. Osman Khan s/o Ali Khan
(Since deceased through his LRs)
- 1A. Hayatbee Osman Pathan
Age – 50 years, Occ – Agriculture
- 1B. Shafi Osman Pathan
Age – 50 years, Occ – Agriculture
- 1C. Salim Osman Pathan,
Age – 47 years, Occ – Agriculture
- 1D. Dastgir Osman Pathan,
Age – 45 years, Occ – Agriculture
- 1E. Aajam s/o Osman Pathan,
Age – 43 years, Occ – Agriculture

All R/o Ghari, Taluka – Paithan,
District – Aurangabad
- 1F. Banobee Babulal Shaikh
Age – 50 years, Occ – Agriculture
R/o Mungi, Taluka – Shevgaon,
District – Aurangabad
- 1G. Rabiyaabee Lalkha Pathan,
Age – 50 years, Occ – Agriculture
R/o Karkeen, Taluka – Paithan,
District – Aurangabad

2. Pathan Khan Amir Khan
Age – 50 years, Occ – Agriculture
R/o Ghari, Taluka – Paithan,
District – Aurangabad
3. Omer Khan Amir Khan
Age – 35 years, Occ – Agriculture
R/o Ghari, Taluka – Paithan,
District – Aurangabad .. RESPONDENTS

Mr. N. K. Chaudhari, Advocate for the appellants
Mr. M. G. Mustafa, Advocate for respondents No.1A to G, 2 & 3

CORAM : SUNIL P. DESHMUKH, J.

DATE : 15th December, 2016

ORAL JUDGMENT:

1. Heard learned advocates for the parties.
2. Second appeal has been admitted on grounds No.10, 11 and 16 as substantial questions of law reading thus -

“ 10. That it is an erroneously held that the provisions of Sec. 115 of the Evidence Act is applicable to the present case. When the plaintiffs are coming with the case that they had granted permission to the defendants to cultivate the suit land as they entrusted with the defendants, being their close relatives; (it is to be notable that in pleadings the defendants before the Trial courts, had denied any relation with the plaintiffs but before lower appellate court they have specifically admitted that they are closely related with the plaintiffs). In such state of facts the plaintiffs statement that they had entrusted

the defendants and therefore the 1988 they were not aware of the change of Revenue record in the names of defendants; is trustworthy. Therefore no question of application of the provisions of sec. 115 of the Evidence Act to present arises. It is not the case of defendants that by any of their conduct or act or omission the plaintiffs have intentionally caused or permitted the defendants, to record their names in the record of right pertaining to suit lands and permitted them to believe the same to be true. Hence the approach of lower appellate Court by this angle of the case is not justifiable.

11. The lower appellate court has committed error in discarding the evidence of the plaintiffs witnesses;

16. That the Court below has committed error of law in holding that the case of (1) AIR 1954 Travancore Kochine (2) AIR 1916 All. Page 241 (3) and AIR 1944 Nagpur, page 20 are not applicable to the present case."

(text as appearing in memorandum of second appeal)

3. On behalf of the plaintiffs, it is averred that lands bearing survey No.1/A admeasuring 1 Acre, 9 Are and survey No.1/AA admeasuring 13 Acre, 19 Are situated at village Ghor, Taluka Paithan, District Aurangabad, are their ancestral properties. The plaintiffs refer to genealogy headed by one Gajekhan, who was having two sons Umerkhan and Rahimkhan. Rahimkhan was succeeded by son Balekhan. Plaintiffs No.1 and 2 respectively are son and daughter of said Balekhan. Umerkhan, from other branch, had two sons

Faridkhan and Alikhan. Defendant No.1 is the son of Alikhan. Faridkhan was survived by Amirkhan and defendants No.2 and 3 are sons of Amirkhan.

4. The plaintiffs averred that fifty years before they had been to Khojewadi for business and around that time they had orally permitted Faridkhan – grand father of defendants No.2 and 3 to cultivate land survey No.1/A and after his death defendants No.2 and 3 were permitted to cultivate said land. Similarly, the plaintiffs allowed Chandkhan Mehtabkha – maternal uncle of Osmankhan – defendant No.1 to cultivate land survey No.1/AA. The defendants used to give crop share and / or money from income of the suit lands to the plaintiffs. The defendants were permitted to cultivate suit lands since they were relatives and relations between plaintiffs and them were cordial. However, around January, 1988, while the defendants refused to give share in the benefits from the suit lands, the plaintiffs sensed trouble and came to know that the defendants have got caused their names to appear in seven twelve extracts as owners of the suit lands. While plaintiffs demanded possession, defendants refused to deliver it and as such, suit ensued for possession.

5. Defendants, in their written statement, resisted the suit. It had been denied by the defendants that they are in possession of the suit lands on behalf of the plaintiffs. It had been denied that they were orally permitted by the plaintiffs to cultivate the suit lands and it has also been denied that the defendants used to give share in fruits of suit lands to the plaintiffs. The defendants went on to contend that they are not relatives of the plaintiffs and further claimed that the plaintiffs had never been in possession of the suit lands and the defendants are in possession of the suit lands for over fifty to sixty years and as such, denied claim in the suit.

6. The trial court framed issues *viz.*, whether the plaintiffs prove that the suit lands to be their ancestral property and are owners, giving finding in the affirmative in favour of the plaintiffs, whether the possession was given to defendants by the plaintiffs for cultivation by oral agreement has also been held to be proved. Entitlement of the plaintiffs for possession of the suit lands had been held in affirmative. So was the case in respect of entitlement to have future mesne profits. The trial court considered that in order to lend credence to the case, the plaintiffs have produced extract of *assal shetwar* of survey No.1/A and 1/AA for the year 1327 *fasali* corresponding

to 1917 AD, referring further to that *Shetwar* shows area of 25 Acre 28 Are belonging to Balekhan Rahimkhan. *Khasara Patrak* placed on record on behalf of the defendants, shows name of Pathan Balekhan as *pattedar* and *Inamdar* as landlord, whereas, possession is shown with Amirkhan and Faridkhan in the year 1953-54. The defendants had produced form No.1 of land survey No.1/A showing Amirkhan Faridkhan and Chandkhan on behalf of Osmankhan to be in possession of suit lands, further showing that possession had been handed over to said persons pursuant to oral agreement between the plaintiffs and them. The trial court considered that entries in revenue record in the shape of seven twelve extract in favour of the defendants would not be able to establish title of defendant No.1. The trial court further considered that having regard to record, it was for the defendants to show, suit properties were their ancestral properties as contended by them. The trial court, as such, deduced that the plaintiffs have title to the suit properties. The trial court considered that there is sufficient evidence indicating that the plaintiffs had entrusted management of suit property to the defendants. Possession, as such, has been permissive and not hostile and further to that mere possession for long time does not raise any presumption. Having regard to oral evidence, which has

been coming forth on record, the trial court considered that the plaintiffs' case appears to be probable and possession of the defendants appears to be permissive. The trial court considered relations between plaintiffs and defendants and with reference to certain citations, considered that the defendants' possession is permissive in nature, them having not claimed any adverse possession and though they had claimed lands to be their ancestral lands, they had not produced anything on record to show that the same is their ancestral property. The trial court, as such, decreed the suit, directing handing over possession by defendants to plaintiffs and further directing inquiry for mesne profits.

7. The defendants challenged aforesaid judgment and decree of the trial court in Regular Civil Appeal No.2014 of 1990. The appellate court framed points for consideration *viz:-* whether the plaintiffs prove to be owners of the suit properties and whether the plaintiffs prove defendants' possession is permissive. The appellate court found that the *assal shetwar* at Exhibit-28 shows name of Balekhan as *Khatedar*, which is record of 1327 *fasli* corresponding to 1917 AD. Whereas in *Khasara Patrak* at Exhibit-27, Balekhan is shown as *pattedar – Inamdardar* and name of Amirkhan s/o Faridkhan is shown as cultivator, which is of the year 1953-54 and Exhibit-26,

certified copy of *namuna* No. 1, shows Amirkhan and Usmankhan through legal guardian *Mama* Chand to be in possession and refers to oral agreement and relations to be of brotherhood and it corresponds to 1939. The appellate court accordingly considered that the plaintiffs had at no point of time been in possession or cultivating suit land and after death of Balekhan, name of plaintiff No.1 has been recorded as *Pattedar*. The appellate court from the definition of *Pattedar* purported to consider that name of plaintiff No.1, after death of his father has been recorded for the purpose of recovery of land revenue. The appellate court further considered that plaintiff No.1 was hardly of ten to twelve years of age while he moved on to village Khojewadi and thus purported to disbelieve that the lands had been given by plaintiffs or their predecessor to Faridkhan for cultivation on their behalf. The appellate court further appears to have considered that upon attaining majority by Osmankhan, the land got divided into two survey numbers *viz.*, 1/A and 1/AA and this aspect has not been referred to by the plaintiffs. The appellate court also disbelieved the contention on behalf of the plaintiffs about benefits of the land being received by them and considered that evidence in this respect is not credible. The appellate court considered that Exhibits-28 and

27 to be stray entries and there is no conclusive corroboration to said pieces of evidence and, therefore, it cannot be said that the plaintiffs have discharged their burden adequately.

8. The appellate court considered that it would not be acceptable that there was any oral agreement between defendant no. 1 and the plaintiffs about giving income of the fields. Thus, the appellate court deduced that it emerges, defendants having cultivated suit land for about fifty years without interruption. The court further appears to have considered that there is no evidence in respect of payment of land revenue by plaintiffs and as such, their case about being in ownership is considerably weakened and has observed that the defendants have been cultivating suit land without paying any amount to the plaintiffs. The court considered, close relationship is not depiction of permissive possession of the defendants. The appellate court referred to that *pahanipatrak* of 1954-55 shows the defendants to have come in possession as and by way of brotherhood and this is an indication that they have been claiming right of ownership and not permissive possession from the plaintiffs. The appellate court considered that having regard to that the plaintiffs have been silent in respect of revenue record wherein it is being shown that the defendants are sharers as brothers and there had

been no objection to maintenance of record and further considered that this was a tacit relinquishment by plaintiffs of their share. The court, however, considered that the defendants cannot be said to have become owners by adverse possession. The court considered that entries in revenue record show source of income of defendants, however, fail to show their title but it is not incumbent to deliver possession of suit land to the plaintiffs. It is further considered that the plaintiffs cannot be said to have established better and exclusive title over the suit land. The entries on record, at the most, would go to show that the plaintiffs may have some interest in suit property but, they cannot be said to be having exclusive interest in the same. The court has considered that in Muslim law, there is no concept of ancestral property and recognition is to the right by inheritance. As such, the appellate court under impugned judgment and decree went on to allow the appeal and dismiss the suit, setting aside the decree of the trial court. It is against this judgment and decree of the appellate court, this second appeal is filed, admitted and is coming up for final hearing.

9. Mr. Nitin K. Chaudhari, learned counsel appearing on behalf of the appellants, vehemently submits that the appreciation by the appellate court of the evidence on record

is not only mis-appreciation but, it tends to be perverse. He submits that having regard to clear and firm picture appearing from the oldest record dating back to 1917 which has been made available to the court, it cannot be gainsaid that the plaintiffs have established their better title to the suit property. He further submits that the conduct of the defendants ought to have received attention wherein they tried to suppress relationship among the parties and from there, it is easily discernible that the defendants want to keep away the courts from real nature of the transaction between plaintiffs' branch and defendants' branch. He submits that in unequivocal terms in the pleadings, defendants have denied relationship as claimed by the plaintiffs. Ultimately, on evidence, it became vividly clear that the defendants are from branch of Omer Khan – the other son Gaje Khan. The property all along stood in the names of ancestors of the plaintiffs, to be precise, in the name of Bale Kahn since 1917 and after him in the name of present plaintiffs. According to him, 1917 AD document at Exh. 28 is *Assal Shetawar* which, as he claims, would clinch the issue. Said status and title of the plaintiffs' branch continued throughout even in the revenue record. He submits, as a matter of fact, *khasra patrak* Exhibit 27 relied on, on behalf of the defendants,

shows that for the first time around 1953-54 they have been put in possession under an oral agreement. In that record as well, the plaintiffs have been shown to be *Pattedars* whereas, insofar as status and title to the property is concerned, there is not a single document dating back to 1950 or showing any nexus of defendants to the suit lands. The trial court, according to him, properly appreciated the situation and evidence on record. As a matter of fact, *khasrapatrak* – Exhibit 27 lends a strong foundation to the claim of the plaintiffs that the suit lands were delivered in possession of defendants fifty years before and as such their possession is permissive since then. He submits that the parties are Muslims by religion and there is absolutely no concept of joint family property in the religion. It is not the case of the defendants that the property belonged to Gaje Khan at any point of time. The defendants have also not disputed that plaintiffs' ancestor, namely, Bale Khan had been Pattedar of suit property. In the circumstances, there is no question of defendants getting any share in the property by inheritance or rather in brotherhood as has been considered by the appellate court. According to learned counsel, the appellate court has obvilously misconceived the facts and the law.

10. Mr. Choudhari goes on to submit that the appellate court has considered Exhibits 27 and 28 to be stray record, however, there is no record made available of the intervening period causing any interlude in respect of status and title of the plaintiffs to the suit property. He submits, if there is any stray record, which is being referred to and placed reliance on by defendants, the same is only for the period 1986-87 which is produced by defendants wherein they have been shown in *Kabjedar's* column, however, the defendants have utterly failed to relate that entry to any background or any source causing such entry. Except said 7 x 12 extracts of the year 1986-87, there is no other record made available by defendants to show their nexus to the suit property. As such, in his estimate, if at all there is any stray record, the same is only in the form of 7 x 12 extracts on behalf of the defendants.

11. Learned counsel submits that the appellate court has been in gross error in considering that the plaintiffs have not discharged burden of proof of title to the suit property. He submits that, as a matter of fact, there is more than sufficient record available, documentary as well as oral, from which the title of the plaintiffs unflinchingly seen. The document dates

back to 1917 and continued to 1953-54 and even further. The only turbulence to their title is in the year 1986-87. He submits that despite only solitary document before the court which is digressed with and not germane, the appellate court went on to consider that the plaintiffs have not been in a position to discharge burden of showing their title to the suit property. He submits that it is not even a case of better title while it comes to determination of title, the same is evidently of plaintiffs. He submits, the defendants have no title at all whereas, the plaintiffs have established the same by strong documentary evidence. The defendants could not relate their title to the suit property through valid source worth the name. He contends that while burden had been adequately discharged by the plaintiffs, the onus got shifted on to the defendants to prove that they had title to the suit property since they had in the pleadings claimed that suit lands are their ancestral property.

12. Learned counsel submits that the defendants have miserably failed to discharge shifted burden and could not lay claim to any title to suit property. He submits, the appellate court as well has considered that it cannot be said that the defendants had any title to the suit property. In the circumstances, he contends, it was incumbent at least to

consider that in any case the plaintiffs had a better title than the defendants to the suit property. In his estimate, the appellate court unnecessarily got drifted away by making reference to the words "brotherhood" appearing in *khasra patrak* of 1953-54, however, the court had been oblivious of the fact that the same had been by way of agreement looking at the preceding record and further that there is no claim by defendants that the property has come to them through Gaje Khan. The appellate court has committed absolute and gross error in reversing the well founded judgment and decree granted by the trial court and dismissed the suit.

13. Learned counsel during the course of his submissions has placed reliance on a decision by the apex court in the case of *R.E.V. Venkatchala Gounder v. Arulmigu Viswesaraswami* reported in *AIR 2003 SC 4548 (1)* and particularly on paragraphs no. 29 and 30 thereunder to buttress his submission that the plaintiffs having discharged their burden, the onus had been shifted on to defendants to prove their case and since they cannot be said to have discharged the same by any credible material, the appellate court could not have dabbled into the judgment rendered by the trial court and, much less, reversed the same.

14. On the other hand, Mr. Mujtaba G. Mustafa, learned counsel appearing on behalf of the defendants countering aforesaid submissions, submits that for more than fifty years, defendants admittedly have been enjoying suit properties in their possession and yet, not even by whisper, plaintiffs had at any point of time objected to defendants' possession. He submits that the defendants all along right from beginning have been enjoying suit properties as owners. He submits that the plaintiffs have initiated proceedings on an assumption that they have been owners of suit properties, however, the evidence and the record show that their such assumption has no basis whatsoever. The documents sought to be relied on on behalf of the plaintiffs, indicate that they cannot be said to be owners of suit property at all. Learned counsel then submits that it cannot be said that the plaintiffs have any title to the suit property. He further submits that over and above this, the contention of plaintiffs about there being oral agreement between predecessors of the plaintiffs and predecessors of the defendants is a fallacious one, for, appellate court has taken stock of the situation and has found that there is no substance in the contention, for, it cannot be said that any such agreement had ever been entered into, and at the relevant time, the appellate court has observed, the

plaintiffs were minor and as such, is least possibility of any such agreement having been entered into as contended on behalf of the plaintiffs. According to learned counsel, having regard to the observations of the appellate court, those can seldom be faulted with and the evidence led on behalf of the plaintiffs does not inspire confidence about the plea of oral agreement between the parties. In the circumstances, Mr. Mustafa vehemently submits that there is no substance at all in the contention of the plaintiffs that possession being enjoyed by defendants is permissive. He further reverts to the agreement and submits that since the plaintiffs had no title to the property, they having been found not to be owners, it cannot be said that the burden as contended on behalf of the plaintiffs has been discharged by them and in such a scenario, plaintiffs' contention the onus stands shifted on to the defendants has absolutely no basis. According to learned counsel, the title claimed by the plaintiffs is that of the owner and the evidence led by them does not show that they have been owners of the suit properties. In such a situation, the authority cited on behalf of the plaintiffs would seldom be of any assistance to carry forward the case and the contentions of the plaintiffs.

15. Mr. Mustafa purports to rely on a decision of the supreme court in the case of *Life Insurance Corporation of India vs. Ram Pal Singh Bisen*, reported in (2010) 4 SCC 491, referring to head note D reading thus;

" D. Evidence Act, 1872-S.101-Failure to prove defence, held, does not reverse or discharge plaintiff's burden of proof.

A departmental enquiry was conducted against the respondent employee as a result of which he was dismissed from service. The respondent filed civil suit questioning the validity of the enquiry inter alia on the ground that adequate opportunity was not given to him to defend himself. The appellant employer pleaded that sufficient opportunity was given to the respondent but he took undue adjournments. It was further averred that on a particular day when the respondent came to the office to receive his subsistence allowed, he was informed that hearing in the enquiry was fixed for that day, yet the respondent did not participate in the enquiry. Enquiry officer was was therefore constrained to proceed ex parte against the respondent. However, in the civil suit, the appellants neither cross-examined the respondent when he offered himself as his witness in the civil suit, nor did the appellants lead evidence in the civil suit to prove the documents relied upon by them in support of their stand that adequate opportunity had been given to the respondent employee in the departmental enquiry. " ,

and submits that failure of the defence does not reverse or discharge plaintiffs' burden of proving the case. He submits that the contentions of the plaintiffs that the defendants have

utterly failed to show source of their title to the suit property is of little consequence in the scenario.

16. He further refers to a decision of the supreme court in the case of *Anil Rishi vs Gurbaksh Singh*, reported in (2006) 5 SCC 558 to underscore aforesaid proposition.

17. Learned counsel submits that the appellate court has properly appreciated evidence on record and has culled out the inference as required and has rightly dismissed the suit. The trial court, in fact, according to him, had not properly appreciated evidence and had gone about the matter cursorily and had erroneously decreed the suit. He contends that the *Pattedar* cannot be said to be title holder as owner and, therefore, the very beginning of the litigation has been on 'no' or in any event on a very weak foundation and as such, it stands rightly razed to the ground by the findings as appearing in the judgment of the appellate court.

18. Learned counsel further purports to press into service a decision of the apex court in the case of *Municipal Corporation, Gwalior vs. Puran Singh*, reported in (2015) 5 SCC 725 to lay stress on that the revenue record, specially *khasra patrak*, is not a proof of title to the land.

19. Having heard submissions advanced on behalf of the parties and upon perusal of decisions rendered by the trial as well as appellate court, it would surface that the appellate court has recorded its observations as to what is the record which had been adduced in the form of documents, in paragraphs no. 10, 11 and 12 of its judgment and has further referred to section 2(11) of the Land Revenue Act for the purpose of consideration of definition of *Pattedar* which would mean a person whose name has been recorded in government record, whether he be personally in possession of the holding or through his '*Shikmidar*' and further referred to section 2(B)(C) concerning the term 'occupant' meaning the same to be holder in actual possession of unalienated land other than an *Asami Shikmi* and if *Asami Shikmi* is in actual possession, the superior holder would be the occupant.

20. The appellate court has considered that the land till 1950 had been under *Nizam* regime, further observing that after death of Bale Khan – the father of the plaintiffs, plaintiff no. 1's name had been recorded for the purpose of recovery of land revenue. The appellate court has considered that while plaintiffs' case is that when plaintiff no.1 had moved to village Khojewadi, he was hardly of twelve years and from the same it

cannot be said that the contention about him having left for Khojewadi is acceptable. Having regard to the age, it was considered that it is difficult to believe that the land had been given by plaintiff no. 1 to Farid Khan, him being minor and not competent to transact. The court went on to consider that the land got divided after into survey no. 1A and 1/AA around 1939. During minority of Osman Khan, concerned land was being shown to be under cultivation of Chand Khan Mehtab Khan. As stated above, as per the contentions, the appellate court did not believe the theory of produce or income from the land being shared by defendants with the plaintiffs. The court also did not believe the case of the plaintiffs since evidence of plaintiffs' witness no. 2 Hassan is to the effect that there had been no oral agreement about giving the income. The appellate court thus tried to relate his evidence to the oral agreement referred to in Exhibit 26- Namuna no. 1. Sum total is that the evidence adduced on behalf of the plaintiffs was not relied upon by the appellate court and in the circumstances, the court found it difficult to dislodge defendants from the possession.

21. Be that as it may, the evidence which has been placed on record and as has been appreciated by the courts hitherto does show that the plaintiffs were the *Pattedars* of the lands

which were erstwhile *inam* lands of the plaintiffs, rather their ancestors. Said position is also depicted in other record maintained in respect of suit land viz; *Namuna* No. 1 and *Assal Shetwar* and *Khasra patrak*. It is in *khasra patrak* and *namuna* no. 1, names of the defendants appear in cultivation column and further refer to oral agreement. Defendants rely on 7 x 12 extracts of the year 1986-87 showing their names in *kabjedars*'s column as well as cultivation column. Apart from this document, there is no evidence adduced and produced to show that defendants were being shown as *kabjedars*/owners and in cultivation column at any time before institution of suit. In the face of such situation, the documents at least depict that the plaintiffs have stronger and better nexus to the suit properties than the defendants are trying to contend. Appellate court appears to have got drifted away with consideration that *Namuna* No. 1 and *khasra patrak* refer to defendants' possession and the same has been for over fifty years and further refer to it being from brotherhood and thus it cannot be said that possession of defendants is permissive, however, at the same time the court has not commented upon the words 'oral agreement' appearing in the same.

22. Besides, the documentary evidence, as observed above, to a considerably large extent, shows that the plaintiffs do have nexus with the suit properties and held the status of *pattedar* in respect of the same. Whereas, there does not appear to be any source for the right being claimed by the defendants save and except their contention that they are in possession through brotherhood. However, one will have to take into account that the parties are Muslims by religion where there is no concept of joint family or property in said religion. In the circumstances, while it emerges on record that the plaintiffs have status and title to the property as that of *pattedar*, naturally onus had shifted on to the defendants to show their nexus to the suit property as claimed by them in defence. This particular aspect and feature arising in the matter has been lost sight of by the appellate court. The defendants have contended that the suit land has come to them from their ancestors, however, they have not been able to show the source of any status or title to the suit properties either from their ancestors or even by themselves. The defendants purport to assume the character and title to the property with reference to their longstanding possession.

23. The trial court has considered that the plaintiffs have been able to show their title to the suit lands; that there are

documents in support of the same and the plaintiffs have been shown in the documents at Exhibits 26, 27 and 28 as *pattedar – inamdar* i.e. the landlords of the properties. Whereas, the defendants have not been able to show that the suit properties are their ancestral properties. The so called evidence of solitary 7x12 extract in favour of the defendants gets diluted and washed out by overwhelming evidence in favour of the plaintiffs.

24. The trial court has also appreciated that there is some credibility to the contention of plaintiffs that the defendants had been let in the suit properties by plaintiffs under an oral agreement. The trial court has considered the evidence in this respect and has also referred to decisions to support its observations. Besides, the trial court has also considered relationship between the plaintiffs and the defendants. The trial court in the circumstances found no substance in the contention on behalf of the defendants that they are the owners by adverse possession.

25. The trial court had relied on yet another decision of the Calcutta high court. It has been considered that a longstanding possession would not wipe out entitlement to possession of the plaintiffs. The trial court has considered

that the suit is based on title and the appreciation by trial court does not appear to be aside the evidence and contentions of the parties on record whereas, observations of the appellate court appear to be rather digressed and obfuscated of the considerations which are germane for decision in respect of controversy. Appellate court could have better delved further and seen that plaintiffs have not only only better claim to title rather than defendants could not lay any claim.

26. While the appellate court has doubted the case of appellants about oral agreement, it would not be said that section 115 in such a case would operate as considered by district court. The substantial question accordingly stands answered.

27. In view of aforesaid, second appeal deserves to be allowed. The points for determination as have been framed as substantial questions of law will have to be answered, holding that the approach of the appellate court would not be said to be justifiable and that the appellate court had been in error in discarding the evidence of the plaintiffs' witnesses.

28. In view of observations as are appearing in this judgment, point no. 16 stands answered accordingly.

29. Second appeal stands allowed. The judgment and decree of the appellate court stands set aside and judgment and decree of the trial court stands restored.

30. Second appeal stands disposed of with no order as to costs.

SUNIL P. DESHMUKH,
JUDGE

pnd