

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.2079 OF 2018

- 1 Dhondiba s/o Vitthalrao Sude,
Age : 72 years,
Occupation : Pensioner and Agri,
R/o Omagra (Court), Tq.Ahmedpur,
District Latur.
- 2 Ganesh s/o Kashinath Gulve,
Age : 71 years,
Occupation : Pensioner and Agri,
R/o Ahmedpur,
Tq.Ahmedpur, District Latur.
- 3 Annarao s/o Tulshiram Shinde,
Age : 71 years,
Occupation : Pensioner and Agri,
R/o Mulki, Tq.Ahmedpur,
District Latur.
- 4 Sambhaji s/o Bapurao Parge,
Age : 71 years,
Occupation : Pensioner and Agri,
R/o Dhalegaon, Tq.Ahmedpur,
District Latur.
- 5 Namdeo s/o Rajaram Thombare,
Age : 71 years,
Occupation : Pensioner and Agri,
R/o New Shopping Centre,
College Road, Ahmedpur,
Tq.Ahmedpur, District Latur.

....PETITIONERS
(Orig. Defendants 1 to 5)

-VERSUS-

Dhondiraj s/o Bhujangrao Lohare,
Age : 83 years,

Occupation : Pensioner and Agri,
R/o Fule Nagar, Ahmedpur,
Tq.Ahmedpur and District Latur.

....RESPONDENT
(Orig. Plaintiff)

...
Advocate for the Petitioners : Shri M.P.Tripathi h/f Shri Ghute Patil Kishor
J..

Advocate for the Respondent : Shri V.D.Gunale.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 25th March, 2019

Oral Judgment :

1 Rule. Rule made returnable forthwith and heard finally by the
consent of the parties.

2 The Petitioners, original Defendants in Special Civil Suit
No.9/2016, are aggrieved by the impugned order dated 29.09.2017
passed by the Trial Court by which, the application Exhibit 46 filed by the
Respondent/ original Plaintiff seeking leave to lead secondary evidence,
has been allowed.

3 I have considered the strenuous submissions of the learned
Advocates for the respective sides and have gone through the record
available.

4 The issue is as regards the purported resolution dated
12.12.1986. The Respondent/ Plaintiff claims that the said resolution was

passed by the Anandnagar Cooperative Bhadekari Malki Gruhanirman Sanstha Maryadit, Ahmedpur, by which, certain plots were allotted to the members. The Special Civil Suit is with regard to "defamation".

5 The Plaintiff had filed an application Exhibit 39 contending that the original resolution dated 12.12.1986 was in the custody of the office bearers of the said cooperative society. The request was made to the Trial Court seeking an order to the cooperative society and the defendants, to produce the said resolution. The Defendants took the stand that no such resolution was passed and no such original resolution is found in their records. It was further stated that the Plaintiff was the Chairman of the society till 2006. Defendant No.1 was the Secretary of the society. There is no such resolution in the documents which form part of the record of the society. On these submissions, the Trial Court rejected the application Exhibit 39 and declined to direct the Defendants to produce the resolution. In effect, the defence of the Defendants that no such resolution is in existence, was accepted.

6 The Plaintiff then moved an application Exhibit 46 stating that he has a photostat copy of the resolution and he may be permitted to lead secondary evidence. Exhibit 46 was allowed by the impugned order.

7 Notwithstanding the strenuous submissions on behalf of the original Plaintiff that if a photostat copy is shown, the Trial Court should allow the party to lead secondary evidence considering Sections 63 and 65

of the Indian Evidence Act, I find that the impugned order is apparently perverse and erroneous order. It is settled law that a document, which is sought to be proved through the process of secondary evidence, should first satisfy the requirement under Section 63 of the Indian Evidence Act. The photostat copy would not fall under any of the types set out below Section 63 and surely not under Section 63(2) which provides for accepting the copy made from the original by mechanical process, which in itself would ensure the accuracy of the copy. A photostat copy can never be said to be drawn from the mechanical process and is never believed to ensure the accuracy of the contents.

8 It also cannot be ignored that the foundation for leading secondary evidence has to be found in the pleadings of the litigating sides. The Plaintiff has not even whispered about the resolution dated 12.12.1986 in the plaint. The photostat copy was also not produced along with the plaint. Even if it was so produced, in the absence of pleadings in the plaint as regards the existence of the original or the loss of the original or destruction of the original or even custody of the original, secondary evidence could not be permitted under Section 65 of the Indian Evidence Act.

9 It is obvious from the impugned order that the Trial Court has not even taken the pains of studying Sections 63 and 65. Even a reference is not made to the said provisions. Apparently, the impugned order has

been passed in a casual manner, which is against the tenets of law.

10 In view of the above, this Writ Petition is allowed. The impugned order dated 29.09.2017 is quashed and set aside. The application Exhibit 46 stands rejected.

11 Rule is made absolute in the above terms.

kps

(RAVINDRA V. GHUGE, J.)