



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

WRIT PETITION NO.8454 OF 2025

1. Rajesh S/o Sainath Khamkar,
Age: 40 Yrs, Occup: Agri,
R/o. Gadhe Pimpalgaon,
Tq.: Vaijapur, Dist: Aurangabad.
2. Dnyaneshwar S/o Mattu Kale,
Age: 44 Yrs, Occup: Agri,
R/o. Mahalgaon,
Tq.: Vaijapur, Dist: Aurangabad.
3. Jayram S/o Shankarrao Zinjurde,
Age: 58 Yrs, Occup: Agri,
R/o. Mahalgaon,
Tq.: Vaijapur, Dist: Aurangabad.

..Petitioners
(Org. Def. No.1 to 3)

Versus

Late Dr Madhukarrao Thavare,
(Bhau) Nagri Sahakari Pat
Sanstha Ltd. Mahalgaon
Tq: Vaijapur, Dist: Aurangabad
Through it's Authorized Off.
Chandrakant S/o Namdeo Zinjurde

..Respondent
(Org. Plaintiff)

...

Mr. D. R. Shelke, Advocate for Petitioners.

Mr. A. M. Gholap h/f Mr. K. J. Suryawanshi, Advocate for Respondent.

...

**CORAM : S. G. CHAPALGAONKAR, J.
DATED : 28th JANUARY, 2026.**

JUDGMENT:-

1. Rule. Rule made returnable forthwith. By consent of parties, matter is taken up for final hearing at the admission stage.
2. The petitioners (original defendants) impugns order dated 07.05.2025 passed by Maharashtra State Co-operative Appellate

Court, Mumbai Bench at Aurangabad in Revision Application No.3/2025 as well as order dated 21.12.2024 passed below Exhibit-41 by Co-operative Court, Aurangabad in C.C.A. No.42/2019.

3. The respondent instituted proceeding in nature of dispute before Co-operative Court seeking recovery of loan alongwith interest from defendants. The petitioners/defendants seriously disputed grant or disbursement of loan to them and took plea that claim is based on forged and fabricated documents. The defendants contend that they have already moved police machinery and Competent Authority against office bearers of respondent-Bank. As such, there appears serious dispute on foundational facts put up before Co-operative Court seeking recovery of amount.

4. The Co-operative Court framed issues. The respondent-Bank filed evidence affidavit of its Manager alongwith photo copies of loan documents. The disputant-Bank had also filed application below Exhibit-28 seeking permission to lead secondary evidence. However, Co-operative Court observed that disputant to prove documents. Aggrieved by said order petitioners/defendants filed Revision Application before Co-operative Appellate Court, who modified order passed below Exhibit-28 and disposed application, particularly observing that unless there is compliance of conditions laid down in Sections 63 and 65 of Indian Evidence Act by giving foundational evidence, Court cannot accept secondary evidence.

Merely filing secondary evidence and accepting same does not mean that Court has agreed upon to read evidence being admitted.

5. The petitioners/defendants filed another application at Exhibit-41 seeking rejection of secondary evidence produced by respondent/disputant, so also reject dispute. The Co-operative Court rejected said application being misconceived observing that no application seeking permission to lead secondary evidence has been pending or filed on behalf of disputant. Without proof documents cannot be read in evidence. The petitioners' application is premature, as documents produced are not exhibited.

6. Aggrieved petitioners approached Co-operative Appellate Court by filing Revision. The Co-operative Appellate Court again observed that disputant-Society has not examined witness on secondary evidence or recorded foundational evidence. Till then, opponent/defendants have no reason to raise objection and seek rejection of secondary evidence. The objection is clearly premature. In light of aforesaid backdrop, present Writ Petition has been filed.

7. Mr. Shelke, learned Advocate appearing for petitioners vehemently submits that procedure adopted by Co-operative Court is inconsistent with well established procedure required to be followed while permitting secondary evidence on record of trial. By inviting attention of this Court to language of Section 65 of Indian

Evidence Act, he would urge that unless evidence as to existence or contents of document is given or condition enumerated in Clause Nos.(a) to (g) of Section 65 are complied, secondary evidence or contents of document are not admissible. Ignoring procedure Co-operative Court permitted disputant Bank to file photo copies of so called loan documents. The disputant-Bank has tendered evidence affidavit of its witness referring such an inadmissible documentary evidence. The petitioners/defendants are put to cross-examine witness. According to Mr. Shelke, if petitioners proceeds to cross-examine witness on contents of affidavit and documents relied by disputant-Bank, they would suffer irreversible loss. Mr. Shelke urges that unless Trial Court decides on admissibility of secondary evidence or disputant puts foundational evidence to make out case for admissibility of documents, disputant cannot proceed further.

8. Per contra, Mr. Suraywanshi, learned Advocate appearing for respondent supports impugned order. Mr. Gholap ably assisted this Court and graciously made submissions on legal issues.

9. Having considered submissions advanced by learned Advocates appearing for respective parties, controversy that arises for consideration is whether Co-operative Court was justified in rejecting petitioners' application seeking rejection of secondary evidence tendered by respondent/disputant, particularly giving

reason that such prayer is premature, as document produced in the form of secondary evidence are not yet exhibited.

10. The respondent/disputant has tendered evidence affidavit alongwith photo copies of loan documents, which are disputed by petitioners with empathetic statement that those are forged or manipulated documents. The petitioners, therefore, contends that documents being xerox copies ought to have been rejected in absence of foundational evidence or plausible reason for laying secondary evidence. The Co-operative Court took a view that yet stage to consider admissibility of secondary evidence has not arrived and documents produced are not yet exhibited. Even Co-operative Appellate Court while approving view of Co-operative Court observed that in absence of foundational evidence as to acceptability of secondary evidence, documents filed by disputant-Bank cannot be considered and further observed that application tendered by petitioners seeking rejection of secondary evidence is premature.

11. The Supreme Court of India in case of ***Dhanpat Vs. Sheo Ram (Deceased) through Lrs. and Others***¹ discussed provisions of Section 65 of Indian Evidence Act and observed in paragraph no.22 as under:

“22. There is no requirement that an application is required to be filed in terms of Section 65(c) of the

¹ (2020) 16 SCC 209.

Evidence Act before the secondary evidence is led. A party to the lis may choose to file an application which is required to be considered by the trial court but if any party to the suit has laid foundation of leading of secondary evidence, either in the plaint or in evidence, the secondary evidence cannot be ousted for consideration only because an application for permission to lead secondary evidence was not filed.

12. The aforesaid observations makes it clear that formal application for leading secondary evidence is not necessary, if foundational facts required for leading secondary evidence are pleaded in plaint or during course of evidence. At this stage, reference can be given to Section 136 of Indian Evidence Act, which reads thus:

“136. Judge to decide as to admissibility of evidence. — When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first-mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.”

13. Illustration (b) of Section 136 of Indian Evidence Act is also relevant in facts of present case, which reads thus:

*“(b) It is proposed to prove, by a copy, the contents of a document said to be lost.
The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.”*

14. The aforesaid provision makes it clear that if disputant wants to rely upon secondary evidence in the form of photo copies of loan documents, he will have to first prove fact that original is lost, of which copy is produced. It is, therefore, burden on disputant to first produce foundational evidence to make out case for leading secondary evidence of loan documents. The Court will have to find out from pleadings or evidence affidavit of disputant, if necessary facts to permit secondary evidence in terms of contingencies prescribed under Clause (c) of Section 65 of Indian Evidence Act are brought on record. It is possible for disputant to supplement reasons for accepting secondary evidence by filling application supported with affidavit in case such reasons could not be supplied in plaint or first evidence affidavit that refers to photo copies of documents lost. The Supreme Court in case of ***Bipin Shantilal Panchal Vs. State of Gujarat and another***², observed in paragraph nos.14 and 15 as under:

“14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence-taking stage regarding the

² (2001) 3 SCC.

*admissibility of any material or item of oral evidence the trial court can make a note of such objection and **mark the objected document tentatively as an exhibit in the case** (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed).*

15. The above procedure, if followed, will have two advantages. First is that the time in the trial court, during evidence-taking stage, would not be wasted on account of raising such objections and the court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior court, when the same objection is recanvassed and reconsidered in appeal or revision against the final judgment of the trial court, can determine the correctness of the view taken by the trial court regarding that objection, without bothering to remit the case to the trial court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.”

15. The aforesaid observations would show that objection as to admissibility of secondary evidence can be considered even at stage of final judgment, however, as long as objection to admissibility of secondary evidence persists, Court may tentatively mark documents for identification and only when Court is satisfied that rigors of Section 65 of Indian Evidence Act are successfully passed over by party relying upon secondary evidence, admit document in

evidence. The corollary of discussion above is that in present case, Trial Court will have to consider first if disputant bank has made out case for admitting secondary evidence in pleading or evidence affidavit. If Court admits documents then only petitioners can proceed to cross examination.

16. In light of aforesaid observations, this Court finds that application below Exhibit-41 filed on behalf of petitioners has been rightly declined consideration being premature. Hence, no case is made out to cause interference under Article 227 of Constitution of India.

17. In result, Writ Petition stands dismissed.

18. Needless to state here that petitioners' objection to admissibility of loan documents shall be considered and decided by Trial Court at appropriate stage and unless such an objection is decided, Trial Court shall not admit documents in evidence or rely on contents of photo copies of documents produced by disputant in form of secondary evidence.

19. Rule stands discharged.

(S. G. CHAPALGAONKAR)
JUDGE