



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 7459 OF 2025

Avishkar Co-operative Housing Society Ltd., Nagpur
Through its Secretary Pratibha Niraj Nagrare, Aged:62
years, R/o Plot no. Milind Nagar, Khamla, Nagpur.

PETITIONER

VERSUS

1. Surekha Ashok Dhage, Aged : Major, Occ: Housewife.
2. Priti Ashok Dhage, Aged: 25 years, Occ: Education.
3. Prachi Ashok Dhage, Aged: 23 years, Occ: Education.
4. Puja Ashok Dhage, Aged: 23 years, Occ: Education.
5. Harshal Ashok Dhage, Aged: 20 years, Occ: Education.

Nos.1 to 5 R/o Near Sawarkar's House, Post Airport,
Somalwada, Nagpur – 440025.

6. Sai Roop Gruh Nirman Sahakari Sanstha Maryadit
Beltarodi, Tahsil and District Nagpur, through its
Chairman Chandrakant Kamalnarayan Kaiswal,
Aged: 37 years, Occ: Service, R/o Dangorie Bhavan,
Behind Khandoba Mandir, Chandni Square, Cotton
Market, Nagpur.
7. Sai Puja Gruh Nirman Sahakari Sanstha Maryadit
Beltarodi, Tahsil and District Nagpur, through its
Chairman Surendra Suryabhan Prek, Aged 44 years,
Occ: Business, R/o Plot no.85, Near Hanuman Mandir,
Bhande Layout, Tahsil and District Nagpur.

RESPONDENTS

Shri Ritesh Badhe, counsel for the petitioner.
Shri Deven Chauhan, Senior Advocate with Shri S.P. Agrawal and Shri N.R.
Jadhav, counsel for the respondent nos.1 to 5.
Shri Sumit Bodalkar, counsel for the respondent nos.6 and 7.

CORAM : PRAFULLA S. KHUBALKAR, J.

DATE : FEBRUARY 16, 2026

ORAL JUDGMENT

RULE. Rule made returnable forthwith. Heard finally with consent of
the learned counsel for the parties.

2. The petitioner assails order dated 18.10.2025 passed by the trial Court allowing an application for discarding evidence of a witness and de-exhibiting the document.

3. The petitioner-Avishkar Co-operative Housing Society (for short, 'the petitioner-Society') is the original plaintiff which had filed Special Civil Suit No.736 of 2002, which was re-numbered as Regular Civil Suit No.513 of 2012 for specific performance of contract and permanent mandatory injunction with respect to an agreement to sell dated 18.02.1994. During evidence, the plaintiff examined two witnesses and its second witness PW2-Sheshrao was examined on 13.07.2009 on which date, his examination-in-chief was recorded and the agreement to sell dated 18.02.1994 was marked as Exhibit 96. This witness was not cross-examined on that date and on subsequent dates also his cross-examination could not be conducted. In the meanwhile, since the document of agreement to sell dated 18.02.1994 was sent for impounding, it was not available before the Court. After the document became available and even before the witness was examined, he had expired in the year 2018 and resultantly his cross-examination could not be undertaken. Under these circumstances, on 15.09.2025 the defendant nos.1 to 5 filed an application at Exhibit 194 seeking to discard the evidence of PW2-Sheshrao and for de-exhibiting the document of agreement to sell. The trial Court allowed this application by order dated 18.10.2025, which is subjected to challenge by way of instant petition.

4. Shri Ritesh Badhe, learned counsel for the petitioner-Society submitted that the evidence of PW2-Sheshrao could not be discarded because the witness was otherwise ready for cross-examination which was not undertaken by the defendant. He submitted that although the document was sent for impounding and it was not available before the Court since it was duly exhibited earlier, it could not have been de-exhibited. He therefore submitted that the available evidence of PW2-Sheshrao need not be discarded and the petitioner-plaintiff cannot be deprived of an opportunity to rely on the said evidence. In support of his submissions, he placed reliance on the observations of the Hon'ble Supreme Court in ***Satnam Singh (dead) by LRs. & Others Versus Sadhu Singh & Others*** [(2010) 15 SCC 335] and pointed out that in identical situation when the attesting witness by name Teja Singh had died after his examination-in-chief, it was observed that his evidence could not have been excluded.

5. While opposing the petition, Shri Deven Chauhan, learned Senior Advocate strenuously submitted that the evidence of the witness who was not cross-examined cannot at all be considered as admissible and in view of the fact that the witness was not cross-examined, the evidence is rightly discarded. By relying on the provisions of Section 33 of the Indian Evidence Act, 1872, he submitted that since the opposite party i.e. the defendants in the suit had no opportunity to cross-examine the witness, the evidence and the documents exhibited during his evidence were required to be discarded. He therefore supported the impugned order.

6. While considering the rival contentions, it has to be seen that undisputedly, the witness was examined on 07.09.2009 and the document of agreement to sell dated 18.02.1994 was exhibited as Exhibit 96 during his examination-in-chief. The witness was not cross-examined on that date and thereafter the document was sent for impounding before the competent authority. The cross-examination thus remained deferred throughout the time till the document became available, however before the cross-examination could start, the witness expired. As such, the fact remains that although the document of agreement to sell was exhibited, the defendants had no opportunity to conduct cross-examination of the said witness. It has to be noted that an opportunity to conduct cross-examination is a valuable right of the party and in absence of the cross-examination of a witness, the evidence cannot be considered as complete when there is no waiver or denial on the part of the party to conduct the cross-examination. It is nobody's case that the defendants avoided to conduct the cross-examination even after the document became available after impounding and the witness was available for cross-examination. As such, the fact remains that the witness was not cross-examined and the value of his evidence on record came under doubt.

7. The provisions of Section 33 of the Indian Evidence Act, 1872 provide that the evidence of a witness in a judicial proceedings is relevant for proving the facts, in a subsequent judicial proceedings, or at a subsequent stage only if the witness cannot be produced provided that the adverse party had right and opportunity to cross-examine the witness on that earlier occasion. As such, the essential condition is that the opposite

party must get a right and an opportunity to conduct cross-examination of the witness. In the instant case, there is nothing on record to show that the defendants consciously or wilfully waived their right to cross-examine. As such, the evidence of PW2-Sheshrao could not be considered to be wholly admissible.

8. As regards the judgment in *Satnam Singh (dead) by LRs. & Others* (supra) relied upon by the counsel for the petitioner, it has to be noted that in that case the evidence of the attesting witness Teja Singh was not excluded even though he was not cross-examined. However, the said judgment does not indicate the circumstances as to whether the adverse party had refused to conduct cross-examination or avoided to conduct cross-examination of the said witness. Further, in the said case, there were two other witnesses viz. Jagdish Singh Uppal and Satnam Singh who had proved the document in question. The said judgment also does not discuss any position of law with respect to Section 33 of the Indian Evidence Act, 1872. In the instant case, the defendants were always willing to conduct cross-examination, however the witness was not available neither the document of agreement to sell was available. As such, in the peculiar facts of this case, the adverse party had no opportunity to conduct cross-examination and thus considering the fact that the witness was never cross-examined, his evidence in examination-in-chief cannot be considered to be admissible for all purposes. The judgment in *Satnam Singh (dead) by LRs. & Others* (supra) cannot be of any assistance to the petitioner.

9. In this regard, it is beneficial to refer to the position of law laid down by the Division Bench of this Court in **Anuradha Anil Bhagwat & Others Kirit Navnitlal Damania & Another** [2019(3) Mh.L.J. 790] with respect to admissibility of evidence of a witness who died before his cross-examination. While considering an identical situation in a case where the witness to a Will-deed had died before his cross-examination was conducted and by considering purport of provision of Section 32 of the Indian Evidence Act, 1872, the Division Bench had inferred that the examination-in-chief cannot be treated as evidence. The relevant paragraphs of the aforesaid judgment are reproduced below:-

“24. In the present case, the first part of section 32 of the Evidence Act was no doubt attracted because Mr.Desai died after filing his affidavit in lieu of examination-in-chief, but before his cross-examination could even commence. However, section 32 of the Evidence Act does not render the statements made by persons who cannot be called as witness admissible in all cases. The statements themselves may be regarded as “evidence” or relevant facts in the eight circumstances referred to in the second part of section 32 of the Evidence Act. The impugned judgment and order does not advert to the circumstances in second part of section 32 of the Evidence Act.

25.The statements in Mr.Desai’s affidavit in lieu of examination-in-chief neither relate to cause of his death nor can they be said to be statements made in the course of his business. The statements can neither be said to be against Mr.Desai’s pecuniary or proprietary interest nor can it said that such statements would have exposed to him some criminal prosecution or suit for damages. The statements obviously do not relate to any opinion as to public right or custom or matters of any general interest. The statements also do not relate to existence of any relationship between persons as to whose relationship Mr.Desai had any special means of knowledge. The statement in this case, was not made any will or deed or family pedigree in relation to existence of any relationship between persons deceased before any question or dispute arose. Mr.Desai’s statement

in the present case, was also not some statement and contained in any deed, will or other document. Finally, this is also not a case of statements made by several persons and expresses feelings relevant to the matter in question. This is the second reason why the statements in Mr.Desai's affidavit in lieu of examination-in-chief could not have been treated as "evidence" under the Evidence Act."

10. In the instant case, the trial Court has given due consideration all the factual and legal aspects and having found that the witness was not cross-examined and since neither the defendants had waived or consciously denied to conduct the cross-examination, the order discarding the evidence of said witness is passed. I do not find any perversity in the reasoning adopted by the trial Court and the view expressed by the trial Court is a plausible view.

11. It has also to be noted that the petitioner-plaintiff has filed the suit for specific performance of contract. The agreement to sell dated 18.02.1994 is a vital document for deciding the controversy involved in the suit. The deceased witness PW2-Sheshrao has stated certain things in his examination-in-chief about this document and this document is also exhibited and now cross-examination of the said witness having become impossible, his statements in examination-in-chief cannot be considered as gospel truth. At the same time, it has to be noted that the document is now impounded and can be relied upon by the plaintiff for proving its case. As such, the petitioner-plaintiff is otherwise entitled to prove the said document of agreement to sell dated 18.02.1994 and get it marked as exhibit by examining any other witness or otherwise. The right of the plaintiff to lead evidence to prove the said document is not disturbed.

12. Having regard to the above mentioned factual and legal aspects, I do not find any need for indulgence with the impugned order passed by the trial Court. The writ petition is accordingly dismissed with no order as to costs. Rule stands discharged.

(PRAFULLA S. KHUBALKAR, J.)

APTE