courtkutchehry.com

**Company:** Sol Infotech Pvt. Ltd.

**Website:** www.courtkutchehry.com

**Printed For:**

**Date:** 23/10/2025

# Pritamdas Vs Akabari and others

## F.A. No. 27 of 1965

**Court:** Madhya Pradesh High Court

**Date of Decision:** Feb. 20, 1973

**Acts Referred:**
Civil Procedure Code, 1908 (CPC) â€" Section 93, 98

**Citation:** (1973) JLJ 559

**Hon'ble Judges:** Shiv Dayal Shrivastava, J; S.B. Sen, J; R.J. Bhave, J

**Bench:** Full Bench

**Advocate:** R.A. Roman, for the Appellant; P.L. Inamdar, for the Respondent

## Judgement

R.J. Bhave, J.
On a difference between Honourable Justice Shiv Dayal and Honourable Justice S.B. Sen, the following question has been

referred to me for my decision :--

Whether the agreements (Exs. D-1 and D-2), relied on by the defendants, were executed before the agreement for sale between the plaintiff and

defendants 1 and 2 Was executed ?

2. To appreciate the circumstances in which the difference between the honourable Judges arose it is necessary to narrate a few facts. The original

defendant No. 1 Hidayatullah owned the suit house situate in Lashkar, Gwalior, near the Town Hall. In one portion of the ground floor the plain

has his shop, while the other portion is occupied by the Bata Shoe Company (the third Defendant). Hashmatullah (defendant No, 2) is the son of

defendant No. 1 Hidayatullah. Hashmatullah had entered into an agreement with the plaintiff, to transfer the suit house for a consideration of Rs.

20,000 on 30 11-1958. Under this agreement, a sum of Rs. 1,000 was to be paid by way of earnest money, and rest of the amount was to be

paid at the time of registration. Inasmuch as Hashmatullah had entered into this agreement on behalf of his father as his Mukhtayar A am and,

inasmuch as he had not produced the necessary documents to satisfy the plaintiff that he had the said authority only Rs. 200 were paid to him by

way of earnest money and he was requested, to produce the necessary documents after which another agreement was to, be executed On 8-12-

1958, Hashmatullah sent a letter to Pritam Das, the plaintiff, asking him to fix a date for examining, the relevant documents at Gwalior and after

which and receiving the balance of Rs. 800 Hashmatullah had shown his willingness to execute another agreement. Accordingly, on 21.12.1958,

Hashmatullah executed, an agreement (Ex. P-1) agreeing to transfer the property for Rs. 20,000. On that date, he was paid Rs. 800 thus making

up the earnest money originally agreed upon. The agreement was signed by Bishandas (P.W. 1) and Hariram (P.W. 2). It was also authenticated

by Shri Dalani, Notary Gwalior. On that date, Hashmatullah had also shown to the plaintiff a registered power of attorney from his father dated

24-10-1958. The original agreement dated 30-11-1958 it is alleged, was returned to Hashmatullah. On 29.12.1958, Hashmatullah sent another

letter (Ex. P-5) asking the plaintiff to fix a date for completing the sale of the suit house. On 24-1-1959, Pritam Das, the plaintiff, published a notice

(Ex. P-6) in the newspaper ""HAMARI AAWAZ"" informing, the general public that the plaintiff had entered into an agreement to purchase the

house through Hashmatullah son of Hidayatullah arid inviting objections of any claimants within 15 days. It appears that the local agents of the Bata

Shoe Company came to know about this agreement and informed their office On 26-2-1959 a notice (Ex. P.7), was sent on behalf of the Bata

Shoe Company by their counsel, Shri Muzumdar informing the plaintiff that Hashmatullah had, under a power of attorney granted to him by his

father, entered into a valid agreement for sale of the house, with the Bata ""Shoe Company for a consideration of Rs. 19,500 on 18-11-1958 and

that Hidayatullah was also a confirming party to the said sale and that the notice, referred to in ""HAMARI, AAWAZ"" dated 24-1-1959 was of no

avail to the plaintiff.

3. On 4-3-1959, Hashmatullah sent a letter (Ex. P. 10) to the plaintiff-expressing his helplessness in the matter of completing the sale and asking

him to take back, his amount of Rs. 1,000. Hashmatullah had stated in the the letter that he had come to know from his father that he had already

entered into a prior agreement with the Bata Shoe Company to sell the house to them. On receipt of this letter, on the same day Pritam Das sent a

letter to Hashmatullah informing him about the claim put forward by the Bata Shoe Company and asking Hashmatullah to come personally and

clarify the true position. He had also sent 2-3 letters to both Hidyatullah and Hashmatullah expressing his surprise as to their activities. On 12-3-

1959, a notice (Ex. P-13) was sent to the Bata Shoe Company asking them to refrain from purchasing the property and informing them about the

intention of the plaintiff to file a suit for specific performance. No reply was given to this notice which was sent through counsel. On 28-3-1959, the

Bata Shoe Company got a sale-deed (Ex. D-3) executed in their favour by Hidyatullah himself. When the plaintiff perhaps came to know about the

execution of the sale-deed a letter dated 15-4-1959 was sent by Shri Nigudkar Advocate, to the Bata Shoe Company asking them to give

inspection of the alleged agreement with Hashmatullah at an early date, time and place which the Company may choose. No reply to this letter was

sent by the Bata Shoe Company. An attempt was made by Hashmatullah to send Rs. 1,000 by cheque, but that was returned by the plaintiff.

When no reply was received to the notice (Ex. P-16) sent by Shri Nigudkar, Advocate, on behalf of the plaintiff, a second reminder by telegram

dated 4-5-1959, (Ex. P-13) was sent by Pritam Das. On 8-5-1959, the Bata Shoe, Company sent a letter in response to the telegram to the

effect that the Bata Shoe Company had nothing to add to what was already stated in their counsel"s notice dated 26-2-1959 (Ex. P-7). On 2-6-

1959, the plaintiff filed the present suit. In the plaint it was stated that the Bata Shoe Company the third defendant, had avoided to show the

alleged agreement dated 18-11-1958 and that it was asserted that no such agreement was in existence.

4. The case was fixed for filing written statement on 11.9.1959. On that date, an application was made for extending the time for filing the written

statement. On that very day the plaintiff had moved an application alleging therein that the defendants were colluding and conspiring to prepare an

antedated false document. The case was, however, adjourned to 18-9-1959. On the adjourned date, the third defendant filed their written

statement, but the alleged agreement was not filed. Subsequently, written statements were also filed oh behalf of defendants 1 and 2. On 15-10

1959, the Court ordered the parties to produce original documents. On 27-10-1959, the date fixed for that purpose, the plaintiff filed his

documents. The defendants stated before the Court that they had no documents to file. The case was fixed for issues on 24-11-1959. The issues

were framed on 16-12-1959 and the case was fixed for 26-12-1959 for filing the lists of witnesses. On 26-12-1959 the plaintiff filed his list of

witnesses. The defendants 1 and 2 stated that they did not wish to file any list of witnesses, while the third defendant took time.

5. On 25-1-1960, Shri Inamdar, Advocate, appeared for the third defendant. He filed in the Court with a list two original documents, namely, Ex.

D-1 and Ex. D-2 and also filed list of witnesses and copies of some other documents. Exhibit D-1 is an agreement dated 17-10-1958, executed

by Hidayatullah in favour of the Bata Shoe Company for transfer of the suit house for a consideration of Rs. 19,500. Rs. 500 were paid by way of

earnest money and the balance was to be paid at the time of registration. The sale was to be completed by 31st of January 1959. This agreement

is typed on two stamp-papers worth Re 1 each and the stamp papers are shown to have been purchased on 4-10-1958 by Hidayatullah himself.

Exhibit D-1 was signed by Jaigopal (D.W. 1) and Laxminarain (D.W. 2) as witnesses. Exhibit D-2 is an agreement dated 18-11-1958 between

the Bata Shoe Company and Hashmatullah, written on a single stamp paper of the value of Rs. 2 purchased by Narula (D.W. 4) District Controller

of the Bata Shoe Company at Agra, on 13-11-1958. This agreement is again for transfer of the same property for a consideration of Rs. 19,500.

In this case also Hashmatullah has acknowledged the receipt of Rs, 500 in case. On this agreement there is endorsement of confirmation of the

agreement by Hidayatullah. The agreement is signed by Laxminarain (D.W. 2) and Surajprasad.

6. When the said two documents were filed by Shri Inamdar, the plaintiff filed an application objecting to the admission of the documents produced

by the third defendant. On 16-2-1960, an application was filed on behalf of the Bata Shoe Company stating that the agreements (Exs. D-1 and D-

2) were not filed by them in the Court before the framing of the issues due to mistake committed in the office of their counsel. It was alleged that

the documents were in the custody of the Bata Shoe Company''s Head Office at Calcutta, and they were not received in time to be produced in

the Court. As it was stated in paragraph 18 of the written statement that the copies of said documents were filed with the written statement, the

counsel for defendant No. 3 remained under a misapprehension that the copies of these documents had already been filed in Court. A request was,

therefore, made under Order 13, rule 2, Civil Procedure Code, to allow the production of the documents (Exs. D-1 and D-2) In support of the

application, Shri Inamdar filed his own affidavit taking the whole blame on himself. In the affidavit it was stated that the original documents were

received by him from the Company on 25-1-1960 and under the misapprehension that the copies were already filed along with the written

statement he did not take steps to file the documents at an earlier stage. In spite of the objections of the plaintiff that these documents were not filed

at the earliest opportunity or were not disclosed as they were not in existence and were subsequently manufactured and that they should not be

allowed to be taken on record, the trial Court permitted them to be produced and proved. These two documents are admittedly of a date prior to

the agreement with the plaintiff. If the agreements are genuine, the plaintiff''s suit must fail. If, on the contrary, they were brought into existence

subsequently, the plaintiff''s suit would succeed, as even the third defendant had a notice of agreement with the plaintiff before the third defendant

purchased the property. On this crucial issue there was difference of opinion between the two Honourable Judges and hence the case was referred

to me.

7. On 25-4-1960, the Bata Shoe Company filed an application for examining Hidayatullah on commission, as he was not expected to survive long.

The application was allowed and Hidayatullah was examined on commission. In support of their case that Exs. D-1 and D-2 were executed on the

alleged dates, two of the three attesting witnesses, namely, Jaigopal (D.W. 1) and Laxminarayan (D.W. 2) as well as Narula (D.W. 4), the District

Controller of the Bata Shoe Company at Agra, were examined. This evidence, which prima facie appears to be natural, was accepted by the trial

Court as well as by Honourable Justice Sen. Honourable Justice Shiv Dayal, however, found it difficult to rely on this evidence. I would, therefore,

consider the evidence on the back ground of the facts narrated above and on the internal evidence furnished by the sale deed in favour of the third

defendant, the two agreements (Exs. D-1 and D-2 and the probabilities of the case.

8. I am aware of the fact that the Bata Shoe Company is a sufficiently renowned company and it is not ordinarily expected to indulge in the activity

of bringing into existence ante-dated documents and that the said inference from the facts and circumstances of the case should not be easily

drawn. It must, at the same time, be remembered that it is a business concern. If the plaintiff would have succeeded in getting the sale-deed

executed in his favour, the net result would have been that the Bata Shoe Company would have been ejected from the said building which has a

very advantageous position. Before the evidence is considered, it must also be kept in mind that the Company had avoided to produce the

agreement for the inspection of the plaintiff''s counsel before the filing of the suit. In the notice it was made clear that the plaintiff wanted to get

himself satisfied regarding the genuineness of the document ; and if he was so satisfied, he would not file the suit. If the document was really in

possession of the Bata Shoe Company, I do not see any reason why it should not have been shown to the counsel for the plaintiff, especially when

the choice of date, time and place was given to the Company. In paragraph 22 of the written statement filed by the third defendant it is stated :

This defendant not having been able to appreciate the meaning and object of this unusual and strange request did no more than repeat in its reply

dated 8-5-59 the facts contained in the paragraph 5 thereof.

This is hardly any explanation for the failure of the third defendant to give inspection of the document to the counsel for the plaintiff. There was no

question of fishing of any evidence at that stage because the Bata Shoe Company had already asserted of having secured an agreement dated 18-

11-1958 in their favour, Again, I find that though the two agreements dated 17-10-1958 and 18-11-1958 (Exs. D-1 and D-2) were referred to in

the written statement, copy of one document was only filed along with the written statement and a statement was made by the counsel appearing

for the third defendant on 27-10-1959 that the party desired to file no documents. Under these circumstances, it is difficult to understand as to

how the third defendant urged that--because of misunderstanding that the copies of the documents were already filed no attempt was made to

produce the documents before 25-1-1960. There is thus some amount of mystery about the non-production of the documents at the earliest stage.

It must also be noted at this stage that in the reply to the notice in ""HAMARI AAWAZ"" there is no reference to the agreement dated 17-10-1958

and it only refers to the agreement dated 18-11-1958 alleged to have been executed by Hashmatullab under a power of attorney granted by his

father, It is again difficult to understand why, the agreement dated 1811-1958 was procured from Hashmatullah when an agreement dated 17-10-

1958 (Ex. D-1) was already secured from Hidayatullah, the real owner of the property. At this stage, it must also be noted that the sale-deed in

favour of the third defendant (Ex. D.3) does not refer to the two agreements preceding the execution of the sale-deed from Ex. D-1 executed

Hidayatullah it would appear that he had received Rs. 500/- in case by way of earnest money and that he was to receive Rs. 19,000/- at the time

of execution of the sale-dead. From Ex. D-2 it would again appear that the consideration fixed was Rs. 19,500/- , out of which Rs. 500/- were to

be paid in case to Hashmatullah at the time of the execution of the agreement and the balance of Rs. 19,000/- -was to be paid at the time of the

execution of the sale-deed. The sale-deed, however, does not speak of any earnest money having been received By Hidayatullah or his son

Hashmatullah. From the document it appears that the whole of the amount of Rs. 19,500.--was paid to the vendor by a draft dated 21st of March

1959 on the State Bank of India in the name of Shri K.C. Chatterjee and which was endorsed by him in favour of Hidayatullah. It is not clear as to

why a draft for the full consideration was drawn by the Company for the amount of Rs: 19,500/- when the amount of Rs. 506/- was already paid

to the vendor The non-mention of the previous agreements in the sale-deed (Ex. D-3) and the payment of the full amount of Rs. 19,500/- - by way

of a draft throws doubt'' regarding the existence of Exs. D-1 and D.2 At this stage, it must also be'' noted that the power of attorney was executed

by Hidayatullah in favour of his son Hashmatulla only after the alleged agreement dated 17-10-1958 (Ex. D-1) alleged to have been executed by

Hidayatullah himself in favour of the Bata Shoe Company. Now if the suit property was already agreed to be sold to the third defendant, where

was no question of authorising Hashmatulla to manage the suit property and to transfer the same? It is equally difficult to understand as to why a

second agreement was got executed from Hashmatullah and got confirmed by Hidayatullah when Hidayatullah had already executed an agreement

dated 17-10-1958. In this connection one may refer to the letter of Hashmatullah dated 4-3-1959 (Ex. P-10) in which Hashmatullah stated that he

had come to know from his father that he had already entered into a prior agreement with the Bath Shoe Company to sell the house to them. This

admission regarding an independent agreement having been executed by his father perhaps made it necessary for the third defendant to bring into

existence Ex. D-1. In as much as in the reply dated 26-2-1959 (Ex. P-7) there was already a commitment to the position that Hashmatullah had

entered into an agreement as an attorney for his father and that the father had also confirmed the sale, bringing into existence of Ex. D-2 was also

necessary. There could have been apprehension that Hashmatulla might create trouble, having come to know that his father had already executed

an agreement in favour of the third defendant and it was necessary to secure his consent also. That could have been done by securing a sale-deed

in the name of both father and son as was actually done in Ex. D-3. The explanation given by Narula (D.W. 4) to the effect that when in

November 1958 he came to know from Hidayatullah that he had given a special power of attorney to his son for disposing of the house, the

witness asked Hidayatullah to execute a fresh agreement under the signature of Hidayatullah and Hashmatulla and that is why Ex. D-2 dated 18-

11-1958 was executed is hardly satisfactory.

9. Now, on this background it is desirable to consider as to how the negotiations were initiated on behalf of the third defendant and how the two

agreements and the sale-deed were got executed. The only witness on this point is Narula (D.W. 4), the District Controller of the Bata Shoe

Company at Agra. According to Narula, in the beginning of October 1958 he met Hidayatullah when Hidayatullah disclosed his desire to sell the

suit house. On this information, Narula settled the bargain for the Bata Shoe Company for a consideration of Rs. 19,000 and having settled the

bargain he secured the consent of the Company from their Calcutta Office by a trunk-call. On 17-10-1958 he paid Rs. 500 by way of earnest

money to Hidayatullah and got the agreement dated 17-10-1958 (Ex. D-1) executed from him. According to this witness, the agreement dated

17-10-1958 was got prepared in the office of Shri Raghunandan Prasad Seth, a lawyer from Agra, and it was executed in that very office. This

witness further stated that the second agreement dated 18-11-1958 (Ex. D2) was got executed for the reasons already referred to, again in the

office of Shri Raghunandan Prasad Seth, the lawer at Agra. According to this witness, when Ex. D-2 was executed no fresh earnest money was

paid, though the document mentions that the amount was to be paid at the time of the execution of the agreement. The witness has not given any

explanation as to why the fact about payment of earnest money in the second agreement was mentioned when the earnest money was already paid

and nothing more was to be paid subsequently. This witness further stated that Shri Chatterjee had brought a draft for Rs. 19,000 and the same

was handed over to Hidayatullah and Hashmatullah in the presence of the Sub-Registrar; and when the parties came out, Rs. 500 were returned to

this witness, as this amount was paid by him to Hidayatullah and there was already an understanding between him and Hidayatullah for the return of

the money. In cross-examination this witness stated that on 1st or 2nd October of 1958 he had the first talk with Hidayatuallah and in two or three

meetings the price was settled. It was only after this that he contacted the Head Office on 2nd or 3rd of October for securing the consent of the

Head Office. According to this witness, he had a talk with Shri Plasic, the Sales Manager, and Shri Sanitzer, Asstt. Sales Manager. This witness

also stated in cross-examination that before he entered into negotiations with Hidayatullah there was no talk of purchasing any property for the

Company; nor was there any correspondence. Though this witness asserted that he had authority to enter into agreements with third parties for

purchasing property with the consent of the Company, no such authority was produced. This witness further admitted that though he had informed

on trunk that Hidayatullah was to be paid Rs. 500 by way of earnest money no letter has been produced to show that he had requisitioned any

amount to be paid to Hidayatullah. In order to get rid of this difficulty of there being absolute blank in the official records of the Company regarding

these negotiations, the witness stated that though he had not received any instructions in writing to pay the amount from his own pocket, he had

paid the amount from his own pocket to Hidayatullah and he had not informed the Company also about it, as there was already an agreement with

Hidayatullah that he would return the money after he received the full consideration at the time of the execution of the sale-deed. This explanation

appears to be very weak when he was asked in cross-examination as to whether he had received any instructions regarding the terms and

conditions to be included in the agreement, this witness stated that all these instructions he had received when he had contacted the Head Office on

the trunk. As the Company is a limited Company, a further question was asked from this witness as to whether there was any resolution of the

Board of Directors sanctioning the purchase of the house property. The witness stated that he did not know about it. No attempt was made by the

third defendant to prove any such resolution or to produce even a scrap of paper from office records to show that any agreement was entered into

for purchase of the house property. At this stage, it may be mentioned that before this witness was examined an application was made that all the

relevant account-books and other papers of the Head Office should be produced before the Court which could be used for the purposes of cross-

examination of this witness. That application was opposed by the third defendant on the ground that this witness was not in the position of a party

to the suit. When a person representing the Company was examined, the accounts would be produced. But as soon as this witness was examined,

the third defendant closed the case, and thus the plaintiff was denied the opportunity of effective cross-examination of the defendant No. 3 to show

that before the sale-deed was actually executed there was absolutely no talk regarding any purchase of the property between this witness and the

Head Office of the Bata Shoe Company. In further cross-examination this witness stated that Shri Chatterjee knew beforehand that he had spent

Rs. 500 towards earnest money ; and yet we find that Shri Chatterjee had brought a draft for Rs. 19 500 and endorsed the same in favour of

Hidayatullah. If Narula had really paid Rs. 500 to Hidayatullah on 17-10-1958 as alleged by him, in the natural course of events he would have

beer separately sent Rs. 500 to reimburse him and there was no necessity of following the round-about way of paying the whole of the amount of

19,500 to Hidayatullah and Hidayatullah, on his turn, returning the amount of Rs. 500 to Narula. In the sale-deed (Ex. D-3) also the fact that Rs.

500 were already paid by Narula would have been mentioned. Under these circumstances, it become very difficult to place complete reliance on

the statement of Narula (D.W. 4) that he had brought about the two agreements on the respective dates as alleged by him.

10. I may also note that in the list filed on behalf of the third defendant the names of the following witnesses were mentioned, namely :

(i) Shri V.R. Naokar, Advocate, Gwalior, who drafted the sale-deed (Ex. D-3); and

(ii) Shri K.C. Chatterjee, Superintendent, Lease and Rent Department, Sales Office, Bata Shoe Company.

Neither Shri Naokar nor Shri Chatterjee was tendered in evidence. Shri Naokar could have been cross-examined on the point as to why he had

not mentioned in the sale-deed the two agreements and the fact that Rs. 500 were already paid by way of earnest money and Shri Chatterjee

could have been cross-examined on the question as to why a draft for the full consideration of Rs. 19,500 was brought by him and endorsed to

Hidayatullah when he knew that Rs. 500 were already paid to him. This opportunity to cross-examine these two witnesses, whose statement on

oath would have been more reliable was denied to the plaintiff when they were kept back by the third defendant for reasons best known to them.

It can, under the circumstances, be presumed that these two respectable witnesses, if they would have been produced, would not have supported

the third defendant''s case and hence were kept back. Similarly, the two important officers of the Company, namely, the Sales Manager and the

Assistant Sales Manager were also not put in the witness-box to support the statement of Narula that there was really a talk with them on the

phone and that they had seen Exs. D-1 and D-2 before the sale deed was executed. Similarly, the law officer, Shri Mazumdar, who sent the reply

dated 26-2-1959 (Ex. P-7), was also kept back. He could have at least asserted on oath that the two documents were in his possession from

before the notice was published by the plaintiff in ""HAMARI AAWAZ"" till they were actually filed in the Court on 25-1-1960. This was all the

more necessary when the plaintiff was all the while asserting that the documents were not in existence and they were likely to be brought into

existence subsequently and when it was asserted in the affidavit filed on behalf of the third defendant explaining the delay in filling the documents

that they were in the possession of the law officer of the Company till 25-1-1960. Having kept back all these persons of status, Premchand (D.W.

3), the clerk of Shri Naokar, Advocate, was put in the witness-box. He stated that Hidayatullah, his son as also Shri Chatterjee and Narula had

taken the help of Shri Naokar, Advocate, in preparing the sale-deed. He asserted that Exs. D-1 and D-2 were shown to him. Inasmuch as Shri

Chatterjee had brought a draft of Rs. 19,500, that very amount was mentioned as a consideration to be received before the Sub-Registrar and in

order to adjust the amount Hidayatullah had agreed to return Rs. 500 to Narula. In cross-examination this witness stated that on the previous day

when the draft was dictated to him by Shri Naokar he had come to know that Rs. 500 were already paid to Hidayatullah and that though on behalf

of the third defendant it was suggested that in the sale-deed the fact of the previous agreements should be mentioned, Shri Naokar insisted that

there was no necessity of doing so. This advice, according to this witness, was given by Shri Naokar because the draft brought by Shri Chatterjee

was for Rs. 19,500 and for this reason it was thought by Shri Naokar that the previous agreements need not be referred to. It is very difficult to

believe that a counsel of Shri Naokar''s standing would have given this kind of advice of not mentioning the previous agreements, especially when

the sale-deed was being executed after the third defendant had received a notice that Hashmatullah had entered into a contract with the plaintiff to

transfer the property and when it was asserted on behalf of the Company that they had a previously executed document in their favour. This

witness further volunteered in cross-examination that when the notice of the plaintiff was published, the representatives of the Bata Shoe Company

had approached Shri Naokar with the notice and Shri Naokar had advised the representatives that as the agreement in their favour was of a

previous date they had a right to take the transfer from Hidayatullah. If this is so, Shri Naokar would have been the last person not to mention the

fact of the previous agreement in the sale-deed. In this connection, I may also note that in the notice published in ""HAMARI AAWAZ"" (Ex. P-6)

no date of the agreement with Hashmatulla has been mentioned ; and yet in the reply (Ex. P-7) it is asserted that because of the agreement dated

18-11-1958 with Hashmatullah as confirmed by the father Hidayatullah the agreement with the plaintiff was ineffective. It is surprising to know as

to how it could be asserted positively on behalf of the Company that the agreement with the plaintiff was ineffective without knowing the date of the

agreement. This shows that the Company was aware of the actual date of agreement with the plaintiff and had mentioned an earlier date, namely,

18-11-1958 in the reply. It may also be noted that in the reply to the notice there is reference to only one agreement, namely, dated 18-11-1958

and there is no reference to the earlier agreement dated 17-10-1958. From the reply to the notice it is also not clear as to whether the agreement

referred to, was in writing or oral. The reply appears to have been left as vague as possible. In the circumstances of the case, I find it difficult to

rely on the testimony of Premchand (D.W. 3).

11. This brings me to the consideration of the evidence of Hidayatullah. The sale-deed in question was executed on 28-3-1959 when Hidayatullah,

along with his son, had come to Gwalior from Agra and got it registered. Hidayatullah was examined on commission on 20-5-1960, after about a

year of the execution of the sale-deed. In his examination-in-chief he did not remember as to with whom he had entered into an agreement to sell

the property in suit. He similarly stated that he might have entered into an agreement to sell the property to the Bata Shoe Company, but he did not

remember the fact. When he was shown the document (Ex. D-1) he admitted his signature on it : but he stated that he neither remembered whether

any amount of Rs. 500 was received by him or whether he had signed the receipt thereof. Thus, the witness only admitted his signature on Ex. D-1

and the date 17-10-1958 put by him. Similarly, when Ex. D-2 was put to the witness, he admitted his signature on it. Regarding the rest of the

document he stated that he did not remember anything about it. Similarly, when Ex. D-3 was put to him, this witness stated that he did not

remember as to whom he had transferred the property. When Shri Inamdar put him a question as to what had happened to his memory, and which

question was objected to by the counsel for the other side, the witness stated that it was an effect of his advancing age. Though this witness did not

remember as to what was contained in Exs. D-1 and D-2 and only admitted his signatures oh them, in cross-examination he admitted that he had

executed a Mukhtyarnama in favour of his son and that under the said Mukhtyarnama he had authorised his son to dispose of the house. Similarly,

in cross-examination he asserted that before he executed the Mukhtyarnama in favour of his son he had already entered into an agreement to sell

the house to the Bata Shoe Company. When he was asked regarding further details as to who approached him and whether he had received any

amount or not and the place where the contract took place, this witness again asserted that he did not remember. Similarly, this witness was

positive in stating that he had not purchased the stamp papers on which Ex. D-1 was written ; nor did he get the same purchased. When it was put

to him that Exs. D-1 and D-2 were brought into existence after the execution of the sale-deed, the witness denied this allegation From the the

evidence of this witness it is clear that he insisted on saying that the two documents bore his signatures and that he had entered into an agreement

even before the power of attorney was executed in favour of his son. On all other matters he pretended forget fullness. When this witness did not

remember any of the details regarding Exs; D-1 and D-2 as also the execution of the sale-deed, it is difficult to believe that he would positively

remember the fact that he had already entered into an agreement with the Bata Shoe Company to transfer the property before he had executed the

power of attorney in favour of his son. I am therefore, convinced that he only stated those facts which were helpful to the case of the third

defendant and avoided being caught in cross-examination by pretending from the very beginning that his memory had gone weak. I am not at all

impressed by the evidence of this witness also.

12. Hashmatullah who had entered into an agreement with the plaintiff and who also executed the sale-deed in favour of the third defendant and

was a party to the suit avoided to enter the witness box.

13. This leaves the consideration of the evidence of the two attesting witnesses. Both the agreements are alleged to have been prepared in the

office of Shri Raghunandan Prasad Seth: but he was not also examined by the defence. When the commission to examine Hidayatullah was issued,

Shri Seth could have also been examined on commission. The defendant, however, did not take that risk. We have, therefore, to rely on the

evidence of the two attesting witnesses, and that of Hidayatullah and Narula to hold that the documents were brought into existence on the dates

alleged to have been brought into existence. The evidence of Hidayatullah and Narula I have discussed and rejected so also the evidence of

Premchand (D.W. 3). According to Jai-Gopal (D.W. 1), on the date the document (Ex. D-1) was executed he had gone to the office of Shri Seth

in connection with his own case. At that time he was shown the Ikrarnama by Shri Sath and in his presence Narula had paid Rs. 500 to

Hidayatullah and that Hidayatullah had signed that document and that the witness had put his signature. Another attesting witness, Laxminarain,

according to this witness, had met him in a lane when he was going to the office of Shri Seth and that on the asking the witness Laxminarain had

accompanied him to the office of Shri Seth. This witness is positive that he was not called by Narula to witness the document but he had gone to

the office of Shri Seth on his own for his own work. Now, it is not explained as to why this witness had asked Laxminarain also to accompany him

to the office of Shri Seth and why Laxminarayan accompanied him instead of attending the coal depot where he was in service. According to this

witness, he remained in the office of Shri Seth right from 9.00 A.M. to 1.30 P.M. It is not clear as to what he was doing in that office after the

Court hours when ordinarily a lawyer"s office remains closed. This witness also admitted in cross-examination that Laxminarain is not a usual

visitor of the office of Shri Seth. Laxminarain (D.W. 2) happens to be the witness of Ex. D-2 as well. In the case of the first document this witness

had gone accidentally because he was asked by Jaigopal to accompany him ; but on the second occasion he was sent for by Narula. Now, why he

was specially sent for is not clear from his evidence. Though these witnesses pretend that they were strangers to Hidayatullah or Narula, they

appear to be persons of their confidence and were, it appears, prepared to sign the documents as witness without apprehending the quence of it.

14. The stamp papers of Ex. D-1 are supposed to have been purchased by Hidayatullah, while the other stamp paper was supposed to have been

purchased by Narula. They were purchased from the same stamp vendor. It is not very difficult to procure ante dated stamp papers and to bring

into existence the documents like Exs. D-1 and D-2. When such documents are brought into existence, it is difficult to prove by direct evidence

that they are ante-dated documents. This is specially so when the executants thereof and the witnesses are prepared to support the same. The

surrounding circumstances in such cases acquire great significance when one is required to decide the question whether they are ante-dated

documents. The circumstances in this case are : that Hashmatullah one of the executants of the documents, avoided to enter the witness box ;

Hidayatullah did enter the witness box but blocked effective cross-examination by pretending that he had developed forgetfulness because of

advancing age, though at the same time he took particular care to insist on saying that the power of attorney in favour of Hashmatullah, his son, was

executed by him after Ex. D-1 was signed, the sale-deed (Ex. D-3) does not refer to any previous agreements, and witnesses payment of full

consideration of Rs. 19,500 though an advance of at least Rs. 500 was made at an earlier date, the explanation given by Premchand, the clerk to

Shri Naokar, as to why no mention was made cannot be accepted, especially when a counsel of Shri Naokar''s standing was not likely to give that

kind of advice because the sale-deed was executed after due notice was published by the plaintiff regarding the agreement of sale with him as well;

there is complete black out regarding any correspondence between the Head Office of the Company and Narula regarding the negotiations of

purchase of the house ; the attempt of the plaintiff to get the records of the Head Office produced before the Court for the purposes of cross-

examining Narula was defeated, and all those witnesses at the Head Office whose oath would have been of importance were kept back ; so also

Shri Seth and Shri Naokar, in whose offices Exs. D-1 and D-2, and the sale deed (Ex. D-3) were prepared were kept back, though they were

cited as witnesses, and there is no reason or explanation as to why Hidayatullah executed the power of attorney in favour of his son authorising him

to transfer the property when he had already entered into an agreement to sell the property and why an agreement was secured from Hashmatullah

subsequently. The contention of the plaintiff is that Ex. D-2 was brought into existence because in the notice sent on behalf of the Bata Shoe

Company it was already mentioned that Hashmatullah had executed the agreement and it was confirmed by his father, and Ex. D-1 was brought

into existence because Hashmatullah without knowing the contents of the notice had admitted in his letter that his father had already entered into an

agreement without his know ledge to sell the property. This contention, in the circumstances of the case, appeals to be plausible. All the

circumstances narrated above, have convinced me that Exs. D-1 and D-2 were ante dated.

15. It was strenuously urged on behalf of the third defendant that there is not an lota of evidence on record to show that the documents (Exs. D-1

and D-2) were ante-dated. The whole of the argument advanced on behalf of the plaintiff was based on mere suspicion and that suspicion cannot

take the place of proof. It was urged that Hashmatullah who had played fraud on the plaintiff was naturally reluctant to enter the witness-box.

Hidayatullah did enter the witness-box and supported the case of the third defendant. It was urged that a man may suffer from loss of memory but

he may remember certain facts which are very relevant. The very fact that Hidayatullah died after a few months of his being examined on

commission clearly shows that he was sufficiently advanced in age and was telling the truth when he claimed that he had developed forgetfulness. It

was also urged that all the persons who were directly connected with the execution of the documents in question were examined ; no adverse

inference could be drawn against the third defendant for their failure to examine other witnesses. I have already held that Hidayatullah was

pretending forgetfulness and that the two attesting witnesses were not persons absolutely unknown to Hidayatull and Narula as they pretended to

be. I have also pointed out the discrepancies between Exs. D-1 and D-2 and Ex. D-3, as also the improbability of there being no record of any

kind in the Head Office of a limited Company regarding previous negotiations. In this background the failure of the third defendant to examine the

witnesses whose oath would have been of great significance warrants adverse inference against the third defendant. Similarly, the fact that the third

defendant refused to give inspection of the agreement, referred to in the notice (Ex. P-7), before the suit was filed and their failure to produce it for

a very long time warrants adverse inference against them.

16. After very anxiously considering the submissions of both the parties, 1 have come to the conclusion that Exs. D-1 and D-2 are antedated and

I, therefore, concur with the findings recorded by Honourable Justice Shiv Dayal.

17. It was also urged by Shri Inamdar, counsel for the third defendant, that when the two Honourable Judges differed, the only order that could

have been passed was to confirm the judgment of the trial Court. It was also urged that, in any case, there could not have been any reference for

the opinion of the third Judge on a question of fact. For this, reliance was placed on sub-section (2) of section 98, Civil Procedure Code, and the

previso underneath. At one time, there was a controversy on the point as to whether there could have been any reference on a question of fact. But

sub-section (3) which was added in 1928 to section 98 clearly lays down that nothing contained in section 98 shall be deemed to alter or

otherwise affect any provision of the Letters-Patents of any High Court. Now, Clause 26 of the Letters Patent of the High Court of Judicature at

Nagpur which governs the Madhya Pradesh High Court clearly lays down :

.....if such Division Court is composed of two or more Judges and the judges as divided in opinion as to the decision to be given on any point,

such point shall be decided according to the opinion of the majority of the judges, if there be a majority, but if the judges be equally divided they

shall state the point on which they differ and the case shall then be heard upon that point by one more of the other judge and the point shall be

decided according to the opinion of the majority of the judges who have heard the case including those who first heard it.

Clause 26 of the Letters Patent which over-rides the provisions of section 98, Civil Procedure Code, makes no distinction between "a point of

law'' and ''a point of fact'' Similarly, it does not provide for automatic confirmation of the decision of the lower Court if there is a difference

between the Judges and there is no majority. In my opinion, therefore, the provisions of section 93, sub-section (2), Civil Procedure Code, are not

attracted.

18. My answer to the question referred for my decision is that Exs. D-1 and D-2 are ante-dated and were brought into existence after the

plaintiff''s notice in HAMARI AAWAZ"" was published. The papers be no laid before the Division Bench for disposal of the appeal.