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**(1973) 02 MP CK 0001**  
**Madhya Pradesh High Court**  
**Case No:** F.A. No. 27 of 1965

Pritamdas		APPELLANT
	Vs	
Akabari and others		RESPONDENT

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

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 93, 98

**Citation:** (1973) JLJ 559

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

**Bench:** Full Bench

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

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**Judgement**

R.J. Bhawe, 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 and 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 Hidayatullah 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 Hidayatullah 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 on 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 Hashmatullah 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-deed. 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 lawyer 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 Hidayatullah 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 been 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 Inamdhar 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 on 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 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 forgetfulness. 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 Seth 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 knowledge to sell the property. This contention, in the circumstances of the case, appears 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 a lot 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, I 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 proviso 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.