**HIGH COURT OF MADHYA PRADESH**
**BENCH AT GWALIOR**

**(SB : SHEEL NAGU J.)**

**Cr.A.No.115/2004**

**Omveer & Others**

**Vs.**

**State of M.P.**

**Whether reportable :- Yes /No**

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**For Appellant**

Shri Arun Pateriya, Advocate for the appellants.

**For Respondents/State**

Dr(Smt)Anjali Gyanani, Public Prosecutor for respondent/State.

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**O R D E R**

**(28.07.2016)**

**1.** The present criminal appeal filed u/S 374(2) of IPC assails the judgment dated 16.01.2004 passed in Special Case No. 382/2000 by which the appellants have been convicted and sentenced as enumerated below:

| Appellants | Sections | Punishment | Fine |
|---|---|---|---|
| **Appellant no. 4** Rambaran Singh | 326 of IPC | 5 years R.I. | 1000 with default stipulation of three months R.I. |
| **Appellants No. 1,2 and 3** namely Omveer, Bade and Vishambar | 326 read with Sec 34 of IPC | 5 year R.I in case of each of the appellant | Rs. 1000/- in case of each of the appellant with default stipluation of three months S.I. |
| All the four appellants | 323 read with Sec 34 | 6 months R.I. in case of each of the appellants | – |
| All the four appellants | 3(1)(x) of SC/ST (Prevention of Atrocities)Act | 6 months R.I. in case of each of the appellants | Rs. 500/- in case of each of the appellants |

**2.** The facts giving rise to present appeal are that:

As per prosecution case on 08.06.1996, at around 12-15 p.m., Gaderam PW-1 lodged a report at P.S. Sihoniya Distt. Morena to the effect that he used to work of brick-clin for which he had paid Rs. 500/- to Jasrath Thakur to get woods. It is alleged that four months before, when he alongwith his son went to the field of Jasrath to take woods, accused Vishambhar came there and objected. When the complainant asked him not to do, he (Vishambhar) rushed towards the village and after sometime at around 6 O' Clock in the evening came alongwith Rambaran, Omveer. All these three accused were armed with deadly weapons and surrounded the complainant. It is alleged that accused Rambaran inflicted a pharsa blow on the head of Prahlad, son of the complainant. Accused Vishambhar also

dealt Prahlad with a lathi blow due to which Prahlad fell down on the ground. Thereafter, accused Bade also came and inflicted a lathi blow to Prahlad. When Raju, another son of Gaderam came to rescue, accused Omveer inflicted Raju with a lathi blow. Accused Vishambhar also assaulted Raju with a lathi . After the incident accused persons fled away from the spot. The matter was reported to the police station, offences were registered and after investigation, chargsheet was filed in the Court of competent jurisdiction.

**3.** After lodging of FIR by Toderam on 08.06.1996 bearing Crime No. 55/1996 at Police Station Sihoniya, Distt. Morena for offences punishable u/S 323, 294, 325, 326 read with Sec 34 of IPC and Sec 3(1)(x) of SC/ST Act 1989 (The Act of 1989 for brevity), investigation was conducted. Statement of witnesses were recorded and evidence was collected including the report of medical examination of three injured persons, which led to filing of chargsheet. Charge was framed under Sec 3(1)(x) of the Act of 1989, 323, 326 & 323 read with Sec 34 and 326 read with Sec 34 of IPC. Thereafter, the prosecution witnesses were produced including the three injured persons Gaderam, Prahlad and Raju as PW1, PW2 and PW4 respectively. Appellants were questioned u/S 313 of Cr.P.C on the evidence that came on record. Out of the four accused, Om Veer Singh and Vishambhar in their response u/S 313 Cr.P.C. put up the defence that the prosecution is an act of vendetta due to past animosity. The trial Court after marshalling the evidence returned the finding of guilt by convicting and sentencing the appellants for the offences and punishments as enumerated in para 1(supra).

**4.** Learned counsel for the appellants challenges the

impugned judgment by contending the following:

i. That the offence punishable u/S 3(1)(x) of the Act of 1989 is not made out as there is no substantial proof to establish that the injured/victims were members of SC/ST community and also that the appellants did not belong to SC/ST community. Reliance is placed on the Single Bench decision in the case of ***Krishna alias Kresa Kushwah Vs. State of M.P.*** reported in ***2011 Cr.L.R. (M.P.) 311 &*** in case of ***Santosh Kumar Vs. State of Madhya Pradesh*** reported in ***ILR 2012 MP 1670***.

ii. That despite no evidence in support of the charge of Sec 326 of IPC, appellant no. 4 Rambaran has been convicted u/S 326 of IPC.

iii. That despite absence of proof of common intention to establish the charge u/S 326 of IPC with the aid of Sec 34, the remaining appellants i.e. appellant no. 1,2 and 3 have been convicted. Moreover, it is also contended that charge u/S 323 with the aid of Sec 34 is also not made out.

**5.** Taking up the case of appellant no.4 Rambaran , it is seen from the evidence on record in shape of statement of injured prosecution witnesses PW1, PW2 and PW4 namely Gaderam, Prahlad and Raju respectively that the said appellant no.4 was armed with a *pharsa* while attempting to prevent the victims from taking away the wood, assaulted the injured victims causing grievous injury on the head of **PW2 Prahlad**. The MLC report detected fracture of the parietal bone. There is nothing on record to indicate that there was no intention of causing grievous injury or the said injury was sustained due to mistake or inadvertence. The very fact that appellant Rambaran was armed with dangerous sharp cutting weapon *pharsa* discloses his criminal intent of committing offence of grievous injury. Each

of the injured witnesses have clearly stated in one voice that Rambaran was armed with a *pharsa* which reflects his premeditated mind to cause grievous injury. **Thus, conviction of appellant no.4 Rambaran u/S 326 of IPC is upheld.**

**6.** Taking up the case of other appellants i.e. appellant no. 1,2 and 3, it is seen from the evidence that they were armed with *lathi* which as compared to *pharsa* is a less dangerous weapon which normally does not cause grievous injury unless used repeatedly or with great force. There is no grievous injury attributed to appellants no. 1,2 and 3 apart from the one which is attributed solely to appellant no.4 Rambaran. All other injured i.e. Gaderam and Raju have sustained injuries of simple nature. Thus, looking to the nature of injures which were simple and the weapon used i.e. *lathi*, it does not appear that the intention of the appellants no. 1,2 and 3 was to cause grievous injury.

**6.1.** Since the appellants no. 1,2 and 3 have been convicted u/S 326 of IPC with an aid of Sec 34 of IPC, it is necessary to ascertain whether these appellants had any common intention of inflicting grievous injury with dangerous weapon. The testimony of PW-1, PW-2 and PW-4 disclose that the appellants no. 1,2 and 3 were very much accompanying the appellant no.4. However, the appellants no. 1,2 and 3 were wielding *lathis*. The prosecution story as proved by the testimony of PW-1, PW-2 and PW-4 further reveals that the assault was initiated by appellant no.4 Rambaran. Remaining appellants 1,2 and 3 followed and inflicted blows with *lathi* causing minor injuries. The minor injuries inflicted by the appellants no. 1,2 and 3 were on non-vital parts of the body. The fact that the appellant no. 1,2 and 3 were wielding *lathi* and inflicted minor injuries on non-vital parts of the body demonstrates that their intention was to cause

hurt, but not grievous hurt as was the intention of appellant no. 4 Rambaran.

**7.** In view of the above, the evidence on record which was found proved clearly shows that the appellant no.4 had clear intention of causing grievous hurt whereas the appellant no. 1,2 and 3 took part in the incident with the intention of causing minor hurt. Accordingly, there was no common intention of causing grievous hurt shared between the appellant no. 4 on one side and the appellants no.1,2 and 3 on the other. The Apex Court in the case of [1]***Pandurang Vs. State of Hyderabad*** reported in ***AIR 1955 SC 216***; in case of [2]***Mehbub Shah Vs. Emperor*** reported in ***AIR 1949 PC 118***, in case of [3]***Garib Singh Vs. State of Punjab*** reported in ***1972 Cr LJ 1286 (SC)*** and in case of [4]***Sewa Ram Vs. State of U.P***. reported in ***2008 Cr.LJ 802 (SC)*** has succinctly and elaborately dealt with the scope and ambit of Sec 34 of IPC, extracts of which are reproduced below:-

> [1]***Pandurang Vs. State of Hyderabad reported in AIR 1955 SC 216***
>
> In the case of Sec. 34, it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all.
>
> [2]***Mehbub Shah Vs. Emperor reported in AIR 1949 PC 118***
>
> Accordingly, there must have been prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention,

namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the Section because there was no prior meeting of minds to form a pre-arranged plan.

[3]***Garib Singh Vs. State of Punjab reported in 1972 Cr LJ 1286 (SC)***

Therefore, Sec. 34 IPC would apply if no charge is framed under that section provided of course from the evidence it becomes clear that there was per-arranged plan to achieve the commonly intended object.

[4]***Sewa Ram Vs. State of U.P.reported in 2008 Cr.LJ 802 (SC)***

Section 34 has been enacted on principle of joint liability of a criminal act. This section is only a rule of evidence and does not create a substantive offence. The distinctive feature is element of participation in action and essence of liability is to be found in existence of a common intention animating accused to do a criminal act in furtherance of such intention.

**7.1.** In view of the above, in the absence of any intention of causing grievous hurt, **conviction of appellants no. 1,2 and 3 u/S 326 read with Sec 34 of IPC is uncalled for.**

**8.** Now the conviction, as regards offence punishable u/S Sec 3(1)(x) of the Act of 1989 is being dealt with.

**8.1** Learned counsel for the appellant has pressed into service, two decisions of this Court to contend that unless and until, the factum of the victim belonging to one of the SC/ST communities and the accused not being a member of SC/ST

community is proved by documentary evidence, none of the offences enumerated and punishable u/S 3 of the Act of 1989 including Sec 3(1)(x) of the Act of 1989, can be proved.

**8.2** To deal with this ground, certain provisions of the Act of 1989 are required to be scrutinized.

**8.3** The term 'Scheduled Caste and Scheduled Tribe is defined under Sec 2(1)(c) in the Act of 1989 which are reproduced below:

SECTION 2(1)(c)

*"Scheduled Castes and Scheduled Tribes" shall have the meanings assigned to them respectively under Clause (24) and Clause (25) of Article 366 of the Constitution.*

**8.4** The relevant provision under which the appellants have been convicted i.e. Sec 3(1)(x) of SC/ST(Prevention of Atrocities)Act also deserves to be reproduced as follows:

*SECTION 3. (1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,-*

*(x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;*

**8.5.** From a bare reading of Sec 3(1)(x) of the Act of 1989 reveals that the said offence can be said to be committed only by a person who does not belong to SC/ST community, whereas said offence can be committed against a person who exclusively belongs the SC/ST community. The provision of Sec 3(1)(x) of the Act of 1989 commences with the term "who ever not being a member of SC/ST community----" which reveals that the first and the foremost ingredient required to constitute the said offence is that the accused should belong to a caste or tribe which is neither one of the scheduled castes nor scheduled

tribes. Similarly, though inversely another essential ingredient of the said offence is that the victim against whom the said offence is committed should necessarily belong to Scheduled Caste or Scheduled Tribe. Once these two foundational ingredients are established, only then and thereafter the other ingredients of intimidation,insult and humiliation in public view can come into play.

**9.** The term 'Scheduled Caste and Scheduled Tribe' are defined u/S 2(1)(c) to give them a meaning which is assigned to them under Clause (24) and (25) of Article 366 of the Constitution of India.

**9.1.** For ready reference and convenience Clause (24) and (25) of Article 366 of the Constitution of India are reproduced below:

> ARTICLE 366
>
> (24) Scheduled Castes means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution;
>
> (25) Scheduled Tribes means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution;

**9.2.** The above said provisions of the Constitution provide Scheduled Castes and Scheduled Tribes to mean such castes and such tribes or groups or sub-groups which are recognized under Article 341 and Article 342 of the Constitution of India to be Scheduled Castes and Scheduled Tribes respectively.

**9.3.** Before proceeding further, it would be appropriate to reproduce Article 341 and 342 of the Constitution of India which

define as to who would be Scheduled Castes and Scheduled Tribes with respect to any State or Union Territory. The relevant Constitutional Articles are quoted below :-

> *Article 341.—(1) The President may with respect to any State or Union Territory and where it is a State after consultation with the Governor thereof, by public notification specify the castes, races or tribes or .parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State . or Union Territory, as the case may be.*
>
> *(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause of any caste, race or tribe or part of or group within_ any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.*
>
> *Article 342. Scheduled Tribes—(1) The President may with respect to any State or. Union Territory and where it is a State, after consultation with the Governor thereof by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purpose of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union Territory, as the case may be.*
>
> *(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under 'the said clause shall not be varied by*

*any subsequent notification.*

**9.4** A bare perusal of Article 341 and 342, which relates to Scheduled Caste and Scheduled Tribe respectively indicates that such castes and tribes which after consultation with the Governor of the particular State are specified as caste or tribe for the purpose of that State, by way of public notification issued by the President of India.

**9.5.** In short, a caste or a tribe gets the status of Schedule Caste and Schedule Tribe when its name finds mention in the public notification issued by the President of India after following due process enumerated in the above said Articles.

**10.** In the instant case, the victim i.e. PW-1 Gaderam has begun his deposition by stating that accused are 'Thakur' by caste. This witness has thereafter said that he belongs to 'Chamar' caste. Indisputably, the caste 'Chamar' is one of the scheduled caste mentioned in the Presidential notification issued under Article 341 of the Constitution in respect of the State of Madhya Pradesh.

**10.1.** Moreover, the said statement of PW1 in respect of the accused belonging to 'Thakur' community which is not Scheduled caste or scheduled tribe and that the PW1 himself belongs to Scheduled caste has not been denied or contradicted by any of appellants. Moreover, there is no suggestion made or a different evidence appearing in the deposition of the PW-1 in respect of the said aspect.

**11.** The pivotal question that now needs to be answered is as to whether on the mere deposition of the victim that he belongs to SC/ST community and the appellants do not belong to SC/ST community, can this Court uphold the conviction u/S 3(1)(x) of the Act of 1989 when there is no documentary evidence to

establish the caste status of the victim and accused/appellants.

**11.1.** This takes this Court directly to the Single Bench decision of this High Court rendered in the case of ***Santosh Kumar Vs. State of Madhya Pradesh*** reported in ***ILR 2012 MP 1670*** where this Court in para 6 held thus:

> *6. It is apparent fact on record that to prove the case and community of the victim, no certificate, either issued by the Revenue Authority or local Gram Panchayat, has neither been produced nor proved. I am of the considered view that in the lack of such certificate of the competent authority mere on the basis of the oral testimony of victim Kalabai, (PW1), it could not be deemed or held that she was/is belonging to the community which is covered under the Act. I have not found any document on the record or any specific averments in the deposition of any of examined witnesses showing that at any point of time, the investigation agency had taken any step to obtain such certificate. The prosecution has also failed to explain the circumstance regarding non-production of such certificate. In the lack of such certificate, it is held that the prosecution has failed to prove the caste of the victim covered under the Act and pursuant to it the impugned conviction and sentence of the appellant under Sec 3(1) (xi) fo the Act is hereby set aside.*

**11.2.** Further, another decision on the same aspect is rendered by another Single Bench of this High Court in the case of ***Krishna alias Kresa Kushwah Vs. State of Madhya Pradesh*** reported in ***2011 Cr LR MP 311***, where in in para 10 the following findings are rendered:-

> *10. In order to convict the accused for the offence punishable u/S 3(1)(x) of the Act, it is incumbent upon the prosecution not only to prove that the complainant is the*

*member either of Scheduled Caste or Scheduled Tribe, but further the prosecution is obliged to prove that the accused is not a member either of the Scheduled Caste or Scheduled Tribe. In the present case, although by filing the documentary evidence Ex. P-8, Ex P-9 and Ex P-10, it is proved that complainant Santosh, Pappu and Rajabeti are the members of Scheduled Caste (Mehtar) community, but no document has been filed by the prosecution in order to prove the appellant is not a member of either Scheduled Caste or Scheduled Tribe community.*

**11.3.** The first decision in the case of ***Santosh*** (supra) lays down that to bring home the charges of offence punishable u/S 3(1)(x) of the Act of 1989, it is essential to establish the factum of victim belonging to SC/ST community by way of documentary evidence, in the absence of which conviction in that case was held to be unsustainable. In the other decision, in the case of Krishna(supra), this Court has gone a step further by holding that it is also incumbent upon the prosecution to establish by documentary evidence that the accused do not belong to SC/ST community.

**12.** The caste or tribe of a person is no more an abstract concept which was known or inferred by means of custom, tradition or word of mouth, but has now attained constitutional status where presidential notification is issued including particular castes/tribes in a list under Article 341/342 of Constitution thereby recognizing such castes/tribes as Scheduled Castes and Scheduled Tribes for a particular State. In the absence of a caste or tribe being mentioned in the schedule/notification issued by the President, it cannot attain the status of Scheduled Caste or Scheduled Tribe.

**12.1.** Since the Presidential notification is published in the Gazette of India, it is presumed that the same is known to all. However, for evidence and for day to day activities, it is essential that the member of Scheduled Caste and Schedule Tribe is provided with proof of belonging to such Scheduled Caste or Schedule Tribe. For this purpose, Union as well as State have laid down procedures, rules and regulations which inter-alia provide that SC/ST certificate is issued after due scrutiny by an authority who is declared to be competent for the purpose. The SC/ST certificate so issued is the documentary identity which certifies the holder of the certificate to belong to a particular Scheduled Caste or Schedule Tribe.

**13.** Presumption, suspicion, surmise or conjecture have no place in the process of assessment of evidence in criminal trial. Pre-ponderence of probability is also a concept foreign to criminal jurisprudence except where accused raises one of the general exceptions in Chapter IV of IPC in his defence. Proof beyond all reasonable doubt is the anvil on which every piece of evidence is tested to be qualified to prove an offence.

**13.1.** The object behind promulgation of the Act of 1989 is to cure by punitive measure the social malady of increasing incidents of atrocities over members of Scheduled Caste and Schedule Tribe.

**13.2.** In the absence of any statutory presumption of guilt in the Act of 1989, the prosecution is required to prove the offence u/S 3(1)(x) of the Act of 1989 beyond all reasonable doubts, even if the accused chooses to remain silent.

**14.** The case at hand reveals that PW1- Gaderam has testified that he belongs to “Chamar” caste and that the appellants are Thakurs. Besides this averment there is nothing

on record as regards the caste status of the rival parties. Can this testimony alone prove the offence u/S 3(1)(x) of the Act of 1989? The answer to this question is a categorical no for reasons infra:

**14.1.** A mere statement on oath of PW1- Gaderam can at best raise a presumption that PW1 is "Chamar" by caste and since "Chamar" is mentioned in the public notification issued by the President of India under Article 341 of Constitution of India as one of the Scheduled Castes for the State of M.P., the said PW1-Gaderam can be suspected/presumed to belong to SC community. However, this suspicion/presumption no matter how strong cannot substitute proof. It is settled that when prosecution evidence, oral and/or documentary, passes the test of proof beyond all reasonable doubt, the offence alleged stands established and thus conviction can safely follow.

**15.** The criminal jurisprudence in our country recognizes the concept of proof beyond all reasonable doubts for bringing home the charges in a criminal prosecution. Thus, the best evidence to prove the victim to be a member of SC/ST community is certificate of SC/ST issued by competent authority which is valid at the time of occurrence of the offence.

**16.** In the case at hand no such certificate has either been brought on record by the prosecution or by the victim to establish that the victim belongs to Scheduled Caste or Scheduled Tribe and the accused/appellants do not belong to SC/ST.

**17.** A mere statement of PW1-Gaderam/victim that he belongs to scheduled caste and the accused do not belong to SC or ST is not enough to satisfy the first and foremost requirement of Section 3(1)(x) of the Act of 1989 that the victim

is member of SC/ST community and the accused is not.

**18.** In view of the above, this Court has no hesitation to hold that the charge u/S 3(1)(x) of the Act of 1989 is not proved/established against all the appellants.

**19.** Accordingly, conviction of all four appellants, so far as it pertains to Sec 3(1)(x) of the Act of 1989 is set aside.

**20.** This appeal is accordingly allowed to the extent indicated below:

i) All the four appellants are acquitted of the offence punishable u/S 3(1)(x) of the Act of 1989.

ii) Conviction of the appellant no. 4- Rambaran u/S 326 of IPC as awarded by the impugned judgment is upheld.

iii) The conviction and sentence of the appellants no. 1,2 and 3 namely Omveer, Bade and Vishambhar u/S 326 read with Sec 34 of IPC is set aside.

iv) As regards conviction u/S 323 read with Sec 34 of IPC awarding sentence of 6 months R.I. to each of the appellants with fine of Rs.1,000/- and with default stipulation of S.I. of one month, this Court is of the considered view that looking to the background of the incident which arose on the petty issue of carrying away of fire wood which is a precious commodity in rural areas, impulse more than intent may have been behind the offence and also that the appellants do not appear to have criminal antecedents except appellant no. 2 – Bade Singh whose arrest memo reflects that he has criminal antecedents, but with no supportive material on record, the ends of justice would be met, if appellants are convicted for the offence punishable u/S 323 read with Sec 34 of IPC for the period and sentence already

undergone which is about 1 ½ months in the case of appellant no. 1,2 & 3 namely, Omveer, Bade and Vishambhar.

v) However, it would be appropriate to compensate the victim u/S 357 Cr.P.C.

vi) In view of restriction prescribed in Sec 357 Cr.P.C. that the quantum of compensation to the victim cannot be more than the maximum imposable fine which is Rs. 1,000/- u/S 323 IPC, it would be appropriate that the sentence of fine awarded deserves to be interfered with.

vii) Accordingly, the sentence of fine of Rs. 500/- u/S 323 of IPC is set aside as regards all the four appellants.

viii) Invoking the provisions of Sec 357(3) Cr.P.C.,this Court directs for grant of compensation to the tune of Rs. 3,000/- to each of the three victims namely Gaderam, Prahlad and Raju totaling an amount of Rs. 12,000/-. If payment of compensation as quantified above is not made by the appellants with proof of payment filed in the trial Court within three months from passing of this order, then the same be recovered and paid to all the three injured victims by invoking the provisions of Sec 83, 84 and 85 of Cr.P.C. by the trial Court.

A copy of this order shall be communicated to the Trial Court for information and necessary action.

**(Sheel Nagu)**
**Judge**

sh/-