

Vikas Batra vs Devender Khanna @ Rinku on 30 September, 2016

IN THE COURT OF ANURAG SAIN, ADJ-02 (EAST),
KARKARDOOMA COURTS, DELHI

C.S. No.: 100/16

Vikas Batra
S/o Sh. N.M. Batra
Prop. of Vikas Auto Centre,
Shop at 2/3, Kotla Scooter Market,
Mayur Vihar Phase-I,
Delhi-110091

.....Plaintiff

Versus

Devender Khanna @ Rinku
S/o Late Sh. Subhash Chandra Khanna,
R/o 34/357, Trilok Puri,
Delhi-110091
Shop at: 16/1, Sarpanch Complex,
Kotla Scooter Market,
Mayur Vihar Phase-I,
Delhi-110091

Also at:-

110, 3rd Floor,
Gali No.05, South Anarkali,
Delhi-110051

.....Defendant

| | |
|----------------------------|--------------|
| Date of institution | : 28.03.2012 |
| Date of reserving judgment | : 30.08.2016 |
| Date of pronouncement | : 30.09.2016 |

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JUDGMENT

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1. The present suit for recovery of Rs.5,70,000/- along with pendentelite and future interest @ 24% p.a. has been filed by the plaintiff against the defendant.
2. Briefly stated the facts of the case are that the defendant was

closely known to the plaintiff and in the month of July, 2011, the defendant approached the plaintiff for advancing a personal loan of Rs.5 lac which has been given by the plaintiff to the defendant and on 12.07.2011, one agreement on the stamp paper of Rs.100/- was executed in the presence of the witnesses

to this effect whereby the defendant had agreed to pay the aforesaid amount in 24 monthly equal installment of Rs.20,850/-p.m. commencing from 15.08.2011. It is further the case of the plaintiff that despite the agreement and various requests, the defendant had not paid a single installment to the plaintiff. It is further averred that the transaction between the parties was commercial and even as per trade, usage and practice, the plaintiff is entitled to claim and recover the amount of Rs.Five Lac with interest @ 24% p.a. being the contractual rate of interest on the aforesaid amount and interest for seven month w.e.f. 15.08.2011 to 15.03.2012 comes to Rs. 70,000/- and thus, the plaintiff is entitled to recover a total sum 5,70,000/-. It is further averred that plaintiff also issued a legal

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notice dt. 24.02.2012 to the defendant however neither the defendant replied the same nor refunded the aforesaid loan amount to the plaintiff. On these premise, the plaintiff has filed the present suit.

3. Initially the suit was filed under the provisions of Order 37 CPC

however, vide order dated 10.09.2012, on the request of the ld. counsel for the defendant, the present suit has been treated as ordinary suit for recovery.

4. Written statement was filed by the defendant wherein he has taken preliminary objections such as plaintiff has not approached the court with clean hands and concealed the true facts and the agreement has been got executed in a very connivance manner and making a false promise that the plaintiff will disburse the loan amount to defendant but after getting the signature of the defendant on the agreement, the plaintiff had not given the said loan amount to the defendant; The agreement dt. 12.7.2011 is neither duly attested by a notary public nor duly registered with the Registrar; The agreement dt. 12.7.2011 has not been duly stamped as per Section 33 of Indian Stamp Act; The suit is not maintainable as the agreement dated 12.07.2011 is creating serious doubt and proves that the defendant has not received any loan amount from the plaintiff as the signature of the defendant on the agreement dated

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12.07.2011 is at the place of lendee/giver whereas the signature of the plaintiff is at the place of borrower/lender; There is no money receipt to prove that the defendant has received the said loan amount from the plaintiff; There is no cause of action in favour of the plaintiff and the plaintiff has no locus standi to file the present suit. The present suit is an afterthought and also a counter blast to the legal notice dated 15.03.2012 sent by the defendant to the plaintiff as well as the police complaint dated 17.03.2012 made by the defendant against the plaintiff. On merits, the defendant denied the contents of the plaint in toto

and prayed for the dismissal of the present suit.

5. Replication to the written statement filed by the plaintiff wherein all the averments made in the plaint have been reiterated and reaffirmed whereas those made in the written statement have been denied.
6. The court vide order dated 15.07.2013 framed following issues:-
 - (1) Whether the suit filed by the plaintiff is not maintainable? OPD
 - (2) Whether the plaintiff is entitled to decree of Rs.5,70,000/- along with interest as prayed for? OPP
 - (3) Relief
7. In order to prove his case, the plaintiff examined himself as PW1 and tendered his examination in chief by way of affidavit

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Ex. PW1/1. PW-1 has also relied upon documents viz agreement dated 12.07.2011 as Ex. PW1/A, Legal notice dated 24.02.2012 as Ex. PW1/B and courier receipts as Ex. PW1/C to Ex. PW1/E. This witness was cross examined on behalf of the defendant

8. The plaintiff also examined Sh. Ved Prakash Mehandirata as PW-2 and Sh. Sameer Khurana as PW-3 who tendered their evidence by way of their respective affidavit Ex. PW2/A and Ex. PW3/A. Both the witnesses were cross examined by the ld. counsel for the defendant and vide separate statement, the plaintiff closed his evidence on 04.11.2015.
9. To rebut the case of the plaintiff, the defendant examined himself as DW1 who tendered his examination in chief by way of affidavit Ex. DW1/1. He also relied upon documents viz legal notice dated 15.03.2012 as Ex. DW1/A and copy of police complaint dated 17.03.2012 as Ex. DW1/B. This witness was cross examined by the ld. counsel for the plaintiff. Vide separate statement, the defendant closed his evidence on 11.04.2016.
10. I have heard ld. counsel for the parties. I have also gone through the entire records of the case including pleadings of the parties, evidence led by the parties and documents proved by the parties during trial.

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11. The plaintiff has filed the present suit for recovery of the alleged loan amount on the basis of agreement dated 12.07.2011 against the defendant and the defendant has filed other suit for declaration bearing CS No.429/16 titled as Devender Khanna Vs. Vikas Batra thereby declaring the agreement dated 12.07.2011 as null and void. Since both the cases are interconnected arising out of the agreement dated 12.07.2011, therefore the evidence led by both the parties in both the cases are considered together.

12. Before I advert to the facts of the case, let me discuss the various principles governing the appreciation of evidence in a civil case.
13. In fact, in this mortal world, in all human endeavors, absolute certainty is a myth and chasing the same is chasing the mirage. Instead, the law has provided a working solution in the doctrine of preponderance of probabilities. The evidence in a civil case is appreciated on the altar of preponderance of probabilities. In civil cases, high preponderance of probability is enough.
14. My issue-wise findings are as under:-
- Issue no.1
- Whether the suit filed by the plaintiff is not maintainable? OPD

15. Onus to prove this issue was upon the defendant. No material

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evidence led by the defendant on this issue. Nor any arguments led by the defendant in this regard. Accordingly, this issue is decided against the defendant.

16. Issue no.2

Whether the plaintiff is entitled to decree of Rs.5,70,000/- along with interest as prayed for? OPP

17. Onus to prove this issue was upon the plaintiff.

18. The case of the plaintiff is that he had advanced a friendly loan of Rs. Five Lac to the defendant on 12.07.2011 in the presence of the witnesses which was to be repaid by the defendant in 24 equal monthly installments of Rs.20,850/- commencing from 15.08.2011 and an agreement dated 12.07.2011 in this regard was executed between them but the defendant did not repay the same.

19. On the other hand, it is the case of the defendant that though an agreement dated 12.07.2011 was executed between the parties with respect to the friendly loan but after the execution of the agreement dated 12.07.2011, the plaintiff did not disburse the loan amount to the defendant and has misused the aforesaid agreement dated 12.07.2011 by filing the present suit.

20. From the facts, it is clear that there is no dispute with respect to the execution of the agreement dated 12.07.2011. The only dispute between the parties is whether the friendly loan of

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Rs. Five Lac was paid by the plaintiff to the defendant at the time of execution of the agreement dated 12.07.2011 or not. From the above, what is apparent that it is the defendant who has to show that the plaintiff has not paid Rs. Five Lac to him.

21. At the outset, the court is of the opinion that defence of the defendant is devoid of any merits being hit by the provisions of Section 91 and 92 of the Evidence Act. Section 91 and 92 make it clear whether the recital in the document are absolutely clear

and are expressed in unmistakable terms then there left no room for adducing evidence aliunde to contract the recitals of the document and any evidence so adduced, clearly hit by Section 91 & 92 of the Evidence Act. Section 91 & 92 of the Evidence Act make it clear that restricts oral evidence between the parties against the terms of deed between the parties.

22. In the present case, the terms of agreement Ex. PW1/A dated 12.07.2011 are clear, specific and unambiguous. The amount in the exhibit Ex. PW1/A was clearly and specifically mentioned. It has also been clearly and specifically mentioned that the said amount has been duly received by the defendant and executed Ex. PW1/A in this regard which is duly witnessed by the witnesses. Thus, the defence so raised by the defendant in the the written statement is beyond what is recited in the document. The recital of documents are not under dispute. Accordingly,

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the court is of the opinion that the averment of the defendant must fail for the same.

23. Looking the matter from the angle of the defendant and assuming for the sake of arguments that what the defendant has stated in his written statement has to be considered, let us examine the case of the defendant whether he has been able to prove his case.
24. Besides the averment of the plaintiff in his evidence and also during cross examination that the amount was paid by him to the defendant, the plaintiff has examined Sh. Ved Prakash Mehandirata as PW-2 who was the witness to the agreement dated 12.07.2011 Ex. PW1/A. In the cross examination, it has come on record that 'The said amount of Rs. Five Lac was given without interest as it was a friendly loan and the installment was Rs.20,850/- which was to be given in 24 months'.
25. In the entire case, except the self serving statement of the defendant that though he has signed the agreement dated 12.07.2011 Ex. PW1/A, it has been the stand of the defendant that no amount was given to him, there is nothing on record in this regard. Merely the self serving statement does not suffice the purpose and if the same is allowed to be given weightage, it would open pandora box to other who after taking the money

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and executing the document would refuse to repay the same on the ground that the amount was not paid to them.

26. The defendant has filed a suit for declaration bearing CS No. 429/16 titled as Devender Khanna Vs. Vikas Batra for the decree of declaration to declare the document dated 12.07.2011 as null and void, the same being without consideration. In the said case also in the plaint so filed by the defendant herein, it is the case of the defendant that defendant was in need of money and approached the plaintiff for friendly terms loan of Rs. Five

Lac from the plaintiff which as per him was not paid to him and nothing else. Apart from the same in the aforesaid suit that he has not received the money, nothing has been shown or proved by the defendant. It cannot be gain said that mere statement without supporting material would suffice the allegations of not making the payment, the same are not backed by any evidence on record.

- 27.If it is the case of the defendant that he was in need of money and he approached the plaintiff for taking the loan of Rs.Five Lac, the defendant has not shown and proved what was the need and what loss he has suffered when he did not receive the loan amount. It is the incumbent duty of the defendant to show and prove that he was in need of money and for which he approached the plaintiff for the loan and because of the non-

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payment of the amount as stated by the defendant, he has suffered any loss because of the same. The same is conspicuously missing in the present matter. The defendant has filed a suit for declaration before suit no.429/16. In the said suit, the defendant has stated that he has approached the plaintiff for the loan of Rs.Five Lac which was agreed by the defendant. Except the same, nothing has been shown or proved by the defendant why he required the loan and for what purpose he required the loan and what loss he has suffered for the non-payment of the loan of Rs.Five Lac. In fact, there is nothing also stated by the defendant in the suit bearing no.429/16 in his evidence also.

- 28.If the defendant was in need of money and the same was not paid to him by the plaintiff what steps has he taken, no steps have been taken by the defendant in this regard. The agreement was executed on 12.07.2011 and till 15.03.2012, nothing has been said or done by the defendant in this regard. The argument of the ld. Counsel for the defendant that he has issued a legal notice dated 15.03.2012, filed suit for declaration bearing no.429/16 and filed criminal complaint under Section 156 (3) Cr. P.C. is of no help to the defendant. Interestingly all these acts were done by the defendant when the plaintiff has taken steps. The defendant issued legal notice dated 15.03.2012

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of the legal notice dated 24.02.2012 issued by the plaintiff exhibited as Ex. PW1/B when the plaintiff instituted the present suit for recovery against the defendant. Defendant filed a suit for declaration against the plaintiff herein. This shows that all the steps are counter blast to the steps taken by the plaintiff in the present matter.

- 29.The defendant has not examined any witness in support of his contention before the court. In the suit for declaration bearing CS No. 429/16 filed by the defendant, the defendant herein and the plaintiff in the said suit besides examining himself, has also

examined two witnesses namely Amar Nath Sharma and Raju Sawant. In the cross examination of PW-3, it has come on record that 'I was not present at the time of execution of the aforesaid agreement. I was told by the plaintiff that he has not been paid a sum of Rs. Five Lac by the defendant. Thus the testimony of this witness is hearsay in nature.

30. As regards PW-2, he has stated that he was not present at the time of agreement. The cross examination of this witness shows that he has deposed what has been told to him by the defendant. The testimony of this witness is also hearsay in nature and therefore the same cannot be looked into.
31. From the above, it is clear that the defendant has failed to show that he has not received the money as alleged by him.

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32. In case the defendant fails to prove what is averred by him as above, would this mean, the case of the plaintiff stands proved. The answer is 'no'. The plaintiff has to stand on his own legs.
33. It is cardinal principle of law that the initial burden of proving the case is always on the plaintiff and he has to discharge the same.
34. Burden of proof- Section 101 of the Indian Evidence Act, 1872 provides that whosoever desires any court to give judgment as to any legal right or liability dependent upon the existence to facts which he asserts must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that burden of proof lies on that person.'
35. It has been held by the Hon'ble Apex Court in a case titled as A. Raghuvamma and Another Vs. Chenchamma and Another that there is an essential distinction between the burden of proof and onus to prove. Burden of proof lies upon the person who has to prove the facts and it never shifts but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. Under Section 101 of the Indian Evidence Act says that whosoever desires any court to give judgment as to any legal right or liability dependent upon the existence to facts which he asserts must prove that those facts exist. When a person is bound to prove the existence of

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any fact, it is said that burden of proof lies on that person. Section 102 of the said Act says that the burden of proof in a suit or proceeding lies on that person, who would fail if no evidence at all were given on either side. Section 103 of the said Act shows that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

36. It is settled proposition of law that the initial burden to prove

the case is upon the plaintiff and the plaintiff has to stand of his own leg to prove the case. Under Section 101 of the Evidence Act the burden of proof has been on the plaintiff as he wanted the Court to give judgment as to the legal right dependent on the existence of facts which he asserted and that must have proved those facts. Thus, it is the incumbent duty of the plaintiff to at least discharge his initial burden of proof.

37. Let us examine the case of the plaintiff in the light of the above.

38. Before coming to the same, let us examine the alleged transaction as stated by the plaintiff qua the advancing of the loan to the defendant. Whether the said transaction was a valid transaction permissible under law or an illegal transaction.

39. The plaintiff has examined himself as PW-1. He deposed that he is running finance business. He further deposed in the

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affidavit in evidence Ex. PW1/1 that the defendant approached him for advancing personal loan of Rs. Five Lac in the month of July 2011 and on 12.07.2011, the defendant executed one agreement on stamp paper of Rs.100/- in the presence of witnesses namely Sameer Khanna and Ved Prakash Mehandirata and in the said agreement, it was agreed that the defendant will pay the amount @ Rs.20,850/ per month to be payable in 24 months and will commence from 15.08.2011.

40. The plaintiff in order to prove the same examined himself as PW-1 wherein he has stated that he has paid a sum of Rs. Five Lac to the defendant. He has also examined two witnesses to the agreement dated 12.07.2011 who have also deposed that the plaintiff has paid the amount to the defendant. Besides the averment by the plaintiff qua the advancing of the loan by him to the defendant, it has come in the cross examination of the witness PW-2 that 'the said amount of Rs. Five Lac was given without interest as it was a friendly loan and the installment was Rs.20,850/- which was to be given in 24 months'.

41. In the cross examination, a question was put to the plaintiff with respect to the availability of the funds and the accountability of the amount so paid. The plaintiff has stated that he is doing the business of finance and is an income tax payee. A specific question was asked from the plaintiff during

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cross examination as to whether the aforesaid loan amount was shown in the ITR to which the witness has replied that since it was a friendly loan without interest and not commercial loan therefore the same was not shown in the ITR.

42. It has been deposed by the plaintiff in the cross examination that the amount so paid by him has not been shown in the income tax returns nor the same has been shown in his statement of account which was his duty to do so. Thus, from the above, it is clear that the aforesaid amount is an amount which is unaccounted.

43. Moreover, the plaintiff has not explained as to why such large sums of moneys were transacted in cash. The plaintiff has not filed a single document to show the availability of cash in such large volume with him as on 12.07.2011 at the time of execution of agreement. When the plaintiff who stated himself to be running the finance business transacts such large volume of amount in such a casual manner, does so at his own peril. The alleged transaction of Rs. Five Lac in the present matter is not properly documented in accordance with law.
44. In the other suit for declaration bearing CS no.429/16 titled as Devender Khanna Vs. Vikas Batra, Vikas Batra, the plaintiff herein was cross examined on behalf of the defendant herein. The relevant portion of the cross examination is reproduced as

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under:-

'.....I do not remember the name of the parties who had given the amount to me. It is correct that we maintained account in the computer for the amount paid by the parties to us'.

Q Can you produce the aforesaid statement of account?

Ans I can say about the same after checking the record. I can produce only cash in hand record of that particular date. I can produce the same on the next date of hearing.

45. Ld. counsel for the plaintiff argued that even assuming that the amount is not shown in the Income Tax Return or the statement of account is not filed, that does not absolve the defendant from his liability. He further argued that merely non-disclosure of the transaction or the amount of Rs. Five Lac in the Income Tax return or in the statement of account/balance sheet is not fatal to the case of the plaintiff when the defendant himself has admitted to have received the amount of Rs. Five Lac and executed the agreement dated 12.07.2011. He further argued that the fact of making the payment by the plaintiff to the defendant has been duly proved by the plaintiff besides examining himself and two other witnesses PW-2 and PW3.
46. As per the agreement dated 12.07.2011 Ex. PW1/A, the alleged loan amount of Rs. Five Lac was repayable in 24 equal monthly installments of Rs.20,850/- and not within a few months. Thus, if in a given case the amount advanced by the plaintiff to the

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defendant is a large amount and is not repayable within few months, the failure to disclose the amount in Income Tax Return or Books of Accounts of the plaintiff is sufficient to draw adverse inference against the plaintiff.

47. The Hon'ble Bombay High Court in a case titled as Sanjay Mishra Vs. Kanishka Kapoor @ Nikki & Anr., 2009 (3) Civil Court Cases 563 (Bombay) in para 7 has held that :-
- "7. It is true that merely because amount advanced is

not shown in the Income Tax Return, in every case, one cannot jump to the conclusion that the presumption under section 139 of the said Act stands rebutted. There may be cases where a small amount less than a sum of Rs.20,000/- is advanced in cash by way of loan which may be repayable within few days or within few months. A complainant may not show the said amount in the Income Tax Return as it is repayable within few days or few months in the same financial year. In such a case the failure to show the amount in the Income Tax Return may not by itself amount to rebuttal of presumption under section 139 of the said Act. If in a given case the amount advanced by the complainant to the accused is a large amount and is not repayable within few months, the failure to disclose the amount in Income Tax Return or Books of Accounts of the complainant may be sufficient to rebut the presumption under section 139 of the said Act.

48.The aforesaid judgment squarely applies to the facts of the present case as in the present case it is not the small amount. The amount is Rs.Five Lac and it is also not to be repayable

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within few days or few months but the same was to be repaid in 24 months on equal monthly installments of Rs.20,850/-. In that eventuality the non-disclosure of the same in the income tax records or books of accounts or balance sheet calls for adverse inference against the plaintiff.

49.It has been further held in the said judgment in para 13 that :-
"13. In the present case, there is a categorical admission that the amount allegedly advanced by the applicant was entirely a cash amount and that the amount was 'unaccounted'. He admitted not only that the same was not disclosed in the Income Tax Return at the relevant time but till recording of evidence in the year 2006 it was not disclosed in the Income Tax Return. By no stretch of imagination it can be stated that liability to repay unaccounted cash amount is a legally enforceable liability within the meaning of explanation to section 138 of the said Act. The alleged debt cannot be said to be a legally recoverable debt".

50.In the present case, it has come categorically in the cross examination of the plaintiff that the alleged amount which he has paid to the defendant was cash amount, he has not been shown the same in his income tax returns nor the plaintiff has filed any statement of account or balance sheet in this regard. Thus, it can be safely inferred that the amount so paid, if any, is an unaccounted payment which by stretch of imagination can fall under the umbrella of enforceable debt. Para 13 of the aforesaid judgment squarely applies to the present fact.

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51. The defendant has relied upon the judgment of the Hon'ble Supreme Court of India in a case titled as G. Pankajakshamma Vs. Mathai Mathew, 2004 Law Suit (SC), 384 where in para 10, it has been held that :-

"10. There is any reason also why the impugned judgment cannot be upheld. According to the 1st respondent, these transactions were to be unaccounted

transactions. According to the 1st respondent, all these amounts are paid in cash. If these are unaccounted transactions then they are illegal transactions. No court can come to the aid of the party in an illegal transaction. It is settled law that in such cases the loss must be allowed to lie where it falls. In this case, as these are unaccounted transactions, the Court could not have lent its hands and passed a decree. For these reasons also, the suit was required to be dismissed".

The aforesaid judgment squarely applies to the facts of this case.

52. From the facts of the case viz a viz the law laid down as above, the court is of the considered opinion, assuming that the plaintiff has advanced the money to the defendant however the same being unaccounted one and thus, the court could not lay its hands to allow to pass a decree against the defendant. The court cannot allow illegal transactions to be given the cover of legally enforceable debt. This would amount to be a part of promoting illegal transactions which have direct affect on the economy of the State. Allowing such transactions in the society would mean that there is direct loss to the Government exchequer and promoting illegal transactions to the society is not beneficial to the State. It is high time that the courts should come forward to put halt on such huge transactions which are unaccounted in nature and has no proof for the same. Such transactions should be curbed so that a party should not go to enter into such illegal transactions. Thus, the court is of the considered opinion that the plaintiff has failed to discharge the onus to prove this issue. The issue is answered accordingly.

53. Issue no.3 Relief.

54. In view of the observations made herein above, the present suit is dismissed. There is no order as to cost.

55. Decree sheet be prepared accordingly.

56. File be consigned to record room.

Announced in the open court On 30.09.2016 (Anurag Sain) Addl. District Judge 02 (East)
Karkardooma Courts, Delhi C.S. No.: 100/16 30.09.2016 Present: None.

Vide separate judgment announced in the open court today, the present suit is dismissed. There is no order as to cost. Decree sheet be prepared accordingly. File be consigned to record room.

(Anurag Sain) ADJ 02, East, Karkardooma Court, Delhi/30.09.2016