

Cases 3612/2017
REGISTRAR OF COMPANIES Vs.
UNITECH HOLDINGS LTD
CNR No. DLCT02-005231-2017

09.07.2024

Present: Sh. Anubhav Singh, Ld. Company Prosecutor for the complainant.
Sh. Hitesh Sharma, Ld. Additional Central Govt. Counsel.
Proceeding qua accused No.1 have been stayed.
Proceeding qua accused No.2 and 4 have been disposed of in Lok Adalat.
Accused No.3 is exempted through counsel.
Sh. Prakhar Garg and Sh. Amir Hasan, Ld. Counsel for accused No.3.

Be put up for announcement of judgment at 4:00 PM

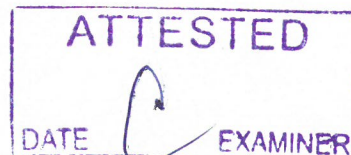
(Mayank Mittal)
ACJM (Special Acts): Central District:
THC: Delhi: 09.07.2024

At 4:00 PM

Present: None for the complainant.
Proceeding qua accused No.1 have been stayed.
Proceeding qua accused No.2 and 4 have been disposed of in Lok Adalat.
None for accused No.3.

Vide separate judgment announced in the open court, accused No.3 Rajiv Agarwal is acquitted for the offence alleged under Section 96 and 137 of The Companies Act, 2013.

Sh. Rajiv Agarwal is directed to furnish bail bond under Section 437A Cr.P.C. in the sum of Rs.15,000/- with a surety in like amount on the next date of hearing i.e. 19.07.2024.



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As proceeding qua accused No.1 company had been stayed by hon'ble Supreme Court of India, the present matter is adjourned sine die qua accused No.1 company with direction to complainant to move appropriate application for revival of present complaint on passing order by hon'ble Supreme Court of India.

Copy of this order be sent to worthy ROC with request to acknowledge the same within three days after receiving.

(Mayank Mittal)

ACJM (Special Acts): Central District:
THC: Delhi: 09.07.2024



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IN THE COURT OF SH. MAYANK MITTAL
ADDL. CHIEF JUDICIAL MAGISTRATE (Spl. Acts)
CENTRAL, TIS HAZARI COURTS, DELHI

ROC Vs. Unitech Holdings Ltd.



CC No. : 3612/2017
CNR No. : DLCT02-005231-2017
Date of Institution : 15.03.2017
Name of the complainant : Registrar of Companies,
its registered office : NCT of Delhi & Haryana
4th Floor, IFCI Tower, 61,
Nehru Place, New Delhi.

Name of accused : (i) Unitech Holdings Limited
his parentage and address etc. : 6, Community Centre, Saket,
New Delhi.
(ii) Shailender Kumar Mahajan
S/o Sh. Parshotam Chand Mahajan
R/o G-6, First floor, South City-II,
Sohna Road, Gurgaon-1220002,
Haryana.
(iii) Rajiv Agarwal
S/o Sh. Jagdish Sharan Agarwal
R/o S-187, Greater Kailash,
Part-II, New Delhi-110048.
(iv) Ms. Jyoti Kanojya,
D/o Mool Chand Kanojya,
R/o 64, DDA Flats, East of
Kailash, New Delhi-110065

Offence complained of : U/s. 99 and 137 of The
Companies Act, 1956.
Date of Judgment : 09.07.2024
Plea of accused : Not guilty
Final Judgment : Accused No.3 Acquitted

Brief facts and reasons for decision of the case:-

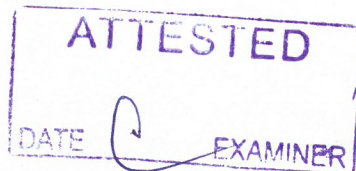
- 1 The facts of the case of complainant is that M/s Unitech Holdings
Ltd was incorporated on 09.12.1982 vide CIN

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U74899DL1982PLC014798 as a Public company under the Companies Act, 1956 and having its regd. Office at 6 Community Centre, Saket, New Delhi-110017. As per provision of The Companies Act, 2013 for default of company, a company and every officer of the company who is in default is / are liable. It is further stated that more specifically the officers in default in the present complaint as per their role/designation under section 2(60) of the Companies Act, 2013 as follows:-

- (i) Accused no.2 who is the Director in the company from 22.11.2008 till date, therefore held liable being officer in default for the concerned period.
- (ii) Accused no.3 who is the Director in the company from 28.03.2015 date, therefore, held liable being officer in default for the concerned period.
- (iii) Accused no.4 who is the Director in the company from 28.03.2015 till date therefore held liable being officer in default for the concerned period.

According to the provision of Section 137(1) of the Act, the Company and its directors are under statutory obligation to file with the Registrar of Companies copies of the Balance Sheet and Profit and Loss Account in the prescribed form within 30 days of the date of Annual General. That the accused company has not filed the Balance Sheet, Profit & Loss since 31.03.2015 and Prima Facie, it is also therefore appears that company could not hold Annual General Meeting since year 2015, hence show cause notice u/s 99 and 137(3) of the Companies Act, 2013 was issued to the company by email pursuant to section 20 of the Act, but no reply received from the company. That for the contravention under

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Section 96 and 137 of the Act, the accused herein are punishable under Section 99 and 137(3) respectively of the Act.

- 2 The present complaint was filed by Dr. Afsar Ali, the then Assistant Registrar of Companies on behalf of the complainant. Since the complaint was filed by a public servant while discharging his duties as a public servant and in his official capacity, so his examination under Section 200 Cr.P.C was dispensed with in terms of proviso (a) of Section 200 Cr.P.C. Cognizance of offence(s) was taken and the accused were summoned vide order dated 15.03.2017.
- 3 Notice of accusation u/s 251 Cr.P.C was framed against the accused no.1 to 4 on 28.08.2019 to which they pleaded not guilty and claimed trial. Proceedings qua accused no.2 and 4 have been disposed of in Lok Adalat vide order dt.13.05.2023. Proceeding against accused No.1 company has been stayed by Hon'ble Apex Court.
- 4 The complainant examined Sh. Shravan Kumar, as CW-1 to substantiate the allegations levelled against the accused. He has stated that he is currently posted with the office of complainant in the capacity of Assistant Registrar of Companies and he has given the charge of prosecutions before courts of companies registered with the office of complainant and the office order authorizing me to depose in the present matter is exhibited as **Ex. CW 1/1 (OSR)**. That the accused No.1 company was incorporated with the office of complainant on 09.12.1982 and the certified copy of master data of accused No.1 company evidencing the same is exhibited as **Ex. CW 1/2 (running into two pages)**. That the accused No.2 to 4 were Directors of accused No.1 company during the alleged period of

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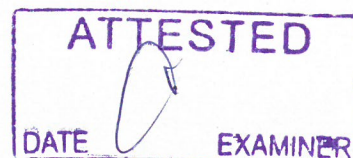


default and the certified copy of signatory details of accused No.1 company evidencing the Directorship of accused No.2 to 4 is exhibited as **Ex. CW 1/3**. That the accused No.1 company did not file its financial statements for the F.Y ending on 31.03.2015 in compliance with Section 137 of The Companies Act, 2013 and accused No.2 to 4 were Directors and liable as 'officers who is in default' for compliance of the same and the accused No.1 company also did not hold its annual general meeting for the F.Y. 2014-15 in compliance of Section 96 of The Companies Act, 2013 for which the accused No.2 to 4 are liable to be punished as 'officers who is in default' in accordance with Section 99 of The Companies Act, 2013. That the show cause notice for the aforementioned default sent on 04.10.2016 on the registered e-mail ID of the accused No.1 company is **Ex. CW 1/4 (running into two pages)**. That the Certificate under Section Section 65B of The Indian Evidence Act, 1872 in support of the electronic documents is exhibited as **Ex. CW 1/5**. The certificate is signed by Dr. Afsar Ali at Point A.

4.1 During his cross examination, CW1 stated that the present complaint was filed on 01.03.2017 and the complaint is filed on the instructions of the Directorate. That he was not the then Directorate who had issued the directions to file the present complaint and he did not file the present complaint, it was filed by the then AROC Dr. Afsar Ali, who was posted in the department. That he does not recall the exact date when the show cause notice was issued to accused No.3. That as per the record, accused No.3 was a Director and not a non executive Director. That he does not know that apart from the Directors of accused No.1 company who have been arrayed as accused No.2 to 4 were there any other Directors who were on the Board of the company

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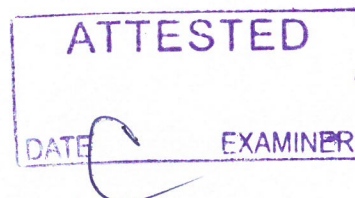
during the alleged period of default. It is correct that I was not the part of the processes which were initiated prior to filing of the present prosecution. He denied that accused No.3 has been falsely implicated in the present case or that accused No.3 was never the Director of the accused No.1. He also denied that accused No.3 was never AR of accused No.1 company. That he has not seen document signed by accused No.3.

- 5 Statement of accused u/s 313 Cr.P.C against the accused no.3 has been recorded on 10.01.2024.
- 6 Accused summoned and examined Sh. Brij Lal Belwal as DW1 in his defence. That he has stated that he has been authorised vide office order dated 18.01.2024 to place on record the documents summoned from the Office of ROC, NCT of Delhi & Haryana and the office order is Ex. DW 1/1. That the Certificate under Section 65B of Indian Evidence Act in support of electronically derived documents is Ex. DW 1/2 (running into two pages), the master data of accused No.1 company is Ex. DW 1/3 and the signatory details of accused No.1 company is Ex. DW 1/4. That the e-form DIR-11 filed by accused No.3 Rajiv Agarwal intimating his resignation as a Director of accused No.1 company is Ex. DW 1/5 (running into two pages). That the e-form DIR-12 filed by accused No.1 company intimating the appointment of accused No.3 and accused No.4 as Additional Directors (Non-executive) of accused No.1 company is Ex. DW 1/6 (running into 5 pages). That the e-form DIR-12 filed by accused No.1 company intimating the change in the situation of Directorship (Non-executive) of accused No.3 and 4 is Ex. DW 1/7 (running into 5 pages).
- 7 I have heard the arguments and perused the record.

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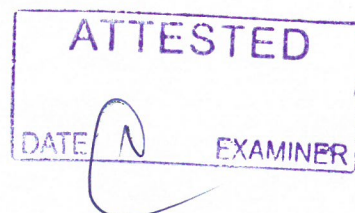
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8 During final arguments learned Company Prosecutor has vehemently submitted that accused No.3 was appointed as the independent director on 26.09.2015, however, the present complaint has been brought as company has not conducted any AGM for the F.Y. 2014-15. It is submitted that when there was no AGM, the designation of accused No.3 can not be changed to independent director on 26.09.2015 as shown in Ex. DW 1/7. It is vehemently submitted that when there was no change in the position of accused No.3, he shall be treated as director (executive) of the company and shall be liable as person responsible under Section 2(60) of The Companies Act, 2013. It is further submitted that even assuming that accused No.3 was a independent director, the provisions of The Companies Act, 2013 are such that it provide responsibility of independent director to convene AGM and to file financial documents of the company for the relevant financial year. Learned company Prosecutor has specifically referred to Section 2(60) (vi), Section 149(4), Section 152(2), Section 177(9) & (10), Schedule-IV of Companies Act and Rule 6 of The Companies (Meeting of Board and its Powers) Rules 2014 and has submitted that a combined reading of these provisions gives a duty to the independent directors to convene the AGM and file the financial documents of the company and in case of dereliction in duty, the independent director is also liable as per Section 99 and 137 of The Companies Act. It is submitted that it is admitted position that accused No.1 company has not conducted AGM and has not file financial documents for the financial year ended on 31.03.2015 and accordingly, accused No.3 is liable to be convicted and punished accordingly.

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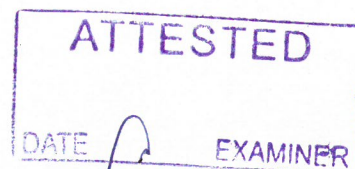
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- 9 Learned counsel for accused No.3 has vehemently submitted that accused No.3 was appointed as additional independent director on 28.03.2015 for a term of two years by the accused No.1 company. It is submitted that same can be verified from the appointment letter dated 28.03.2015 placed on page No.313 of the written submissions filed by accused No.3. It is submitted that as per the appointment letter, it was not within the right and duties of accused No.3 to convene AGM or to file the financial documents of the accused No.1 for any relevant year. It is further submitted that working of accused No.3 as independent additional director was governed by the appointment letter dated 28.03.2015. It is further submitted that if AGM for the financial year ended on 31.03.2015 did not take place and accused No.3 could not be designated properly as independent director, it is submitted that same does not make accused No.3 a executive director and the position of accused No.3 shall be the same i.e. additional independent director. It is submitted that learned Company Prosecutor had tried to over stretch the provisions of the Companies Act, 2013 so as to read in between lines the responsibility and consequential liability of accused No.3 to hold AGM and to file the financial documents for financial year ended on 31.03.2015, however, it should not be ignored that provisions of Companies Act, 2013 under which the complaint has been filed provides the criminal liability of accused No.3 and accordingly, the provisions of Companies Act, 2013 should be construed strictly and as per literal rule of interpretation. It is submitted that Section 2(60) of The Companies Act or the section referred by learned Company Prosecutor or any other provision of Companies

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Act do not provide the duties and consequential liability of independent director to convene AGM and to file the financial document of the company. It is submitted that accused No.3 is liable to be acquitted.

- 10 Before proceeding ahead it is important to reproduce various provisions of law referred by the parties during final arguments and are required to be considered for deciding the present case:

Section (60) of the Companies Act, 2013

"officer who is in default" for the purpose of any provision in this Act which enacts that an officer of the company who is default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely:-

(vi) every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance;

Section 149:

Company to have Board of Directors -

(4) Every listed public company shall have at least one-third of the total number of directors as independent directors and the Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies.

Explanation - For the purposes of this sub-section, any fraction contained in such one-third number shall be rounded off as one.

Section 152:

Appointment of directors -

(2) Save as otherwise expressly provided in this Act, every director shall be appointed by the company in general meeting.

Section 177:

Audit Committee -

(9) Every listed company or such class or classes of companies, as may be prescribed, shall establish a vigil mechanism for director and employees to report genuine concerns in such manner as may be prescribed.

(10) The vigil mechanism under sub-section (9) shall provide for adequate safeguards against victimisation of persons who use such mechanism and make provision for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases.

Schedule IV:

Code for Independent Directors

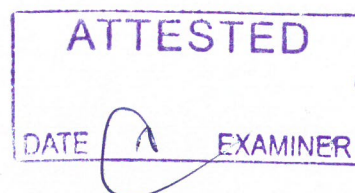
II. Role and Functions :

(4) satisfy themselves on the integrity of financial information and that financial controls and the systems of risk management are robust and defensible;

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(5) safeguard the interests of all stakeholders, particularly the minority shareholders;

III. Duties

(3) strive to attend all meetings of the Board of Directors and of the Board committees of which he is member;

(4) participate constructively and actively in the committees of the Board in which they are chairpersons or members;

(5) strive to attend the general meetings of the company;

The Companies (Meeting of Board and its Powers) Rules, 2014

(6) Committees of the Board—

The Board of directors of (every listed public company) and a company covered under rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 shall constitute an 'Audit Committee' and a 'Nomination and Remuneration Committee of the Board'.

96. Annual general meeting.- (1) Every company other than a One Person Company shall in each year hold in addition to any other meetings, a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it, and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next:

Provided that in case of the first annual general meeting, it shall be held within a period of nine months from the date of closing of the first financial year of the company and in any other case, within a period of six months, from the date of closing of the financial year:

Provided further that if a company holds its first annual general meeting as aforesaid, it shall not be necessary for the company to hold any annual general meeting in the year of its incorporation:

Provided also that the Registrar may, for any special reason, extend the time within which any annual general meeting, other than the first annual general meeting, shall be held, by a period not exceeding three months.

(2) Every annual general meeting shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday and shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situate:

Provided further that the Central Government may exempt any company from the provisions of this sub-section subject to such conditions as it may impose.

Explanation.-- For the purposes of this sub-section, National Holiday means and includes a day declared as National Holiday by the Central Government.

99. Punishment for default in complying with provisions of sections 96 to 98.- If any default is made in holding a meeting of the company in accordance with section 96 or section 97 or section 98 or in complying with any directions of the Tribunal, the company and every officer of the company who is in default shall be punishable with fine which may extend to one lakh rupees and in the case of a continuing default, with a further fine which may extend to five thousand rupees for every day during which such default continues.

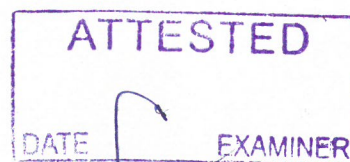
137. Copy of financial statement to be filed with Registrar.- (1) A copy of the financial statements, including consolidated financial statement, if any,

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along with all the documents which are required to be or attached to such financial statements under this Act, duly adopted at the annual general meeting of the company, shall be filed with the Registrar within thirty days of the date of annual general meeting in such manner, with such fees or additional fees as may be prescribed within the time specified under section 403:

Provided that where the financial statements under sub-section (1) are not adopted at annual general meeting or adjourned annual general meeting, such unadopted financial statements along with the required documents under sub-section (1) shall be filed with the Registrar within thirty days of the date of annual general meeting and the Registrar shall take them in his records as provisional till the financial statements are filed with him after their adoption in the adjourned annual general meeting for that purpose:

Provided further that financial statements adopted in the adjourned annual general meeting shall be filed with the Registrar within thirty days of the date of such adjourned annual general meeting with such fees or such additional fees as may be prescribed within the time specified under section 403:

Provided also that a One Person Company shall file a copy of the financial statements duly adopted by its member, along with all the documents which are required to be attached to such financial statements, within one hundred eighty days from the closure of the financial year:

Provided also that a company shall, along with its financial statements to be filed with the Registrar, attach the accounts of its subsidiary or subsidiaries which have been incorporated outside India and which have not established their place of business in India.

(2) Where the annual general meeting of a company for any year has not been held, the financial statements along with the documents required to be attached under sub-section (1), duly signed along with the statement of facts and reasons for not holding the annual general meeting shall be filed with the Registrar within thirty days of the last date before which the annual general meeting should have been held and in such manner, with such fees or additional fees as may be prescribed within the time specified, under section 403.

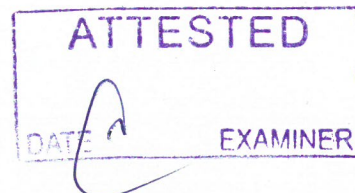
(3) If a company fails to file the copy of the financial statements under sub-section (1) or sub-section (2), as the case may be, before the expiry of the period specified in section 403, the company shall be punishable with fine of one thousand rupees for every day during which the failure continues but which shall not be more than ten lakh rupees, and the managing director and the Chief Financial Officer of the company, if any, and, in the absence of the managing director and the Chief Financial Officer, any other director who is charged by the Board with the responsibility of complying with the provisions of this section, and, in the absence of any such director, all the directors of the company, shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.

11 From the consideration of argument and perusal of record and written submissions filed by the parties, it is noted that both the parties are at agreement that accused No.3 was appointed as

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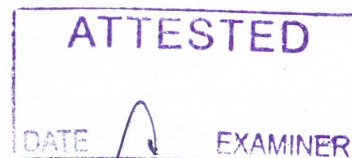
additional independent director of accused No.1 company vide appointment letter dated 28.03.2015. Parties are again at agreement that AGM for financial year ended on 31.03.2015 did not take place and financial document for the said financial year could not be filed as per Section 137 of The Companies Act. From the said admitted position on behalf of both the sides, it is beyond any doubt or confusion that despite filing of Form DIR-12 Ex. DW 1/7, the accused No.3 could not be properly designated as independent director as new director / independent director can be appointed only in AGM, which did not take place for the financial year ended on 31.03.2015. That being the position, the accused No.3 will certainly be in the same position, in which he was before filing DIR-12 Ex. DW 1/7. Accordingly, there is no doubt that accused No.3 was in a position of additional independent director for the relevant point of time.

11.1 Further, it has not been the case of the complainant either in complaint or in the evidence lead by the complainant or during the final arguments that accused No.3 was actually a full time director of accused No.1 and with a malafide intention to cheat the members and to evade the procedure of law, he had been designated as independent director or additional independent director. That being the position, it is to be determined whether the provisions of Companies Act, 2013 castes on independent director, duties of convening AGM or filing the financial documents of the company and consequentially whether he can be held responsible for non holding AGM or non filing of financial documents of the company. The learned Company Prosecutor has read Section 2(60) (vi), Section 149(4), Section

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152(2), Section 177(9) & (10), Schedule-IV of Companies Act and Rule 6 of The Companies (Meeting of Board and its Powers) Rules 2014 together in a very articulated manner so as to point out the duties of independent directors. However, we have to keep in mind that we have to construe the said provisions strictly and by rule of literal interpretation, for the purposes of determining criminal liability of accused No.3. In this regard court is guided by the judgment of hon'ble Apex Court in Anita Hada vs. M/s. Godfather Travels & Tour Pvt. Ltd., Criminal Appeal No.838/2008 and Hon'ble High Court of Delhi in The Commissioner of Income Tax-II vs. JDS Apparels Private Limited, Income Tax Appeal No.608/2014.

11.2 From the consideration of provisions pointed out by learned Company Prosecutor the court is of the opinion that the independent directors have been assigned task of over all vigilance, scrutinizing of financial documents, safe guarding the interest of all stakeholders and to evaluate the performance of management, however, there is no duty or responsibility casted upon the independent directors to convene AGM or to file financial documents of the company. To construe the duty / responsibility to convene AGM or to file financial documents as per Section 96 and 137 respectively shall amount to going too far and reading up the provisions of Companies Act, which can not be done while deciding the criminal liability of accused No.3.

12 On the basis of above discussion complainant could not prove beyond reasonable doubt that it was duty of accused no.3 to convene AGM or to file financial documents as per Section 96 and

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ATTESTED

DATE

EXAMINER

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137 respectively or that accused No.3 was person responsible within the meaning of Section 2(60) of The Companies Act, 2013 as it was admitted position that accused no.3 was additional independent director. Accordingly, accused No.3 is acquitted for offence under Section 99 and 137 of The Companies Act, 2013 subject to furnishing bail bond under Section 437A Cr.P.C.



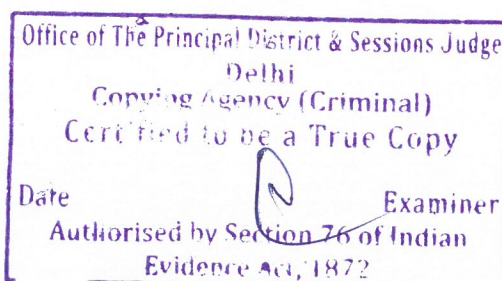
Announced in the open court
on this 9th July 2024

Mayank
MAYANK MITTAL
ACJM (Spl. Acts), CENTRAL
TIS HAZARI COURTS, DELHI
19.07.2024

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