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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 18.09.2015**

% **RSA 123/2015 & C.M. No.5731/2015**

RAJ PAL Appellant

Through: Ms. Sunita Harish, Advocate

versus

RAM PHAL THR LRS Respondent

Through: Mr. Sharad Chandra, Adv for R-1

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. I have heard learned counsels for the parties. Though the evidence led by the parties has not been placed on record and the Trial Court record has not been requisitioned, during the course of arguments, the parties have produced the relevant evidence before this Court from their own record, which have been perused by this Court.

2. The present second appeal is directed against the judgment and decree passed by the First Appellate Court, namely, ADJ-06, South Distt., New Delhi in RCA No.12/2014 preferred by the appellant/defendant. By the impugned judgment and decree, the First Appellate Court has dismissed the

said first appeal of the appellant and affirmed the judgment and decree passed by the Trial Court, namely, SCJ-cum-RC (North) Delhi in Suit No.99/1999 titled Sh. Ram Phal v. Ram Kishan & Anr. The Trial Court by the said judgment and preliminary decree, has decreed the original suit seeking partition, possession and rendition of accounts/mesne profits.

3. The facts in brief are that the plaintiff, Ram Phal and defendant no.1 Ram Kishan were brothers – both sons of late Sh. Bahala. Defendant no.2 Raj Pal, who is the appellant herein, is the son of defendant no.1 Ram Kishan. Late Sh. Bahala was the owner of House No.18, Begumpur, Harijan Basti, Near Malivya Nagar, New Delhi, admeasuring 150 sq yds. with construction thereon. The same was shown in the site plan annexed with the plaint in colour red.

4. The said house was constructed by Sh. Bahala. The allotment had been made by the Delhi State Harijan Cooperative Association Ltd., Delhi on 01.10.1972. The plaintiff was allotted the adjoining plot no.17 on one side, while defendant no.1 had purchased the adjoining plot on the other side of plot no.18, i.e. plot no.19 from the original allottee. Both the plaintiff and defendant no.1 raised the construction on their respective plots.

5. The defendant continued to live with late Sh. Bahala after purchasing his plot no.19, which was let out at times. Late Sh. Bahala died on 18.02.1979 and upon his death, the plaintiff claimed that the suit property devolved upon the plaintiff and defendant no.1 in equal shares. The plaintiff stated that defendant no.1 continued to live in the suit property with the assurance that the plaintiff may claim his right, i.e. half share in the suit

property, when he faces paucity of accommodation. He also requested the plaintiff not to disturb the set up.

6. The plaintiff stated that sometime in April 1998, he found that the suit property is being got assessed to house tax in the name of defendant no.2. At that stage, the plaintiff started claiming his half share in the suit property from defendant no.1, but to no avail.

7. The plaintiff further stated that defendant no.1 started making construction on plot no.19. The plaintiff requested him not to damage the house/plot no.18. However, he threatened to demolish the same so as to build a single building on the two plots, i.e. plot no.18 and 19. The plaintiff then served a notice dated 15.08.1998 through his counsel on the defendant, but the same was not replied to. The plaintiff filed the civil suit on 26.05.1998 to seek a permanent injunction against defendant no.1, from demolishing the house no.18, or raising construction therein.

8. In the written statement filed by defendant no.1 in the said suit, the defendant no.1 claimed to be the owner of the house of plot no.18 by adverse possession. He simultaneously also claimed that his son defendant no.2 herein is the owner on the basis of an alleged will of late Sh. Bahala. The defendant filed a copy of the alleged will, and a copy of the alleged certificate issued by Delhi State Harijan Cooperative Association Ltd. showing that defendant no.2 is holding plot no.18.

9. The plaintiff stated that the said certificate had been got issued without inviting “no-objection” from the LRs, and even without requiring defendant no.2 to get the alleged will probated. He also doubted whether the

said certificate had actually been issued by the said Association. The plaintiff also claimed that the defendant had let out portions of the suit property and was receiving rent from the tenants, and he claimed his half share in the plot and in the earnings derived from the suit property.

10. Upon being summoned, the defendants filed their written statement. One objection taken was to the valuation of the suit property. It was claimed that market value of the suit property was 12-15 lacs. It was also claimed that the suit is not maintainable since the earlier suit had been withdrawn. The defendants also claimed that they were in uninterrupted and hostile possession of the suit property since 1972, and had become owners by adverse possession. Defendant no.2 also set up the aforesaid alleged will claimed to have been executed by late Sh. Bahala. The defendants also relied on the aforesaid certificate dated 25.01.1980 issued by Delhi State Harijan Cooperative Association Ltd.

11. On the basis of the pleadings, the Trial Court framed the issue on 16.12.2002, which reads as follows:

“1. Whether the suit has been properly valued for the purpose of court fees and jurisdiction? If in negative, its effect ? OPP.

2. Whether the suit is barred u/s 34 of Specific Relief Act as alleged in para 2 and 4 of the WS? If so, its effect ? OPD.

3. Whether the plaint is liable to be rejected u/o 7 R.11 CPC as alleged by defendant ? OPD.

4. Whether the plaintiff has suppressed any material fact as alleged in para 5 of preliminary objections ? If so, its effect ? OPD.

5. Whether suit is barred u/s 41 (i) of Specific Relief Act as alleged in WS ? OPD.

6. Whether defendants are in continuous possession of the suit plot and have become the owners by adverse possession ? OPD.

7. Whether plaintiff is entitled for the relief of Partition If so, to what share ? OPP.

8. Whether the plaintiff is entitled for the relief of rendition of accounts and mesne profits ? If so, to what extent and against which of the defendants ? OPP.

9. Whether plaintiff is entitled for the relief of possession ? If so, to which portion of property ? OPP.

10. Relief.”

12. An additional issue was framed on 29.07.2005, which reads as follows:

“1. Whether suit of the plaintiff is barred by limitation as alleged in the preliminary objection no.7 in the amended written statement of the defendant no.1 and 2? OPD.”

13. At the trial, the plaintiff examined himself as PW-1. He also produced three other witnesses. Defendant no.1 examined himself as DW-1, while defendant no.2 examined himself as DW-2. The defendants examined three other witnesses.

14. The Trial Court returned the finding on all the issues in favour of the plaintiff, except the issue arising from the plaintiffs claim for mesne profits. Accordingly, the Trial Court passed a preliminary decree for partition in

favour of the plaintiff, by holding that the plaintiff and defendant no.1 are the owners in equal share of the suit property to the extent of 75 sq yds each.

15. The aforesaid judgment and preliminary decree was assailed by the appellant before the First Appellate Court. As aforesaid, the said first appeal has been dismissed by the impugned judgment.

16. The submission of Counsel for the appellant, firstly, is that the courts below have not correctly dealt with the preliminary objection of the appellant/defendant qua valuation of the relief of partition and possession. Learned counsel submits that the plaintiff/respondent had valued the said relief for purpose of court fee and jurisdiction at Rs.3,238/- by applying the rate of Rs.22.50 per sq yd, whereas the value of the suit property was anywhere between 12-15 lacs. Learned counsel submits that the suit property is located in the vicinity of Malviya Nagar, South Delhi, and it was unthinkable that the market value of the suit property was only Rs.22.50 per sq yd in the year 1999 when the suit was filed. Learned counsel submits that the Trial Court did not even have the pecuniary jurisdiction to decide the suit, for the same reason.

17. To consider the said submission of the appellant, it is necessary to peruse the averments made by the plaintiff in the plaint, and the justification offered by the plaintiff for valuing the relief of partition and possession in the manner aforesaid. The plaintiff stated that the market value of the land was based on the valuation/compensatory rights assessed by the Land Acquisition Collector of the adjoining land. He stated that the suit property is non-saleable and is located in a congested colony. He stated that the

original allotment/purchase price of the plot was only Rs.1,000/-.

18. The Trial Court rejected the said objection of the appellant/defendant by observing that the defendant had not denied the fact that the property is non-saleable and is located in a congested locality. The defendant while raising the said objection had not produced any evidence to establish that the value of the suit property was 12-15 lacs. It was held that the burden to prove that the market value of the property in question was 12 lacs, or around that figure, was on the defendant. In the absence of any evidence to the contrary, the valuation of the suit property as valued by the plaintiff was accepted by the Trial Court.

19. The First Appellate Court also rejected this objection of the appellant/defendant and while doing so, reference was made to ***Hafiz MD. Fateh Naseeb v. Haji Abdur Rab***, AIR 1954 Cal 101.

20. I do not find any merit in the submission of Counsel for the appellant with regard to the objection to the valuation of the reliefs in the suit. It cannot be said that either the Trial Court or the First Appellate Court have fallen in perversity or patent error while returning the consistent findings with regard to the valuation of the suit property. It has come on record that the suit property was allotted to Sh. Bahala at a sum of Rs.1,000/-. It was also not denied that the suit property is situated in a congested area and is non-saleable. If it was the objection of the appellant/defendant that the market value of the property was 12-15 lacs at the time of filing of the suit, it was for the defendants to lead evidence in that regard, which they failed to do. Obviously, the plaintiff could not be expected to prove something that

did not exist.

21. Counsel for the appellant next submits that the will dated 22/28.03.1976 of late Sh. Bahala in favour of the appellant had been duly proved. She submits that DW-3 Desh Raj was the son of one of the attesting witnesses, Uday Singh. DW-3 in his examination in chief on affidavit had stated that he knew the parties who are his relatives. He explained the relationship between the parties and himself. He stated that the defendants were living in the property of late Sh. Bahala, i.e. the suit property, since the time when Sh. Bahala was alive, whereas the plaintiff was living separately since long. He stated that Uday Singh was his father, who had expired 15 years back. He stated that he had seen his father putting the thumb impression and that he could identify the thumb impression of his father. He stated that he had seen the original will of 1976 and he identified the thumb impression of his father at point-C on the will Ex. DW-1/1.

22. The courts below have consistently rejected the testimony of DW-3. Before I deal with the reasons given by the courts below, I consider it appropriate to take note of the cross examination of DW-3. DW-3, firstly, stated that he had no proof of the death of his father Sh. Uday Singh. Upon being shown his own affidavit by way of evidence Ex. DW-3/A, he could not state as to what is the nature of the said document, since he is illiterate. At the same time, he stated that the contents of the affidavit had been explained to him in Hindi by his counsel. On being confronted with Ex. DW-1/1 and on being asked about the nature of the said document, he stated that it is something relating to a plot. He stated that it is his father's thumb impression at point-C on Ex. DW-1/1 and that he had seen the said document

earlier during the lifetime of his father, which was shown to him about 20-25 years back. He stated that he could identify the thumb impression of his father as he had seen him putting his thumb impression. He denied the suggestion that it was not his father's thumb impression.

23. The Trial Court held that a person can identify the handwriting and signature of the executant if he is acquainted with his handwriting or his signature in the ordinary course of business. The Trial Court raised the issue as to how an illiterate person or other witness, can identify the thumb impression of the executant or a witness, when no proof of similar thumb impression or any registered document – either of the executant or the attesting witnesses, had been placed on record; no expert opinion had been led by the defendant to prove the thumb impression by comparing the same with other admitted thumb impression of the executant or the attesting witnesses. The court also observed that it was not disclosed as to who got the will Ex. DW-1/1 typed. Though Ex. DW-1/1 recites that Sh. Bahala put his signatures and thumb impression after the will was read over to him, and the witnesses also put their signatures and thumb impression on the will, but the will Ex. DW-1/1 did not bear any signatures of either the executant or the attesting witnesses. The circumstances in which, and the place at which the will was got typed were not disclosed or explained. The Trial Court, therefore, held the will Ex. DW-1/1 to be shrouded in suspicious circumstances.

24. The First Appellate Court has conferred with the said findings. While doing so, the First Appellate Court referred to Section 68 of the Indian Evidence Act, which requires the document to be proved by the attesting

witness, if the attesting witness is alive. The First Appellate Court has observed that the thumb impression of Uday Singh (wrongly typed as Udar Singh) was totally smudged – to such an extent that no one can see even a single finger print mark on it. The will is neither registered nor notarised.

25. The submission of counsel for the appellant – that the will had been proved through DW-3 Desh Raj, and that the onus lay on the respondent/plaintiff to prove that the document is forged, was rejected and, in my view, rightly so. The reasoning adopted by the First Appellate Court reads as follows:

“It is well settled position of law that if the executant of Will is a illiterate person and the Will is unregistered and even not notarized, the Court should be circumspect while dealing with the allegations of execution of Will and should deal with al the suspicious circumstances more diligently. In the present case, the beneficiary of the Will i.e. DW Ram Kishan in his evidence stated that he was present when the .Will was executed, the Will was being executed, in favour of his son to the exclusion of other LRs and he being the father of the beneficiary was allegedly present there as per his testimony though, no such allegation was made in the pleadings. This, in my opinion, is itself is a suspicious circumstance existing in the process of above execution. There is another admission made by DW2 Rajpal in his cross examination that Kanwar Pal Singh i.e. attesting witness no.1 on the Will »was a government employee. If he , was a government employee, then he cannot be a totally illiterate person who is unable to sign but he has allegedly put his thumb impression on the said Will. The third suspicious circumstance arose from, the testimony of Deshra] i.e. DW-3 who admittedly is an illiterate person but in his affidavit stated

that he had seen his father Uday Singh, the attesting witness putting his thumb impression and he can identify the thumb impression of his father on the Will at ,point; C. It is unexplainable that without any technical training and equipments, how one person can identify the thumb impression even of his close relatives, especially when his thumb impression is smudged one and one cannot see even a single finger prim mark on it It is also pertinent to mention here that during his cross examination the DW3 Deshraj when up to saying that he can identify the thumb impression of his father as he has seen him putting his thumb impression but no such allegation was made in his affidavit that he was present at the time of alleged execution of Will but still he improved his statement in his cross examination, rather he could not prove any death certificate of his father on record or any document showing his relationship with Uday Singh. Having regard to the above mentioned anomalies in his statement, in my opinion, the testimony of DW Deshraj cannot be said to be are liable testimony for holding the Will to be validly executed. No expert witness was examined, no admitted thumb impressions of the executant or the attesting witnesses were placed on record for comparison. Rather all the circumstances of the execution of the Will are not explained, such as where it was executed, how many persons were present there, from the documents were got typed etc. All these above mentioned facts does not allow the Court to believe in the factum of alleged execution of Will and it can safely be said that the defendant has failed to prove the Will in question, Hence this issue is decided in favour of plaintiff/respondents herein and against the defendant.”

26. Both the courts below have returned consistent findings of fact with regard to the will Ex. DW-1/1 upon appreciation of evidence led by the parties. The appellant has not been able to point out either any perversity, or

mis-direction in the approach, or consideration of extraneous evidence or irrelevant circumstances, or non-consideration of relevant evidence by the courts below, in the matter of appreciation of evidence. Particularly when the Will is claimed to have been executed and witnessed by illiterate persons, and it bears only the thumb impressions of the executant and the attesting witnesses, the courts have to be more circumspect when it comes to examination of the evidence led by the party setting up the will. The other admitted thumb impressions of the executant and the attesting witnesses should have been produced by the defendants – for the purpose of comparison, which was not done. Expert evidence should have been led to prove the genuineness of the thumb impression of the executant and the attesting witnesses, by comparison with admitted thumb impressions. The scribe of the will, or the typist, in case the same was typed out, should have been produced. The details with regard to the place of execution of the will should have been disclosed and proved on record. None of this has been done by the appellant/defendant. Therefore, the consistent findings returned with regard to the non establishment of the will do not call for interference in the second appeal.

27. Lastly, counsel for the appellant has submitted that the defendants were in hostile possession of the suit property since the death of Sh. Bahala in 1979. Reliance has been placed on *L.N. Aswathama & Anr. v. P. Prakash*, 2011 (1) CC Cases 026 (SC), by counsel for the appellant in support of her submissions.

28. Once again, I find that the both the courts below have consistently rejected this defence of the appellant. The Trial Court observed that though

in the written statement, the defendants had set up the plea of ownership by virtue of the will Ex. DW-1/1, as well as by virtue of adverse possession, but in their examination in chief as DW-1/A and DW-1/2A respectively both DW-1 and DW-2 did not claim the property by adverse possession.

29. The issue of adverse possession is an issue of fact. In my view, in the absence of any affirmative evidence by the defendants on their defence of adverse possession, the said issue required no further discussion, and was bound to be decided against the defendants, as the onus fell entirely on them to make good their plea of adverse possession. It was for the defendants to establish on record that they were openly in hostile possession of the suit property to the knowledge of the plaintiff, continuously and without protest or demur, for a period of over 12 years. Not having done the same, the said plea was bound to fall to the ground. In any event, I find that both the courts below have discussed the said plea of adverse possession and rejected the same.

30. The Trial Court observed that it was necessary for the defendants to establish that they were enjoying the property adverse to the title holders interest, after making the title holder aware that such enjoyment is against his interest. There was no averment in the written statement, and no evidence was led by the defendants to the effect that they enjoyed the property adverse to the plaintiffs interest after making him know that such enjoyment was against his interest. The Trial Court also took into consideration the circumstance that the plaintiff and defendant no.1 are real brothers and defendant no.1 was residing with the father of the parties being a family member. In the absence of evidence, to the effect that the

defendants enjoyed the suit property adverse to the plaintiffs interest after making him aware of that fact, the defendants could not become owner by adverse possession.

31. The First Appellate Court has similarly rejected the plea of adverse possession. While doing so, the First Appellate Court has placed reliance on the judgment of the Supreme Court in ***P.T. Munnichikkanna Reddy & Ors. v. Revamma & Ors.***, AIR 2007 SC 1753, and on several other decisions. It was held that except a mere pleading that “*the defendants are in continuous, undisturbed, uninterrupted and hostile possession of plot no.18 since the year 1972*”, there is no specific pleading as to when the possession of the defendants became hostile to the title of the plaintiff. The First Appellate Court in its detailed discussion on this issue, observed as follows:

“As per the own case of the defendant, they were living with their father Bahala since the allotment of the plot and they were taking care of him being a dutiful family member and therefore, he executed a Will in favour of defendant no. 2/appellant. Therefore, their possession from 1972 to 1979 cannot be hostile to the title of their father Bahala and this possession cannot be said to be hostile possession. Late Sh. Bahala expired in the year -1979 and thereafter, his both the legal heirs became owner of the suit property and the defendant/appellant was supposed to plead in his pleadings specifically as to when they started claiming themselves to be the owner of the suit property to the knowledge of the plaintiff/respondents herein. In the absence of such allegation, the court cannot fix the time from which the limitation of 12 years starts running. It is surprising that on the one hand, the appellant is claiming his ownership on the basis of adverse possession and on the other hand, they

are claiming ownership on the basis of a Will and that too, against the same person which on the face of it, is not maintainable in view of the law discussed above as the defendant is not allowed to take contradictory pleas in one breath. If we see the case of the defendant, as per his own case/allegations, the plaintiff was very much aware about the execution of Will and transfer of property. If the plaintiff was allegedly aware of these facts, then the defendant must have been enjoying the possession of the property as a rightful owner and not as a hostile possessor. Hence, the plea of adverse possession is not available to the defendant in view of his own defence as a main plea or as an alternative plea. Because the defendant cannot be allowed to shatter his entire defence taken by him during the trial in case of his failure to prove the same and to opt for an alternative plea of adverse possession because it is the hostile intention to possess which is to be seen and it cannot exist if the possession was on the basis of Will. It is well settled law that before opting for plea of adverse possession, the party should abandon all his other claims of rightful owner. They cannot co-exist together and even in appeal, the appellant is relying upon the Will of Bahala. The appellant argued that the plea of title on the basis of Will and the plea of adverse possession are not inconsistent pleas and can be taken together and he, in support of his contentions, relied upon the following judgments:

(1) L.N. Aswathama & Anr. Vs. P. Prakash 2011 (1) Civil Court Cases 026 (SC) wherein it is held -

that when a person in possession asserts to be owner, even if he fails to establish his title, his possession would still be adverse to the true owner Defendant claimed title which was proved to be false or fabricated - burden is very heavy upon him to prove actual, exclusive, open, uninterrupted possession for 12 year's.

In this case, both the parties were claiming title under different title chains and when plaintiff filed suit for possession on the basis of his title, the defendant registered the suit on the basis of his independent title and also raised an alternative plea of adverse possession and he could not prove his title over the suit property and finally laid his claim on the basis of adverse possession. The Trial Court held the judgment in favour of plaintiff declining both the pleas of defendant which was challenged in appeal and the Hon'ble Karnataka High Court reversed the judgment on the plea of title holding that plaintiff failed to prove his title better than the defendant. The said judgment was challenged before Hon'ble Supreme Court wherein it was observed that the Ld. High Court did not consider the entire evidence independently while passing the judgment and further decided both the pleas of defendant holding that in the given facts of the case, the plea of adverse possession cannot be said to be inconsistent with the plea of title as the defendant did not contend that he entered possession under or through the plaintiff. It is held that even if the defendant could not prove his title, but still his possession could be hostile to the true owner and held that both the pleas are not inconsistent pleas always and in some cases, they can be considered. (Para no. 18).

(ii) A. Krishnappa Vs. Thimmara Yappa 2002 (1) CCC 256 Karnataka.

In this case, both the parties were claiming their title under the same person. There was a history of chequered litigation with respect to the suit property. The plaintiff was claiming sale deed and the defendant was claiming under a Will and a gift deed which the defendant could not prove. Plaintiff was able to prove his title, but the suit was dismissed. The plea of adverse possession was said to be not available to the defendant as the

defendant was disputing the title of the plaintiff and was claiming title on the basis of a Will. Therefore, there cannot be necessary animus for perfecting title by adverse possession, but relying upon the Division Bench Judgment of Karnataka WAQF Board, Bangalore Vs. State of Karnataka & Ors. AIR 1996 Kant 55, the Hon'ble High Court held that both the pleas are not inconsistent with each other and matter was remanded back for evidence on this issue.

The perusal of the above mentioned judgments clearly holds out that in every case, it cannot be said that the plea of title and the plea of adverse possession are always inconsistent to each other and there are cases where both the pleas may be consistent to each other and can be taken by the defendant, but the other essentials of the plea of adverse possession should be made out as settled by Hon'ble Apex Court in the above mentioned judgments such as:

- There has to be specific pleadings in this regard as to since when the possession of the defendant is hostile to the tide of the owner and how.*
- That the plaintiff despite the knowledge of the fact of hostile possession, did not take any steps for recovery of possession for 12 years and & the possession of the defendant remained open and undisturbed.*

In the present case, the defendant is claiming his hostile possession since 1972 i.e. during the lifetime of his father Bahala and on the other hand, he is claiming that Bahala executed a Will in his favour. These two facts cannot co-exist together so, it cannot be said by any means that possession of the defendant was hostile to the title of his father during his lifetime as both these pleas cannot be taken against the same person and after the death of the father of the parties, the defendants nowhere stated that when they informed about the

execution of Will to the plaintiff or about the transfer of the property. They could not prove that these facts were in the knowledge of the plaintiff. There is no allegation that when the possession of the defendants became hostile to the title of the plaintiff. As per the settled law, it is the defendant who has to give the specific date or period when their possession became hostile. It is not a fact to be assumed. Mere holding the possession of the property for a longer time is no ground for holding the plea of adverse possession. In families, it is not uncommon that brothers allow one of them to stay in the premises without any objection even for their entire lives, but it does not mean that they have abandoned their right to the property. There is no evidence that the defendant ever claimed himself to be the owner of the property against the title of the plaintiff and the same cannot be presumed merely on the basis of long, undisturbed possession.

Therefore, the plea of adverse possession is not available to the defendant in the given facts and circumstances. Hence, this issue is also decided against the defendant. ”

32. In my view, the aforesaid discussion in the judgment of the First Appellate Court is exhaustive and fully deals with the plea of adverse possession set up by the appellant/defendant in the written statement, in relation to which no evidence was led by the defendants in their examination in chief. Pertinently, even after the demise of late Shri Bahala in 1979, the defendant no.1 had the right to occupy the suit property as a co-owner. Thus, his mere occupation of the suit property since 1979 could not be termed as hostile to the plaintiff or as adverse to the plaintiff. The same, however, became adverse only when the plaintiff learnt of the intention of the defendants to assert their rights in the suit property to the exclusion of

the rights of the plaintiff in 1998, as aforesaid.

33. Reliance placed on *L.N. Aswathama* (supra) is of no avail, since both the defences of the defendant, namely, that claimed through the will Ex. DW-1/1 as well as adverse possession have been considered and rejected on merits.

34. Accordingly, I find no merit in the present appeal and dismiss the same with costs quantified at Rs.10,000/-.

VIPIN SANGHI, J

SEPTEMBER 18, 2015

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