



2024:DHC:5686



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

% **Date of order: 23rd July, 2024**

+ C.R.P. 353/2023 & CM APPL. 61909/2023
SUBHASH KAPOOR

.....Petitioner

Through: Mr. Arvind K.Nigam, Sr. Advocate
with Mr.Rajiv K.Nanda, Mr.Kuldeep
Singh, Ms.Astha Jain, Mr.Aashish
Gumber and Ms.Jyoti Garg,
Advocates

versus

OM PRAKASH KAPOOR AND ORS

.....Respondents

Through: Mr.Rajat Aneja, Mr.Aditya Sharma &
Mr.Raman Goyal, Advocates for R-6

+ C.R.P. 355/2023 & CM APPL. 62031/2023

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Through: Mr. Arvind K.Nigam, Sr. Advocate
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versus

MR OM PRAKASH KAPOOR AND ORS

.....Respondents

Through: Mr.Rajat Aneja, Mr.Aditya Sharma &
Mr.Raman Goyal, Advocates for R-6.

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The captioned civil revision petitions filed under Section 115 of the Code of Civil Procedure, 1908 (hereinafter "CPC") have been filed on

C.R.P. 353/2023 & 1 connected matter

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behalf of petitioner seeking setting aside of the impugned orders dated 1st September, 2023 arising out of civil suits bearing Civ DJ no. 9241/2016 (CRP no. 353/2023) and Civ DJ no. 10334/2016 (CRP no. 355/2023).

2. The Civil Suit bearing Civ DJ no. 9241/2016 was filed by Sh. Om Prakash Kapoor along with others against Sh. Shubhash Kapoor (petitioner herein) and the Civil Suit bearing Civ DJ no. 10334/2016 was filed by Sh. Shubhash Kapoor against Sh. Suraj Prakash Kapoor and others. Both the suits were filed seeking partition, possession, and *mesne* profits.

3. In both of the aforesaid civil suits, applications under Order XXXII Rule 15 of the CPC were filed on behalf of Sh. Om Prakash Kapoor for appointment of next friend on his behalf. The learned Trial Court allowed the aforementioned applications and appointed one Sh. Rajnish Kapoor as the next friend of Sh. Om Prakash Kapoor for the purpose of suit proceedings vide impugned order dated 1st September, 2019.

4. Being aggrieved by the above said impugned order, the petitioner has filed the captioned civil revision petitions, seeking setting aside of the same.

5. Since the facts as well as the legal issues are common to both the revision petitions, the facts and submissions have been culled out from C.R.P no. 353/2023 for the purposes of adjudication.

6. Mr. Arvind K. Nigam, learned senior counsel appearing on behalf of the petitioner submitted that the impugned order is bad in law and liable to be set aside since the same has been passed without taking into consideration the entire facts of the case as well as the settled position of law.



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7. It is submitted that the learned Trial Court erred in passing the impugned order as it did not permit the petitioner to file reply to the application filed under Order XXXII Rule 15 of the CPC.

8. It is submitted that although the petitioner was given the right to be heard by way of filing written submissions, the contentions advanced as well as the judgment relied upon by the learned counsel for the petitioner were not considered while passing the impugned order.

9. It is further submitted that the impugned order does not advert to any submission made by the learned counsel on behalf of the petitioner before the learned Trial Court. It is submitted that the learned counsel on behalf of the petitioner had cited various judgments regarding the procedure to be followed for appointment of a guardian, however, the learned Trial Court failed to appreciate the same.

10. It is submitted that the learned Trial court passed the impugned order in a mechanical manner, without properly conducting judicial enquiry, relied upon the *ex-parte* opinion of the doctor, without recording his testimony or giving an opportunity to the other side/petitioner to cross-examine the doctor.

11. It is submitted that the learned Trial Court failed to undertake an enquiry and call for the opinion of an independent doctor, but rather, relied on the opinion of the consultant doctor of the respondent no. 1.

12. It is further submitted that the examination of respondent no. 1, which was conducted by the learned Trial Court via video conferencing, was



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unsatisfactory and should have been conducted physically before the Court. It is submitted that while the respondent no. 1 began to answer the first question in part, he suddenly stopped and did not answer the remaining questions posed to him, and the same is contrary to the established procedure of conducting a judicial enquiry under Order XXXII Rule 15 of the CPC.

13. It is submitted that the exercise of powers under Order XXXII Rule 15 of the CPC is now circumscribed by the provisions of the Mental Health Care Act, 2017 (hereinafter “the Act”), and the provisions thereof were completely ignored by the learned Trial Court, especially the jurisdiction of the Civil Court. It is also submitted that the application ought to have been filed before the District Court in Mumbai where the respondent no.1 resides. Therefore, in view of the foregoing submissions, it is prayed that the instant petition may be allowed and the reliefs be granted as prayed for.

14. *Per Contra*, the learned counsel appearing on behalf of the respondent no. 1 vehemently opposed the instant revision petitions submitting to the effect that the same are liable to be dismissed being devoid of any merits.

15. It is submitted that the learned Trial Court has passed the impugned order after taking into consideration the entire facts and circumstances of the case and there is no illegality of any kind thereto.

16. It is submitted that during the lockdown, the respondent no. 1 fell in the bathroom in the month of March, 2020 and resultantly has not been able to recover till date. Further, his mental faculties have also been grossly affected and upon consulting the doctor, it was discovered that he is



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suffering from dementia. It is submitted that the respondent no. 1 was suffering from dementia disease which has deteriorated his physical and mental condition, and it is worsening day by day as a result of which he is unable to perform routine functions. Further, on account of his inability to take a decision in relation to any matter including legal matters, it is necessary to appoint a guardian *ad litem* for him.

17. It is submitted that Mr. Rajnish Kapoor is the elder son of respondent no. 1 and has been residing with him since the last 60 years and that his wife namely, Smt. Chander Kapoor is also under his care and thus, Mr. Rajnish Kapoor is fit to be appointed as legal guardian. Therefore, in view of the foregoing submissions, it is prayed that the instant petition may be dismissed.

18. Heard the learned counsel appearing on behalf of the parties and perused the record.

19. It is the case of the petitioner that the learned Trial Court erroneously relied on the *ex-parte* opinion of the doctor without recording any testimonies from medical experts. Additionally, the enquiry conducted by the learned Court below *via* video conference was unsatisfactory, as the respondent merely answered the first question and refused to answer any subsequent questions, and under such arbitrary circumstances, the learned Court below deemed itself satisfied with the condition of the respondent which is against the settled position of law. It is contended that neither proper enquiry was conducted by the learned Trial Court nor did the learned



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Trial Court record the testimonies of any independent expert witness. Further, the impugned order is erroneous as the petitioner was barred from filing reply to the application under Order XXXII Rule 15 of the CPC, and merely giving permission to file the written submissions is against the rules of established procedure.

20. It has also been contended on behalf of the petitioner that Order XXXII Rule 15 of the CPC has been superseded by the Act which is a special legislation whose provisions should have been applied and considered, however, the learned Trial Court failed to take into consideration the application of the Act. As per the Act, the respondent no. 1 ought to have filed the application for appointment of a legal guardian before the District Courts in Mumbai where the said respondent resides. Therefore, it is prayed that since the petitioner's arguments were not considered in entirety, the impugned order is liable to be set aside.

21. In rival submissions, the respondent no. 1 has refuted the submissions advanced on behalf of the petitioner submitting to the effect that the same are baseless and without any merits. It has been submitted that the learned Trial Court rightly passed the impugned order, after taking into consideration that the respondent no. 1 is weak and suffering from dementia, and thus is not able to pursue litigation properly. Therefore, the instant petition may be dismissed being devoid of any merits.

22. At this stage, this Court deems it appropriate to peruse the impugned order, relevant extracts of which are as under:



“..1. Vide this order, this Court shall dispose off application under Order 32 Rule 15 read with Section 151 CPC moved on behalf for plaintiff no. 1 i.e. Om Prakash Kapoor for appointment of next friend on his behalf.

2. Arguments have already been heard. Record perused.

3. In said application, it is submitted that in March 2020, plaintiff no. 1 suffered a fall in bathroom and resultantly, has not been able to recover till date and his mental faculties have suffered. It is submitted that his consultant doctor has opined that he is suffering from Dementia. It is submitted that due to Dementia disease, his physical and mental condition have deteriorated and resultantly, he is unable to grasp the matters.

4. It is submitted that due to his inability to take decision in relation to any matter, it is necessary to appoint a next friend for him. It is submitted that elder son of plaintiff no. 1 namely, Sh. Rajnish Kapoor has been residing with him for last 60 years and taking care of him. It is submitted that Sh. Rajnish Kapoor has no interest adverse to that of plaintiff no. 1 and is a fit person to be appointed as next friend of plaintiff no. 1.

5. It is submitted that appointment of next friend for plaintiff no. 1 is necessary to ensure proper representation to him in the present proceedings, so prayer has been made to appoint Sh. Rajnish Kapoor as next friend of plaintiff no. 1 for the purpose or present proceedings.

6. During pendency of present application, plaintiff no. 1 was asked to appear through video conferencing (he was asked to appear through video conferencing as he is getting treatment in Mumbai and is of the age of 90+ and as per medical records suffering from illness) and on 22.08.2023, he appeared through video conferencing certain basic questions regarding his family



affairs education illness and present case proceedings were asked (said questions are part of the record), however, except one question he could not give reply of other questions and from his appearance and behaviour, it appeared that he is not able to remember things and is suffering from some illness.

7. In support of the present application, certain medical documents have also been filed on record which show that plaintiff no. 1 - Om Prakash Kapoor is getting treatment at Breach Candy Hospital Mumbai. Said medical documents are discharge summary and medical certificate dated 28.04.2023 issued by concerned doctor. Said documents show that plaintiff no. 1 - Om Prakash Kapoor is or the age of 90+ and suffering from Dementia and other diseases.

*8. This Court is of the considered view that the nature and extent of enquiry under Order 32 Rule 15 CPC has been discussed by Hon'ble Delhi High Court in case titled **Radhika Kapoor vs. State and Others, 2016 SCC Online Del 6652***

9. This Court is of the considered view that from the interaction with plaintiff no. 1 and medical evidence filed on record on his behalf, it is clear that plaintiff no. 1 is not in a position to protect his interest in the present suit. It appears that he has weak intellect and is incapable to look after his interest and affairs. This Court is of the further view that Sh. Rajnish Kapoor is son of plaintiff no. 1 and he does not interest adverse to that of plaintiff no. 1.

10. In view of above mentioned fact and circumstances present application is allowed and Sh. Rajnish Kapoor is appointed as next friend of plaintiff no. 1-Sh. Om Prakash Kapoor for the purpose of present suit proceedings. Accordingly, this application is disposed off..."



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23. Upon perusal of the aforesaid extracts, it is made out that the learned Trial Court decided an application filed under Order XXXII Rule 15 of the CPC which was moved by the plaintiff no. 1 (respondent no. 1 herein) seeking appointment of a next friend. During the pendency of the applications, plaintiff no. 1 appeared via video conferencing on 22nd August, 2023, as he was undergoing treatment in Mumbai and is over 90 years old. During this appearance, it was observed by the learned Court below that the plaintiff no. 1 struggled to answer basic questions about his family, education, illness, and the current case, reinforcing concerns about his memory and health. Medical documents, including a discharge summary and a medical certificate dated 28th April, 2023 from one Breach Candy Hospital in Mumbai, corroborate his condition, confirming his dementia and other health issues.

24. Based on the interaction with plaintiff no. 1 and the medical evidence, the learned Trial Court concluded that he is incapable of protecting his interests in the present suit due to his weakened intellect and mental faculties. Further, taking into consideration Sh. Rajnish Kapoor's suitability and lack of adverse interests, the learned Court allowed the application, appointing him as the next friend for plaintiff no. 1/respondent no. 1 in the ongoing proceedings, thereby disposing of the application.

25. Taking the foregoing paragraphs into consideration, the issue before this Court is to decide whether the learned Trial Court erred in passing the impugned order as alleged by the petitioner.



26. The contentions of the petitioner *qua* the alleged illegality in the impugned order are as follows:

- a. No proper enquiry has been conducted.
- b. Provisions of Mental Health Care Act, 2017 have been ignored.
- c. No opportunity to file reply to the application was given.

27. Here, it becomes apposite to understand the purpose of Order XXXII Rule 15 of the CPC, relevant portion of which is hereunder:

“..Order XXXII – Suits by or against minors and persons of unsound mind

[15. Rules 1 to 14 (Except rule 2A) to apply to persons of unsound mind.—Rules 1 to 14 (except rule 2A) shall, so far as may be, apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing being sued.] ...”

28. The aforesaid is a provision enshrined to provide that even persons who were not adjudged as having unsound mind can also apply for next friend or guardian if the Court is satisfied after ‘enquiry’ that the person is suffering from mental infirmities and is incapable of representing his interest in a suit.

29. With regard to the scope of ‘enquiry’ while deciding an application under the aforesaid provision, this Court is of the view that ‘enquiry’ conducted has to be proper and sufficient to determine the veracity of the



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claim and not for namesake. Courts should not hastily conclude that a person is mentally unfit just because some of their answers seem irrational, instead, Courts are duty bound to consider if the person has a significant mental condition, such as insanity or severe impairment. Further, Courts should take a practical approach and gather further evidence, like medical reports and independent expert witness, before making a decision. Moreover, Courts should grant the other party sufficient opportunities to contest the claim made under order XXXII Rule 15 of the CPC by allowing the contesting party to cross-examine the witnesses. The High Court of Kerala in ***Gopakumar v. Madhusoodanan Nair, 2023 SCC OnLine Ker 797***, has made similar observations with regard to the scope of enquiry and observed as under:

“...3. It is too adventurous for the courts to arrive at a conclusion under the second limb of Rule 15 merely on the reason that some of the answers which were given on examination of the person were not found to be rational. What has to be tested under the second limb involves the mental incapacity on account of any mental ailment or disorder which would include a question of insanity, complete impairment, unsoundness of mind etc. Hence, the court should adopt a pragmatic approach and if it is found necessary, call for further evidence including medical evidence, instead of jumping into a conclusion merely on the ground that some of the answers which were given by the person were found to be not convincing or rational. The procedure, then available, is to refer the parties to a Medical Board so as to obtain a report regarding any mental ailment, retardation or disorder or any impairment of mental ability to take a rational decision pertaining to his affairs or to protect his interest. The extensive jurisdiction



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vested with the court under Order XXXII CPC was elaborately considered by a three Judge Bench of Apex Court in Sharda v. Dharmpal [(2003) 4 SCC 493] and laid down that:-

“50.....The prime concern of the court is to find out as to whether a person who is said to be mentally ill could defend himself properly or not. Determination of such an issue although may have some relevance with the determination of the issue in the lis, nonetheless, the court cannot be said to be wholly powerless in this behalf. Furthermore, it is one thing to say that a person would be subjected to a test which would invade his right of privacy and may in some case amount to battery; but it is another thing to say that a party may be asked to submit himself to a psychiatrist or psychoanalyst so as to enable the court to arrive at a just conclusion. Whether the party to the marriage requires a treatment or not can be found out only in the event, he is examined by a properly qualified psychiatrist. For the said purpose, it may not be necessary to submit himself to any blood test or other pathological tests. 51. If the court for the purpose envisaged under Order 32 Rule 15 of the Code of Civil Procedure or Section 41 of the Indian Lunacy Act can do it suo motu, there is no reason why it cannot do so on an application filed by a party to the marriage. 52. Even otherwise the court may issue an appropriate direction so as to satisfy itself as to whether apart from treatment he requires adequate protection inter alia by way of legal aid so that he may not be subject to an unjust order because of his incapacity. Keeping in view of the fact that in a case of mental illness the court has adequate power to examine the party or get him examined by a qualified doctor, we are of the opinion that in an appropriate case the court may take recourse to such a procedure even at the instance of the party to the lis. 53. Furthermore, the court



must be held to have the requisite power even under Section 151 of the Code of Civil Procedure to issue such direction either suo motu or otherwise which, according to him, would lead to the truth.”..”

30. Further, in ***Duwuri Rami Reddi v. Duvvudu Papi Reddi, 1962 SCC OnLine AP 15***, the process of enquiry under Order XXXII Rule 15 of the CPC was discussed in detail wherein the following was observed:

“...21. In Balakrishnan v. Balachandran, (1956) 1 Mad LJ 459, Panchapakesa Ayyar, J., referred to, AIR 1941 Mad 505, and AIR 1949 Mad 292 and laid down that O. XXXII, R. 15 of the CPC. Is intended to ensure that no man is adjudged a lunatic without proper enquiry, and that the Court should hold a judicial inquiry and it may seek the assistance of medical experts. It was pointed out that the only safe course to adopt regarding the lunatics is to follow strictly the procedure prescribed in O. XXXII, R. 15 of the CPC, and that if the precaution of a judicial inquiry is not observed, a man cannot be declared to be a lunatic., and a guardian appointed for him on that basis. A decree passed against a defendant in such a case owing to the guardian not putting up proper or sufficient defence must be considered to be an ex parte decree, and must be set aside. At page 461, the learned Judge observed:

“That procedure involves a judicial inquiry which consists normally of two parts: (1) questioning the lunatic by the Judge himself in open court, or in chambers, in order to see whether he is really a lunatic and of unsound mind, and (2) as the Court is generally presided over only by a layman, to send the alleged lunatic to a doctor for report about his mental condition after keeping him under observation for some days..... When this elementary precaution of a judicial inquiry prescribed by law is not observed, I am afraid that the laws of this



country will not allow a man to be declared a lunatic and a guardian appointed for him, on such basis.”.

22. *From these decisions, the following principles emerge:*

(1) Order XXXII, R. 15 of the CPC places persons of unsound mind or persons so adjudged in the same position as minors for purposes of Rr. 1 to 14.

(2) Order XXXII R. 15 of the CPC applies not only to a person adjudged to be of unsound mind, as under the I old Code, but also to a person of weak mind.

(3) Where it is alleged that a party to a suit is of unsound mind, and the other party denies it, the Court must hold a Judicial inquiry, and come to a definite conclusion, as to whether by reason of the unsoundness of mind or mental infirmity, he is incapable of protecting his interests in the suit.

(4) Mental Infirmity may even be due to physical defects, if it renders him incapable of receiving any communication, or of communicating his wishes or thoughts to others.

(5) Whether a person is of unsound mind or mentally infirm for the purpose of the rule and the extent of the infirmity has to be found by the Court on inquiry.

(6) Where the question of unsoundness of mind arises not only under O. XXXII, R. 15 of the CPC but is also one of the issues in the suit, the Court has ample jurisdiction to enquire into that question, and for that purpose seek medical opinion.

(7) The enquiry should consist not only of the examination of the witnesses produced by either party, but also of the examination of the alleged lunatic by the Judge, either in



open court or chambers, and as Courts are generally presided over by lay-men, as a matter of precaution, the evidence of medical expert should be taken.

(8) Of course, the opinion, of a doctor, as is the opinion of any other expert, under Section 45 of the Evidence Act, is only a relevant piece of evidence.

(9) The Court may also compel the attendance of the alleged lunatic before it, and to submit himself for medical examination. If the alleged lunatic is in custody, the Court may direct the next friend or any other person having custody to produce him before the medical expert for examination.

(10) Where the precaution of judicial enquiry is not observed, the person cannot be declared lunatic, and a guardian cannot be appointed for him.

(11) When a person is adjudged a lunatic irregularly and improperly, and notice was not served on him, and a guardian alone was allowed to appear and defend the suit and decree was passed owing to the guardian not putting up a proper defence, the alleged lunatic can treat the decree against him as an ex parte decree, and have it set aside under O. IX R. 13 of the CPC.

31. Upon perusal of the above, it is made out that whilst deciding an application under Order XXXII Rule 15 of the CPC, a proper judicial enquiry must be conducted before declaring someone as mentally weak. This involves two steps, *firstly*, the Court personally questioning the person seeking appointment of a guardian/next friend and seeking opinion from an



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independent medical expert and *secondly*, examining testimonies of the witnesses presented by both the parties.

32. In light of the present case, it is observed that admittedly, the petitioner was not given any opportunity to file his reply, however, he was permitted to file written submissions. The petitioner has placed on record the written submissions dated 31st August, 2023 which was filed by him before the learned Trial Court.

33. This Court has gone through the contents of the aforesaid written submissions as well as meticulously examined the impugned order. Upon examination of the same, it is observed by this Court that on the pretext of conducting an enquiry under Order XXXII Rule 15 of the CPC, the learned Trial Court has only considered the submissions of the plaintiff no. 1 (respondent no. 1), the medical documents annexed by him, the opinion of the doctor of plaintiff no. 1 and then relied upon the response to the questions put forth to the respondent no. 1 by the learned ADJ. Furthermore, upon perusal of the questions put forth to the respondent no. 1, through video conferencing, it is made out that the respondent no. 1 responded to only a single question and no response to other questions was recorded.

34. This Court is of the view that even if it is apparent on the face of the record that the person seeking appointment of a legal guardian is a mentally weak person, not adjudged by any Court of law, it is still the duty of the Court to follow the established rules of procedure and failure to abide by the same is an abuse of the process of law.



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35. With respect to the matter in hand, this Court observes that the learned Trial Court failed to conduct a proper judicial enquiry by not giving the petitioner an opportunity to file reply and to cross-examine the respondent no. 1, his doctor and the medical documents produced along with the application under Order XXXII Rule 15 of the CPC.

36. Furthermore, there is nothing in the impugned order which shows that the learned Court below has taken into consideration the submissions of the petitioner made *qua* the applicability of the Mental Health Care Act, 2017, wherein, the petitioner had contended that the learned Trial Court does not have the jurisdiction to appoint a legal guardian of the respondent no. 1 as the same is now governed by the provisions of the Mental Health Care Act, 2017 and Section 116 of the said Act excludes the jurisdiction of the Civil Courts.

37. It is also pertinent to note that the learned Trial Court has further erred by not appointing an independent medical expert in order to verify the veracity of the claim made by the respondent no. 1.

38. Therefore, taking into consideration the observations made by this Court in the preceding paragraphs, it is held that the impugned orders suffer from illegality since the learned Trial Court has failed to adjudicate the respondent no. 1's application under Order XXXII Rule 15 of the CPC in a just and fair manner. The learned Trial Court did not pay heed to the contentions of the petitioner, thereby, failing to conduct a proper judicial



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enquiry. In view of the same, this Court is of the view that the impugned orders are liable to be set aside under Section 115 of the CPC.

39. In light of the above facts and circumstances, this Court is inclined to remand back the matter to the learned Trial Court. Accordingly, the impugned orders dated 1st September, 2023 passed in civil suits bearing Civ DJ no. 9241/2016 and Civ DJ no. 10334/2016 are set aside.

40. The learned Trial Court is directed to adjudicate the applications filed under order XXXII Rule 15 of the CPC, in both the civil suits, by conducting a fresh enquiry, as per the procedure laid down *qua* Order XXXII Rule 15 of CPC, bearing in mind the observations made by this Court in the foregoing paragraphs. The learned Trial Court is also directed to conclude the same expeditiously, preferably within two months.

41. Accordingly, the captioned revision petitions are allowed and stands disposed of along with the pending applications, if any.

42. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

JULY 23, 2024

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Click here to check corrigendum, if any