

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKHAT SRINAGAR**

Reserved on: 20.02.2024

Pronounced on:04.04.2024

**OWP No.1146/2015
CPOWP No.454/2015
CCP(S) No.51/2021**

ANOOP SINGH & ANOTHER

...PETITIONER(S)

*Through: - Mr. Z. A. Shah, Sr. Advocate, with
Mr. Hanan, Advocate.*

Vs.

STATE OF J&K & OTHERS

...RESPONDENT(S)

*Through: - Mr. Jahangir Dar, GA.
Mr. Nissar Ahmad Bhat, Advocate.*

CORAM:HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

OWP No.1146/2015

1) The Hon'ble Supreme Court of India while deprecating the practice of taking inconsistent stands by a litigant at different stages of same litigation, in **Amar Singh v. Union of India** , (2011) 7 SCC 69, has observed as under:

“50. This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions.”

2) The petitioner No.1 had earlier filed the writ petition bearing OWP No. 437/2014 in order to protect his possession qua the house

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No. 289 situated at Jawahar Nagar, Srinagar, wherein interim direction was issued to the respondent No.3 not to evict the petitioner forcibly from the house mentioned above. Thereafter the respondent No. 3 issued the order dated 30.06.2014, thereby holding that the alienation of house No.289 situated at Jawahar Nagar Srinagar, having been made without the permission and in contravention of the provisions contained in Section 3 (b) of the Jammu and Kashmir Migrant Immovable Property (Preservation, Protection and Restraint on Distress Sales), Act, 1997 (hereinafter referred to as “the Migrant Act”), was null and void and directed for the vacation of the house and restoration of the possession thereof in favour of the respondent No.7 i.e. the migrant.

3) The petitioners thereafter filed the writ petition bearing OWP No.999/2014 assailing the order dated 30.06.2014 issued by the respondent No.3. The abovementioned writ petition was disposed of by the Court vide order dated 11.03.2015, thereby setting aside the order dated 30.06.2014 and the matter was remanded back to the respondent No.3 to return a finding whether in the facts and circumstances of the case the property falls within the ambit of the Migrant Act, whether the petitioners can be termed as unauthorised occupants of the house, especially so when they claim to be in possession on the basis of alleged sale of the house thereof in their favour by the respondent No.7. Subsequently, pursuant to the application moved by the petitioners, by virtue of order dated 02.06.2015, the Court issued a clarification that in

terms of the directions passed by the Court vide judgment dated 11.03.2015, the District Magistrate shall also consider the admission made by the respondent No.7 vis-à-vis status of the petitioners as tenants thereof.

4) The District Magistrate-respondent No.3, pursuant to the directions issued by the Court vide orders mentioned above, framed the following three issues:

- 1. Whether the property falls within the ambit of provisions of J&K Migrant Immovable Property (Preservation, Protection and Restraint on Distress Sales), Act, 1997?*
- 2. Whether the petitioners can be said to be the unauthorized occupants of the property/house?*
- 3. Whether the property can be deemed to have been purchased by the petitioners?*

5) The District Magistrate-respondent No.3 vide order dated 26.06.2015 decided all the above-mentioned issues in favour of the respondent No.7 and directed the respondent No.4 to take over possession of the house and keep the same in his custody on behalf of the respondent No.3. The District Magistrate while deciding the issue No.1 held that the property so left by the respondent No.7 falls within the ambit of the Migrant Act. So far as issue No.3 is concerned, the District Magistrate-respondent No.3 held that though the acknowledgement receipts of cheques/drafts are on record but in absence of any registered document, the sale of the house is not

established and further the petitioners being the non-State subjects could not have purchased any property in the State (now U.T). The respondent No.3 while deciding the issue No.2, held that the provisions of the Migrant Act do not recognize any tenancy which is held without the consent of the migrant and the Migrant Act has an overriding effect over all other Acts in case of inconsistency between them.

6 The petitioners being aggrieved of the order dated 26.06.2015 have filed the present writ petition thereby assailing the said order on the ground that the respondent No.3 could not have held the respondent No.7 as 'migrant' as he had constructed his house at Trikuta Nagar, Jammu and had manipulated his ration card and relief cheques which were relied upon by the District Magistrate while passing the order impugned. The petitioners have further assailed the finding returned by the respondent No.3 in respect of issue No.3 that though the respondent No.3 has observed that several payments have been made by the petitioners but the respondent No.3 has ignored the fact that even if the sale between the parties could not take place, there were other options available with the petitioners to seek alienation of the property in favour of any other person having the status of the permanent resident of the State, after obtaining permission from the competent authority. It is also urged by the petitioners that the finding returned on the issue No.2 is without jurisdiction as the provisions of the Migrant Act were not applicable in the instant case as the tenancy was created by a

migrant, after he acquired the status of a migrant and notwithstanding the non-payment of rent, they had acquired the status of statutory tenant. It needs to be noted that during the pendency of the writ petition, the respondent No.7 expired and was substituted by his legal representatives i.e. respondent No.7(i) and 7(ii). For the sake of convenience, the respondent No.7 referred hereinafter shall mean the original respondent No.7.

7) The objections stand filed by the contesting respondent i.e. respondent No.7 wherein it has been stated that he had constructed his house at Plot No.289 at Jawahar Nagar, Srinagar, prior to 1989. When all of a sudden militancy erupted in the year 1990, the respondent No.7 along with his family left the Valley during night hours and shifted to Jammu. In the month of March, 1991, the petitioners approached the respondent No.7 with the request that the ground floor of the house be rented out to them so that his house along with the belongings would remain safe. Due to pathetic and poor financial condition, the respondent No.7 agreed to the offer made by the petitioners only so far as the ground floor of his house comprising of four rooms and one kitchen is concerned and that too was rented out for a period of one year only with the condition that they would take care of the costly belongings of the respondent No.7 worth lacs of rupees lying on the first and second floors of the house. The petitioners paid rent for a period of nine months only and stopped the payment of rent with effect

from January, 1992 till 1997. In the month of November, 1997, the petitioners herein came to the house of the respondent No.7 and apologized for their silence and promised to settle the matter on account of rent and the value of the goods, which were misappropriated by them. Finally, an amount of Rs.7.25 lacs on account of belongings and Rs.3.25 lacs on account of rent pending from January, 1992 to March, 1998, was settled. It was on that account that the total cost of household things and the rent were written on a simple piece of paper for memory as it was habitual on the part of the petitioners not to meet the respondent No.7 for years together. The respondent No.7 has further stated that the petitioners had paid the amount on account of misappropriation of belongings as committed by them and in addition to that, the petitioners also paid an amount of Rs.3.25 lacs as rent from 1992 to March 1998. It is further averred that no agreement was ever entered in to between the petitioners and the respondent No.7 in respect of the alienation of the property. The cheque dated 07.12.1997 for Rs.4.00 lacs, cheque dated 14.03.1998 for Rs.2.00 lacs and cheque dated 20.02.1998 for Rs.3.50 lacs were never received by the respondent No.7. The petitioners have made another story that the respondent No.7 lost the above-mentioned cheques and he was handed over four bank drafts of Rs.2,37,500/ each dated 09.11.199, 01.11.199, 11.11.1999 and 15.11.1999. It is further averred that as per the statement of Trilok Singh, the imaginary sale was fixed for Rs.10.50

lacs in the year 1997 and in the year 2001, it was fixed for Rs.12.84 lacs and then again in the year 2005, it was fixed for Rs.12.84 lacs + Rs.1,15,200/=13,99,200/-. The petitioners sent a legal notice to the respondent No.7 in the year 2013 after a gap of 16 years wherein they stated that they have purchased the house of the respondent No.7 for Rs.10.50 lacs along with some unknown person Yoginder Kaul. Once the notice was issued under the instructions of Yoginder Kaul, then wherefrom Rajinder Singh came into picture after the issuance of legal notice in the year 2013. The respondent No.7 has placed on record the written submissions submitted before the District Magistrate.

8) The petitioners have also filed a rejoinder stating therein that initially the property was taken on rent by them but subsequently the respondent No.7 agreed to transfer the property by way of sale and the petitioners agreed to buy the same. The respondent No.7 received Rs.1.00 lac in cash from the petitioners and instructed them to pay the sale consideration in the name of the persons as mentioned in the rejoinder and as such, the respondent No.7 has received the cheques/drafts as mentioned in the rejoinder.

9) Mr. Z. A. Shah learned senior counsel appearing for the petitioners mainly restricted his argument on issues No.2 and 3 decided by the respondent No.3 and submitted that once the petitioners were in authorized occupation as per the own admission made by respondent No.7 as tenants, they could never have been declared as 'unauthorized

occupants' by the District Magistrate. He further submitted that the petitioners had placed on record the documentary evidence in respect of the payments made by them towards sale of the house and the petitioners could have got the sale deed executed in the name of some other person having state subject, notwithstanding the fact that the petitioners were not the State subject holders. It was strenuously submitted by the learned senior counsel that the status of the petitioners was that of statutory tenants as such the petitioners were not unauthorised occupants under the Migrant Act. Mr. Z. A. Shah, learned senior counsel, doubled down his submissions by placing reliance upon the judgment of a Division Bench of this Court in the case of **Rajeev Verma & anr. Vs. State & Ors. 2010 (2) JKJ 859.**

10) *Per contra*, Mr. Nissar Ahmad, learned counsel appearing for the respondent No.7 submitted that the petitioners are changing their stand time and again. The petitioners initially were objecting their eviction on the ground that they had purchased the property and for that reason only, this Court vide order dated 11.03.2015 directed the District Magistrate to return a finding as to whether the petitioners can be said to be unauthorized occupants of the house, especially so when they claim its possession on the basis of the alleged sale thereof. It was thereafter only that the petitioners got clarification only to continue in unauthorized occupation. Vide order dated 02.06.2015, the only direction issued to the District Magistrate was to refer to the admission

of respondent No.7 vis-à-vis status of the petitioners as tenants. He has further submitted that the respondent No.3 has rightly come to the conclusion that the petitioners were unauthorized occupants of the property owned by the respondent No.7, as the petitioners were not in possession of the house with the consent of the respondent No.7 in writing. He further submitted that the respondent No.7 had only rented out the ground floor of the house to the petitioners but they not only misappropriated the belongings of the respondent No.7 lying on the first and second floors of the house but also forcibly occupied second and third floors of the house. He further submitted that after the enactment of the Migrant Act, in terms of Section 4 thereof, the possession of the migrant properties stood vested with the District Magistrate and there is no authorization of the respondent No.7 in writing with the petitioners permitting them to remain in possession of even ground floor. He further submitted that the nature of possession, whether authorized or unauthorized, is immaterial in view of the decision of the Division Bench of this Court in the case titled **Manzoor Ahmad Mir & anr. vs. UT of J&K & Ors. 2021(2) JKJ 315.**

11) Mr. Jehangir A Dar, the learned Counsel for the official respondents while submitting the relevant record argued that there is no infirmity or illegality in the order impugned as such the writ petition deserves to be dismissed.

12) Heard the learned Senior Counsel for the petitioners and the

counsels for the respondents in extenso and perused the record.

13) From the case projected by the petitioners, it is evident that right from the beginning they claimed to be in possession of the house as tenants initially and thereafter on account of having purchased the same by paying the sale consideration to the respondent No.7. It would be appropriate to extract the relevant part of para 14(c) of the OWP No.999/2014 filed by the petitioners while assailing the order dated 30.06.2014 passed by the respondent No.3, which is as under:

“c) That without prejudice to what has been stated above, **it is further submitted that though the petitioner and his family members had entered the house initially as tenants, yet subsequently they negotiated the sale of the house with respondent no. 07. The sale consideration was firstly settled at Rs. 10.50 lacs which amount was paid by the petitioner and his father to respondent no. 07.** The respondent no. 7 subsequently informed the petitioner and his father that he has lost the cheques and he should be given bank drafts for an amount of Rs. 9.50 lacs. The petitioner and his father there-after gave bank drafts for an amount of Rs. 9.50 lacs to the respondent no. 07. The respondent no. 07 again came to the petitioner and his father in 2001 and informed them that he has lost the bank drafts, as such, they should now pay him an amount of Rs. 12.84 lacs as sale consideration of the house. The petitioner and his father settled the transaction with him in the said amount and paid the same through various cheques. The respondent no. 07 assured the petitioner and his father that he will execute necessary documents with the petitioner as and when he is called upon to do so. He did not, however, turn up there-after until in 2005, he again approached them and asked for some more money. He was again paid an amount of Rs. 1,15,200/- through cheques by the petitioner and his father, so that he could execute the documents regarding the

house in their favour. **After taking the amount of Rs.1,15,200/- from the petitioner and his father, he again disappeared, forcing the petitioner and his father to serve a legal notice dated 26- 9-2013 on him. On receipt of the legal notice, he was obliged to come forward and execute a sale deed or any other document with the petitioner and his father regarding the house.”**

14) While assailing the order dated 30.06.2014, the petitioners had annexed their written arguments submitted before the Additional Deputy Commissioner, Srinagar, along with the writ petition as Annexure-N. Those written submissions also form part of the record produced by the learned counsel for the official respondents. It is appropriate to extract para (4) of the written submissions made by the petitioners before the Additional Deputy Commissioner, Srinagar, which led to the passing of order dated 30.06.2014:

“4. That as already submitted by the non-applicant in his statement before this Hon'ble court, that the non-applicant though was not interested in purchasing the house of the applicant/complainant, but it was due to his persistent approaches and repeated requests, the non-applicants agreed to purchase his house and the cost of the house was initially fixed by him at Rs.10.50 lacs. A deal of Rs 10.50 lacs was made in 1997 only on behalf of Mr. Yoginder Koul, out of which he took 1 lakh cash and for the remaining amount of Rs 9.50 lacs the non-applicants gave him three cheques bearing numbers 1906556, dated: 7-12-1997 for Rs 4lacs, number 1906557, dated: 14-3-1998 for Rs 2 lacs and number 672339, dated: 20-2-1998 for Rs 3.50 lacs were issued in favor of the applicant/complainant and his wife. He never cashed those cheques and kept on delaying the whole process. He then asked for the payments through bank drafts, which he

again never cashed. applicant/complainant demanded a higher price and asked the non-applicants to pay him an additional amount, thus fixed the cost of the house at Rs 12.84 lacs in 2001. **Which offer was reluctantly accepted by the non-applicants and the amount was agreed upon between the parties at Rs 12.84 lacs on behalf of Rajinder Singh who is the father- in-law of Trivender Singh (non-applicant) and a State Subject holder of J&K.** The mode of payment of this amount was also advised by the applicant/complainant and asked the non-applicants to pay this amount on different names, in order to avoid the Income Tax problems. However, the amount was, paid in the name of applicant/complainant and his other family members including his wife namely Nirmala Dhar, his daughter Dr. Rekha Khar, his son-in-law namely Anil Ganju and other persons whose relation with the applicant/complainant is not known. The said amount of Rs 12.84 lacs was thus received by the applicant/complainant by way of cross cheques drawn by him at Jammu in June 2001. Some amount was also received by the applicant through demand drafts payable at Jammu the detail of which is given in the bank statement. **The entire amount was received in 2001 by the applicant/complainant which fact is also evidenced by the bank statement of Vijaya Bank, the certified copy of which is submitted by the non-applicants before this Hon'ble court forms part of the record, wherein a request was made to make the payments in different names. Thereafter the applicant/complainant handed over the possession, of the entire house to the non-applicants in 2001, which is admitted by the applicant in his reply to notice wherein it is admitted that the entire house was rented out to the non-applicants on an enhanced rent with 10% increase per annum, when the fact is the house was sold by the applicant to the non-applicants through a state subject holder namely Rajinder Singh.** The non-applicant thereafter renovated the entire house which was in dilapidated condition after spending a huge` amount for its

renovation and repairs. Finally when the applicant/complainant tried to avoid the execution of the relevant documents, the non-applicants were constrained to get a legal notice issued to the applicant /complainant requesting him to come forward for execution of the agreed upon by him. But instead executing the necessary documents, the applicant/complainant filed a frivolous compliant before Relief and Rehabilitation Commissioner (M) Jammu narrating wrong and fictitious facts, which was forwarded to the Deputy Commissioner, Srinagar for necessary action. Deputy Commissioner, Srinagar got the said matter enquired through S.S.P, Srinagar.

15) In the written submissions, it was admitted by the petitioners that the they took the possession of whole of the house in the year 2001, when the total sale consideration was received by the respondent No.7. In reply notice it has been stated by the respondent No.7 that in the year 1997, it was agreed that the rent in future shall be Rs. 6,000/ per month but the fact remains that in the written submissions, the petitioners claim to have purchased the whole house in the year 2001 from the respondent No.7, after making payment of total sale consideration to him. In notice dated 26.09.2013 relied upon by the petitioners in OWP No.999/2014, it was categorically stated that in the year 1997, the respondent No.7 entered into an agreement with respect to sale of house and received whole sale consideration of Rs.10.50 lacs whereas in the rejoinder it has been stated that the sale consideration was fixed at Rs.10.50 lacs in the year 2001 and the respondent No.7 thereafter enhanced the price and received Rs.12.84 lacs in addition to the

advance payment of Rs.1.00 lac, thus aggregating Rs.13.84 lacs. No such story of receipt of Rs. 13.84 lacs was ever mentioned in the notice dated 26.09.2013, more particularly when the same was allegedly received prior to year 2013. More so, in the notice it has been stated that the agreement to sell was entered into by Yogender Kumar and Trilok Singh with respondent No.7 whereas in the para (4) of the written arguments as quoted above, there is reference of one Rajinder Singh, who was nowhere mentioned in the notice dated 26.09.2013. It reflects the conduct of the petitioners that they are cooking new stories forgetting their earlier ones and in fact want to grab the property of the migrant.

16) As the petitioners right from the beginning were defending their possession of the house on the basis of agreement of sale, therefore, after taking into consideration the pleadings and the submissions made by learned counsel for the petitioners, this Court in its order dated 11.03.2015 passed in OWP. 999/2014 observed that the petitioners have challenged the aforesaid order i.e. order dated 30.06.2014 on four counts:

- (i) *That the respondent No.7 is not a migrant;*
- (ii) ***That the petitioners are not unauthorized occupants but had been initially let in pursuant to a rent deed as tenants and thereafter had been occupying the same by reason of having paid sale consideration thereof to respondent No.7;***

- (iii) *That there is a civil dispute existing between the parties and, therefore, the respondent No.3 had no jurisdiction to take cognizance of the matter under the provisions of the Migrant Act;*
- (iv) *That the petitioners and their family members have a legal right to remain in possession of the house in question.*

17) Accordingly, the writ petition bearing No. 999/2014 was disposed of, vide order dated 11.03.2015 in following terms:

15. In view of the above, I need not go to the other aspects of the matter, as pleaded by the parties and argued by the learned counsel for them. The District Magistrate is required to consider the case in accordance with the mandate of the provisions of the Act, especially Sections 4 and 5 thereof and pass a reasoned order. He has to return a finding whether, in the facts and circumstances of the case, the property falls within the ambit of the Act and **whether the petitioners can be said to be unauthorized occupants of the house, especially so when they claim its possession on the basis of the alleged sale thereof in their favour by respondent No.7.**

18) After the writ petition was disposed of, the petitioners pursuant to the new legal advice, after finding the least chance of success of their stand before the respondent No. 3 shifted their stand, as such, there was a tectonic shift in the defence of the petitioners to protect their possession of the migrant property on the ground of tenancy and the clarification of the order dated 11.03.,2015 was sought, which seems to have been granted by the court vide order dated 02.06.2015 in absence of the respondent No.7. The court as an abundant caution did not accept the status of the petitioners as tenants but directed the respondent No.3

to consider the admission made by the respondent No.7 vis-à-vis status of the petitioners as tenants.

19) The petitioners, in fact, have made an attempt to sail through the rigours of Migrant Act by travelling in two boats, by pleading firstly that they were the tenants and secondly, that they had purchased the house after making the payment of sale consideration to the respondent No.7 pending execution of the formal sale deed and had spent huge amount for its renovation.

20) Once the petitioners claimed to be in possession of the house of the basis of agreement of sale, then they cannot claim to be in possession thereof as tenants. In fact, the petitioners have themselves invited this situation for themselves by claiming to be in possession of the house pursuant to the agreement of sale. In fact, till the writ petition bearing OWP No.999/2014 was decided by the court on 11.03.2015, the petitioners were defending their possession of the house on account of its purchase but with the pouring in of the new legal advice, there was shift in the defence of the petitioners. The petitioners cannot get any benefit out of the admission made by the respondent No.7 as he had made admission only to the extent that he had rented out only ground floor of the house. The said admission is of no consequence at all because subsequently the petitioners altered the nature of their occupation of the ground floor of the house by specifically stating that

they obtained the possession of whole of the house in the year 2001 after the payment of total sale consideration to the respondent No.7 and not as tenants. This is substantiated by the stand of the petitioners in their written submissions made before the Additional Deputy Commissioner, Srinagar, as extracted above for reference. In the writ petition bearing OWP No.999/2014, there was no pleading to the extent that the petitioners being the tenants of the respondent No.7 are entitled to protection under Houses and Shops Rent Control Act. The petitioners time and again have vacillated their stands at different stages in the same proceedings. Once the petitioners never claimed protection of their possession on account of tenancy initially and rather sought protection of their possession on the basis of having purchased the house in the year 2001, they cannot now be heard to say that they are the tenants of the property in question. Even there is nothing on record to demonstrate that the petitioners are the tenants of the respondent No.7 of whole of the house. Even in his representation dated 26.10.2013 filed before the Division Commissioner, Kashmir, (Annexure-M to OWP No.999/2014), it was specifically stated by the petitioner No.2 that even after paying him the money, the respondent No.7 kept on dragging the process and never gave complete documents of the house to the petitioners. It was further stated in the representation that after the respondent No.7 received the payment, the petitioners partially dismantled the house, which was damaged, and reconstructed

the same. It was stated that being a Pandit, now the respondent No.7 became an opportunist and he was now making lame excuses, as such, they requested the Divisional Commissioner, Kashmir, to look into the matter and safeguard their rights. In this representation dated 26.10.2013 also, there was no whisper that the petitioners were tenants of the respondent No.7. Though the respondent No.3 has decided the issue of tenancy in different manner against the petitioners, this Court is of the considered opinion that the issued No.2 was and is required to be decided against the petitioners and in favour of the respondent No.7 in terms of what has been said and observed as above.

21) The Hon'ble Supreme Court of India in **Suzuki Parasrampuriah Suitings (P) Ltd. v. Official Liquidator, (2018) 10 SCC 707**, while reiterating its earlier views in **Amar Singh vs. Union of India** (supra), has held as under:

“12. A litigant can take different stands at different times but cannot take contradictory stands in the same case. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands.....”

13. A similar view was taken in *Joint Action Committee of Air Line Pilots' Assn. of India v. DGCA* [(2011) 5 SCC 435], observing:

“12. The doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity..... Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking

inconsistent stands and prolong proceedings unnecessarily.”

22) The extraordinary remedy of writ of certiorari granted under Article 226 of the constitution of India is a discretionary remedy and cannot be issued on the mere asking of the petitioner. When the petitioner approaches the court with distorted facts and unclean hands, the court can refuse to exercise its jurisdiction under Article 226 of the constitution of India. The conduct of the litigant should be fair and not aimed at taking undue advantage by changing his stands at his own sweet will and to his own convenience. The court can refuse to exercise its discretion to issue writ of certiorari in favour of the petitioner, when he vacillates his stands or oscillates between two contradictory stands, just to ensure success in his endeavor to get the relief from the court.

23) In view of above, this court is of the considered view that the petitioners have failed to make out any case for interference by this court. The writ petition is found to be without any merit and the same is, accordingly, dismissed.

24) The record be returned to learned counsel for the official respondents.

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In view of the decision in the main writ petition, the orders out of which instant contempt petitions had arisen, have merged in the final

judgment. Therefore, nothing further survives for consideration in these contempt petitions. The same are, accordingly, disposed of.

(Rajesh Oswal)
Judge

SRINAGAR

04.04.2024

“Bhat Altaf-Secy”

Whether the order is reportable: Yes/No

