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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 07.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN

and

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

W.A(MD)Nos. 355 to 361 of 2018

and

C.M.P (MD)Nos.2174 to 2180 of 2018

W.A(MD)No. 355 of 2018:

M/s. Dharani Hi-TEch Projects Pvt Ltd.,
Rep by its Authorised Representative,
S.Veera Sekar,
No.3/25, Thatchamalli,
Vilanoor Post,
Avudaiyar Koil Taluk,
Pudukkottai - 614 618

: Appellant in all writ appeals

Vs.

1.The District Collector / Chairman,
D.R.D.A. (District Rural Development Agency),
Pudukkottai, Pudukkottai District.

2.The Project Director,
D.R.D.A. (District Rural Development Agency),
Pudukkottai, Pudukkottai District.

3.The Executive Engineer,
D.R.D.A. (District Rural Development Agency),
Pudukkottai, Pudukkottai District.

4.The Accounts Officer,
D.R.D.A. (District Rural Development Agency),
Pudukkottai, Pudukkottai District.

5.M.Murugesan : Respondents 1 to 5 in all writ appeals

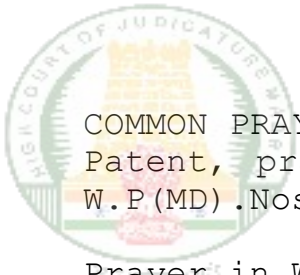
6.M.Suralirajan : 6th Respondent in W.A.(MD)Nos.355 &
360/2018

7.A.G.Sethuraman

The Executive Engineer,
D.R.D.A. (District Rural Development Agency),
Pudukkottai, Pudukkottai District.

: 6th Respondent in W.A.(MD)Nos.356 to 359
and 361 of 2018

: 7th Respondent in W.A.(MD)Nos.355 and 360/2018



COMMON PRAYER: Writ Appeals are filed under Clause 15 of the Letters Patent, praying to set aside the common order dated 28.02.2018 in W.P(MD).Nos.4125 to 4131 of 2018.

Prayer in WP(MD). 4125/ 2018 :

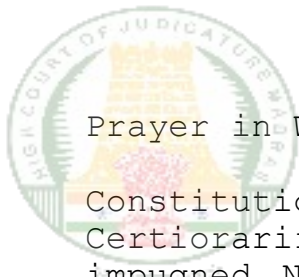
Writ Petition is filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus calling for the records relating to the impugned NABARD XXIII-2017-2018 (E-tender Website) Evaluation report (package No.08) Gandarvakottai Block in Pudukkottai District issued by the respondents 1 to 4 dated 05.02.2018 and the impugned tender summary report issued by the 2nd respondent in his proceedings dated 07.02.2018 and to quash the same in respect of rejecting the technical bid submitted of the respondents No.5 & 6 and consequently to direct the respondents 1 and 2 to accept the technical bid submitted by the petitioner for the work namely "strengthening the road Gandarvakottai Block in package No.18 of Pudukkottai District under NABARD RIDF-XXIII (2017-2018) Tranche."

Prayer in WP(MD). 4126/ 2018 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus calling for the records relating to the impugned NABARD XXII9I-2017-2018 (E-tender Website) Evaluation report (package No.13)ponnamaravathi Block in Pudukkottai District issued by the respondents 1 to 4 dated 05.02.2018 and the impugned tender summary report issued by the 2nd respondent in his proceedings dated 07.02.2018 and to quash the same in respect of rejecting the technical bid submitted by me and accepting the technical bid of the respondents NO.5 and consequently to direct the respondents 1 and 2 to accept the technical bid submitted by the petitioner for the work namely "Strengthening the road Gandarvakottai Block in package No.13 of Pudukkottai District under NABARD RIDF-XXII91(2017-2018) Tranche."

Prayer in WP(MD). 4127/ 2018 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue a Writ of Certiorarified Mandamus calling for the records relating to the impugned NABARD XXII9I-2017-18 (E-tender Website) Evaluation report (package No.09) Thirumayam Block in Pudukkotttai District issued by the respondents 1 to 4 dated 05/02/2018 and the impugned tender summary report issued by the 2nd respondent in his proceedings dated 07/02/2018 and to quash the same in respect of rejecting the technical bid submitted by Petitioners and accepting the technical bid of the respondents No.5 and 6 and consequently to direct the respondents 1 and 2 to accept the technical bid submitted by the petitioner for the work namely "Strengthening the road Thirumayam Block in package No.09 of Pudukkottai District under NABARD RIDF-XXII91(2017-2018) Tranche."



Prayer in WP(MD). 4128/ 2018 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Writ of Certiorarified Mandamus calling for the records relating to the impugned NABARD XXIII - 2017 - 18 (E-ternder Webside) Evaluation report (package No.02) Annavasal Block in Pudukkottai District issued by the respondents 1 to 4 dated 5.2.2018 and impugned tender summary report issued by the 2nd respondent in his proceedings dated 07.02.2018 and to quash the same in respect of rejecting the technical bid submitted by me and accepting the technical bid of the respondents No.5 and 6 and consequently to direct the respondents 1 and 2 to accept the technical bid submitted by the pettitioner for the work namely "strenthening the road Annavasal Block package No.02 of Pudukkottai District under NABARD RIDF-XXIII (2017-2018) Tranche".

Prayer in WP(MD). 4129/ 2018 :

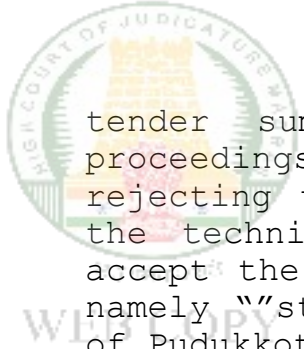
Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Writ of Certiorarified Mandamus calling for the records relating to the impugned NABARD XXII9I - 2017 - 18 (E-Tender Website) Evaluation report (package No.1) Annavasal Block in Pudukkottai District issued by the respondents 1 to 4 dated 5.2.18 and impugned tender summary report issued by the 2nd respondent in his proceedings dated 07.02.2018 and to quash the same in respect of rejecting the technical bid submitted by the petitioner for the work namely "strengthening the road Annavasal Block in package No.1 of pudukkottai District under NABARD RIDF-XXIII (2017-2018) Tranche".

Prayer in WP(MD). 4130/ 2018 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue a Writ of Certirorarified Mandamus calling for the records relating to the impugned NABARD XXII9I-2017-18 (E-tender Website) Evaluation report (package No.11) Karambakudi Block in Pudukkottttai District issued by the respondents 1 to 4 dated 05/02/2018 and the impugned tender summary report issued by the 2nd respondent in his proceedings dated 07/02/2018 and to quash the same in respect of rejecting the technical bid submitted by Petitioners and accepting the technical bid of the respondents No.5 and 6 and consequently to direct the respondents 1 and 2 to accept the technical bid submitted by the petitioner for the work namely "strenghtening the road Karambakudi Block in package No.11 of Pudukkottai District under NABARD RIDF-XXII91 (2017-2018) Tranche".

Prayer in WP(MD). 4131/ 2018 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court to issue Writ of Certiorarified Mandamus calling for the records relating to the impugned NABARD XXII9I - 2017 - 18 (E-tender Website) Evaluation report (package No.04) Kannandarkoil Block in Pudukkottai District issued by the respondents 1 to 4 dated 5.2.2018 and the impugned



tender summary report issued by the 2nd respondent in his proceedings dated 07.02.2018 and to quash the same in respect of rejecting the technical bid submitted by petitioners and accepting the technical bid of the respondents No.5 & 6 and consequently accept the technical bid submitted by the petitioner for the work namely "strengthening the road Kannandarkoil Block in package No.04 of Pudukkottai District under NABARD RIDF-XXII91(2017-2018)Tranche."

For Appellant : Mr.M.Vallinayagam
Senior Counsel for
Mr.R.Venkateshwar (in all)

For Respondents 1 to 4 : Mr.K.Chellapandian,
Additional Advocate General
Assisted by Mr.A.K.Baskarapandian
Special Government Pleader

For Respondent No.5 : Mr.M.Ajmal Khan
Senior Counsel
Assisted by Mr.H.Mohammed Imran
[In all Writ Appeals]

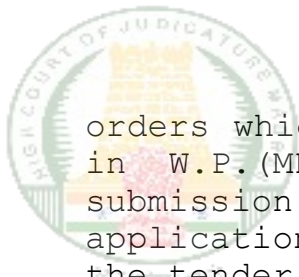
COMMON JUDGMENT

[Judgment of the Court was delivered by M.SATHYANARAYANAN, J.]

The writ appeals are preferred against a common order dated 28.02.2018, in W.P(MD).Nos.4125 to 4131 of 2018, filed by the appellant herein / writ petitioner.

2.The appellant / writ petitioner made a challenge to the evaluation report regarding Package No.8, relating to Gandarvakottai Block given by the respondents in and by which, his bid came to be rejected by citing the reasons in Sl.Nos. 6, 7 and 11. All the writ petitions were dismissed by the learned Single Judge vide common order dated 28.02.2018, on the ground of availability of effective alternate remedy in the form of appeal under Section 11 of the Tamil Nadu Transparency in Tenders Act, 1998 and challenging the legality of the same, the present writ appeals are filed.

3.Mr.M.Vallinayagam, learned Senior Counsel, assisted by Mr.R.Venkateshwar, learned counsel appearing for the appellant / writ petitioner has drawn the attention of this Court to the typed set of documents filed in support of these writ appeals and would submit that on every auction, the appellant / writ petitioner was constrained to approach this Court to get a remedy and drawn the attention of this Court to paragraph No.8 of the affidavit filed in support of the writ petitions, wherein it is averred that in W.P. (MD)No.21512 of 2017, the appellant / writ petitioner had filed a writ of mandamus to consider his application for issuance of mandatory working condition certificate of plants and machineries and vide order dated 27.11.2017, this Court directed the third respondent herein to consider his application and pass suitable



orders which was rejected on 02.12.2017 and it was put to challenge in W.P.(MD)No.22209 of 2017 and it was closed based on the submission of the learned Additional Advocate General that the application of the appellant / writ petitioner for participation in the tender process would be accepted.

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4.It is the further submission of the learned Senior Counsel appearing for the appellant / writ petitioner that the reasons cited for rejection are unsustainable for the reason that Income Tax Inspection was conducted and the appellant / writ petitioner has submitted the particulars for the year 2010 - 2017 and insofar as the Work Experience Certificate is concerned, the appellant / writ petitioner has also produced Work Experience Certificate dated 28.06.2017, issued by the Divisional Engineer (Highways), Construction and Maintenance Division, Tiruvarur for satisfactory completion of work during the year 2015 - 2016 and also produced yet another experience certificate dated 29.08.2016, issued by the Executive Engineer (RD) for the work completed in the year 2016 and as such the said reason is also untenable.

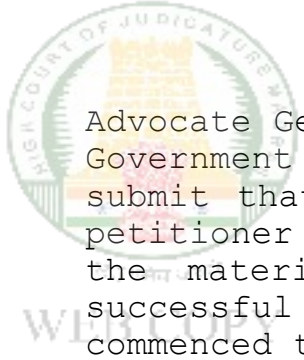
5.The petitioner that apart has also produced certificate in respect of last three years from Executive Engineer level officers for 50% of the value of the estimate value at single agreement in the same nature of work which would also indicate that the appellant / writ petitioner has been awarded contract for upgradation of road from Vellakudi to Karkoil in Neendamangalam Block of Thiruvarur District for the value of Rs.536.74 Lakhs and it was also successfully completed in the year 2016.

6.Insofar as the fourth ground of rejection as to the non-enclosing of Technical Assistant Certificate is concerned, none of the terms of tender documents require submission of the said certificate and also appointed out that though there were lapses on the part of the private respondents for the award of tender, their bids were positively considered and they have been awarded and hence prays for interference.

7.The learned Senior Counsel appearing for the appellant / writ petitioner on a legal plea made a submission that though the learned Judge has dismissed the writ petition on the availability of effective alternative remedy, it cannot be put in a straight jacket formula for the reason that if any infraction is noted on the phase of the impugned proceedings, still this Court can entertain the writ petitions under Article 226 of the Constitution of India and also draw the attention of this Court to the judgment of the Hon'ble Supreme Court reported in (1995) 1 SCC 478 (*New Horizons Limited and another Vs. Union of India and others*) and prays for setting aside the impugned communication with a further direction, directing the respondents to re-do the entire exercise as to the technical evaluation.

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8.Per contra, Mr.M.Chellapandian, learned Additional



Advocate General, assisted by Mr.A.K.Baskarapandian, learned Special Government Pleader appearing for the official respondents would submit that in respect of three other works, the appellant / writ petitioner has been awarded contract and since he has not submitted the material documents, his bid was rightly rejected and the successful bidders were also awarded contract and they also commenced their operation from 09.02.2018.

9.Mr.M.Ajmal Khan, learned Senior Counsel assisted by Mr.H.Mohammed Imran, learned counsel appearing for the fifth respondent would submit that the petitioner under the guise of filing the writ petition wants this Court to evaluate the entire tender process and it may not be permissible and would further add that the point urged by the learned Senior Counsel appearing for the appellant / writ petitioner revolves around adjudication on technical and factual aspects and it can be done only by the appellate authority constituted under the provisions of the above said Act and prays for dismissal of this writ appeal.

10.This Court has considered the rival submissions and also perused the materials placed before it.

11.It is the primordial submission of the learned Senior Counsel appearing for the appellant / writ petitioner in these writ appeals that the reasons assigned in the impugned evaluation report are *per se* unsustainable and since there is an error apparent on the records and the official respondents had also acted arbitrarily and in an oblique and *mala fide* motive, the impugned report warrants interference.

12.In the considered opinion of this Court, the point urged by the learned Senior Counsel appearing for the appellant / writ petitioner revolve around the adjudication aspects which are highly technical in nature.

13.It is also the submission of the learned Senior Counsel appearing for the appellant / writ petitioner that even for the sake of arguments that the appellant did not produce the documents and equally the private respondents did not produce the material documents, their bids having been positively considered and having been awarded is highly arbitrary.

14.The primordial question which arise for consideration in these writ appeals is that in the light of the points urged which are technical in nature and also revolve around the adjudication on disputed questions of fact, whether the Court can exercise its jurisdiction under Article 226 of the Constitution of India as well as under Clause 15 of the Letters Patent?

15.In (2017) 7 SCC 486 (*Consortium of Titagarh Firema Adler S.P.A. - Titagarh Wagons Ltd., Vs. Nagpur Metro Rail Corporation Limited and another*), the Hon'ble Supreme Court dealt with the issue

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invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the Court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."

31. In *T.N. Generation and Distribution Corpn. Ltd. v. SEPDI-Trishe Consortium*, the Court, after referring to *Jagdish Mandal* and taking note of the complex fiscal evaluation and other aspects, held: (*T.N. Generation case*, SCC pp.338-39, para 36)

"36. At this juncture we are obliged to say that in a complex fiscal evaluation the Court has



to apply the doctrine of restraint. Several aspects, clauses, contingencies, etc. have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review. We cannot sit in appeal over the financial consultant's assessment. Suffice it to say, it is neither *ex facie* erroneous nor can we perceive as flawed for being perverse or absurd."

32. In *Reliance Telecom Ltd., v. Union of India*, the Court referred to the authority in *Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd.* wherein it has been observed that: (*Reliance Telecom Ltd. case*, SCC p.317, para 58)

"58. though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies is concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose.

Thereafter, the Court in *Reliance Telecom Ltd.* proceeded to state thus: (SCC p. 317, para 58)

"58. In the instant case, we are unable to perceive any arbitrariness or favouritism or exercise of power for any collateral purpose in NIA. In the absence of the same, to exercise the power of judicial review is not warranted. In the case at hand, we think, it is a prudent decision once there is increase of revenue and expansion of the range of service."

And again: (SCC p.317, para 59)

"59. It needs to be stressed that in the matters relating to complex auction procedure having enormous financial ramification, interference by the courts based upon any perception which is thought to be wise or assumed to be fair can lead to a situation which is not warrantable and may have unforeseen adverse impact. It may have the effect potentiality of creating a situation of fiscal imbalance. In our view, interference in such auction should be on the ground of stricter scrutiny when the decision-making process commencing from NIA till the end smacks of obnoxious arbitrariness or any extraneous consideration which is



perceivable."

16.The judgment relied upon by the learned Senior Counsel reported in (1995) 1 SCC 478 (Cited supra) has also been considered in the above cited decision.

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17.The petitioner in paragraph No.17 of the affidavits filed in support of the writ petitions also took a stand that the entire tender process is an eyewash.

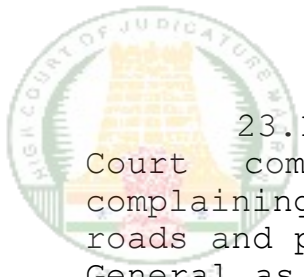
18.In the considered opinion of this Court, the stand taken by the appellant / writ petitioner is wholly untenable for the reason that having accepted the terms of the tender and participated in the tender process and having become unsuccessful, he cannot turn around and say that the entire tender process is an eyewash.

19.In (2002) 1 SCC 188 (Union of India and another Vs. Ashutosh Kumar Srivastava and another), allegation has been levelled against the member of the selection committee that he was closely related to an officer who was suspended on the basis of the report submitted by the respondent / candidate and as such he was not selected. The Hon'ble Supreme Court in paragraph No.7 observed that "There is always a presumption in favour of administration that it exercises powers in good faith and for public benefit. The burden is on the individual to produce sufficient material to suggest of the mala fides of the authority concerned and it is not easy to discharge the same".

20.The learned Senior Counsel appearing for the appellant / writ petitioner also alleges arbitrariness and mala fide exercise of powers on the part of the tendering authorities in the affidavits filed in support of these writ appeals and that apart, it is well settled that the allegation of mala fide can not only be specifically averred but it should also be strictly proved. However, the appellant / writ petitioner did not make any specific averment to that effect.

21.As rightly pointed out by the learned Single Judge, the appellant / writ petitioner has an effective alternate remedy under Section 11 of the Tamil Nadu Transparency in Tenders Act, 1998.

22.Though, the learned Senior Counsel appearing for the appellant / writ petitioner made a vehement and forceful submission that the availability of alternate remedy is not a bar to entertain the writ petitions, in the considered opinion of this Court, in the light of the fact that the points urged on behalf of the appellants revolve around technical aspects and as to the compliance of the tender conditions and also involve adjudication on factual dispute, this Court is of the considered view that the appellate remedy is the appropriate remedy which may enable the appellant herein to get their grievance redressed.



23. It is also to be pointed out at this juncture that this Court comes across very many Public Interest Litigations, complaining about the quality of roads and non-maintenance of the roads and put a specific question to the learned Additional Advocate General as to the life of the newly laid roads and on instructions, the learned Additional Advocate General would submit that normally, the road is supposed to have a life of five years subject to periodical maintenance and it should also be in conformity with the standards laid down by the Indian Road Congress. It is to be noted at this juncture that the said norms spoken to by the learned Additional Advocate General appear to remain only on paper.

24. Therefore, respondents 1 to 3 and 5 as well as the Administrative Department namely, the Department of Rural Development as well as the Directorate of Rural Development shall ensure that the roads laid shall be in adherence to the norms prescribed by the Indian Road Congress and it should also be all-weather roads and periodical maintenance should also be carried out.

25. In the light of the reasons assigned above, this Court is of the considered view that no interference is warranted in the impugned common order passed in the writ petitions.

26. In the result, the writ appeals are dismissed confirming the common order dated 28.02.2018, passed in W.P.(MD)Nos.4125 to 4131 of 2018.

27. If the petitioners are so advised, they are at liberty to file an appeal before the appellate authority within a period of one week from the date of receipt of a copy of this order along with a petition for interim orders under Section 11(4) of the said Act and on such filing of appeal, the appellate authority shall entertain the appeal, if the papers are otherwise in order without putting the issue of limitation and after putting the respondents in the writ petitions on notice, shall take up the petition for stay at the first instance and give a disposal in accordance with law within a period of two weeks from the date of submission of the appeal. The Appellate authority is also at an option to give disposal of the appeal itself, within a period of six weeks from the date of entertainment of the appeal. However, in the circumstances of the case, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/

Assistant Registrar(RTI)

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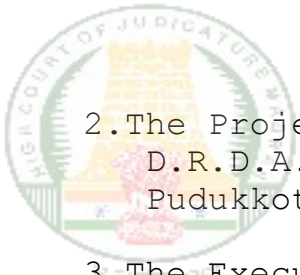
Sub Assistant Registrar

To

1. The District Collector / Chairman,

D.R.D.A. (District Rural Development Agency),

<https://hcservices.ecourts.gov.in/hcservices/>
Pudukkottai, Pudukkottai District.



2.The Project Director,
D.R.D.A. (District Rural Development Agency),
Pudukkottai, Pudukkottai District.

3.The Executive Engineer,
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Pudukkottai, Pudukkottai District.

4.The Accounts Officer,
D.R.D.A. (District Rural Development Agency),
Pudukkottai, Pudukkottai District.

+1cc to M/s.Special Government Pleader,SR.No. 54106
+1cc to Mr.R.VENKATESHWAR Advocate, SR.No. 53547
+1cc to M/S.AJMAL ASSOCIATES, Advocate, SR.No. 53799

W.A(MD)Nos. 355 to 361 of 2018
07.03.2018

MR
KK/SKN RSK/11.04.2018/SAR-4/12P-8C