IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : **14.10.2022**

DELIVERED ON : **20.10.2022**

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

W.P.Nos.**19947** & **19948** of **2017**
and W.M.P.Nos.**21514** to **21517** of **2017**

MAK Engineering Industries Limited,
a Company incorporated under the
provisions of the Companies Act, 1956
having its registered office at
8/1A, Middleton Row, 3rd Floor,
Kolkata - 700071, represented by
Mr.Mahaesh Prahladka, Authorised Signatory .. Petitioner in both WPs

Vs.

1. Union of India,
   through The Secretary,
   Ministry of Railway,
   having its office at Rail Bhawan,
   New Delhi - 110001.

2. Southern Railway,
   through the General Manager,
   having its office at Construction Branch,
   Egmore, Chennai - 600008.

3. General Manager,
   Southern Railway,
   having his office at Construction Branch,
   Egmore, Chennai - 600008.

4. Chief Administrative Officer,
   Southern Railway, having his office at
   Construction Branch,
   Egmore, Chennai - 600008.

5. Deputy Chief Engineer,
   Chief Administrative Officer,
   Southern Railway, having his office at
   Construction Branch, Egmore, Chennai - 600008.

6. Assistant Executive Engineer,
   Construction/Stores/MS,
   Southern Railway, having his office at
   Construction Branch, Egmore,
   Chennai - 600008. .. Respondents in WPs

Prayer in W.P.No.19947 of 2017: Writ Petition has been filed under Article 226 of the Constitution of India seeking a Writ of Certiorarified Mandamus calling for the records of the respondents, being the letter dated 05.12.2016, the purported letter of acceptance and the consequential letters dated 08.03.2017 of termination and 22.03.2017 for recovery and quash the same as being illegal, arbitrary and unconstitutional.

Prayer in W.P.No.19948 of 2017: Writ Petition has been filed under Article 226 of the Constitution of India seeking a Writ of Certiorarified Mandamus calling for the records of the respondents, being the letter dated 21.10.2016, the purported letter of acceptance and the consequential letters dated

14.11.2016 of termination and 01.02.2017 for recovery and quash the same as being illegal, arbitrary and unconstitutional.

For Petitioner in both W.Ps.	:	Mr.Thriyambak J.Kannan and Ms.G.Annapoorani
For Respondents in both W.Ps.	:	Mr.P.T.Ramkumar

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COMMON ORDER

Since both the writ petitions have been preferred on the same set of facts, submissions being common, they are taken up together and disposed of by means of this common order.

2. These two writ petitions have been filed challenging the letters of the fourth respondent dated 22.03.2017 and 01.02.2017 respectively, in and by which, it is proposed to recover the penalty amount equivalent to Security Deposit of Rs.10,00,000/- by encashing the Bank Guarantees.

3. The brief facts leading to the filing of these writ petitions are as follows:

(i) The second respondent floated a tender for manufacturing and supplying Elastic Rail Clips 'MK-III' to RDSO Drg.No.T-3701, conforming to Indian Railway Standard (IRS) specifications T-31-1992, with Corrigendum No.3 of January, 2016 with latest alterations/amended as on the date of the opening of the tender and Elastic Rail Clips J-type conforming to RDSO Drg.No.T-8258 as per IRS specifications of Elastic Rail Clip - J(Provisional) Revised 1994 along with Corrigendum No.1 of 2014 with latest alterations/as amended as on the date of opening of tender respectively.

(ii) On 02.08.2016 and 26.07.2016 respectively, the petitioner by a letter made their offer in respect of such tender with certain conditions and the same was valid upto 10.12.2016 and 28.11.2016 respectively. However, the Deputy Chief Engineer, Southern Railways issued a purported letter dated 05.12.2016 and 21.10.2016 respectively purportedly captioned as "Letter of Acceptance" dated 05.12.2016 and 21.10.2016 respectively and the letter dated 05.12.2016 was issued on 08.12.2016 and the same was received by the petitioner on 13.12.2016, which was after the bid validity period of the petitioner had expired in respect of the said tender. Further the said purported "Letter of Acceptance" contained certain counter offers and the respondents also arbitrarily directed the petitioner to submit a Security Deposit of Rs.10,00,000/- and Rs.1,40,196 respectively as per Clause

No.10.4 of the tender conditions and allegedly stated that thereafter the purchase order would be issued to the petitioner.

(iii) The petitioner in reply to the purported "Letter of Acceptance", by letter dated 15.12.2016 and 31.10.2016 respectively addressed to the Chief Administrative Officer, Southern Railways, communicated that the counter offer made by Southern Railways in their letter dated 05.12.2016 and 21.10.2016 respectively, stated that as the offer of the petitioner had not been accepted in toto, the same was not binding on the petitioner and the petitioner further expressed its inability to accept the said counter offer of the respondents and accordingly no contract was finalised between the parties.

(iv) In reply to the petitioner letters dated 15.12.2016 and 31.10.2016 respectively, the respondents issued letters dated 20.12.2016 and 14.11.2016 respectively to the petitioner, wherein the respondent referred to two purchase orders, in respect of other contracts wherein the petitioner had accepted the counter offer conditions stipulated in the present purported letter of acceptance dated 05.12.2016 and 21.10.2016 respectively. In the said letters, the respondents have requested the petitioner to submit the requisite bank guarantees for issuance of the purchase orders.

(v) The respondents further threatened that if the petitioner did not accept the counter offer of the respondents then the same will be intimated to RDSO as well as other railways so that they may consider the future tenders submitted by the petitioner and so that appropriate action can be taken against the petitioner.

(vi) The petitioner through his Advocate sent a reply on 20.01.2017, requesting the respondents to cease from threatening / harassing the petitioner. The fifth respondent replied to the notice of the petitioner vide letter dated 07.02.2017, wherein, it was alleged that the purported letter of acceptance issued by the respondents to the petitioner was as per the tender conditions and the same was in order and was also binding on the petitioner and rejected the contention of the petitioner that the respondents have issued a counter offer to the petitioner. The respondents further threatened to invoke Clause 10.4 of the tender conditions as the petitioner had allegedly failed to submit security deposit within the stipulated period as per the tender conditions.

(vii) Thereafter, the respondents by a purported termination notice, to the petitioner, dated 08.03.2017 and 01.02.2017 respectively, terminated the purported letter of acceptance dated 05.12.2016 and 21.10.2016 respectively and threatened to invoke Clause 10.4 of the tender conditions as and by way of penalty. It further recorded that this penalty of Rs.10,00,000/- and Rs.1,40,196 respectively would be recovered from the other security deposits so submitted by the petitioner in respect of other contracts.

(viii) The petitioner issued legal notice dated 21.03.2017 and 20.04.2017 respectively to the respondents. The respondents issued a letter dated 22.03.2017, with a copy to the petitioner threatening to recover some alleged penalty amount equivalent to the security deposit amount as per the present tender, i.e. Rs.10,00,000/- by wrongfully and illegally encashing the bank guarantee bearing No.ME-74-15, dated 16.11.2015 issued by Canara Bank, Kolkatta for Rs.10,00,000/- submitted by the petitioner in respect of a separate contract with the said respondents allegedly as per Clause 2403 of IRS conditions of contract.

(ix) Hence the order of the respondents cancelling and adjusting the Security Deposit of Rs.10,00,000/- from other works has been put under challenge.

4. Counter affidavit has been filed on behalf of the respondents by the fifth respondents herein contending as follows:

(i) Open tenders were invited for procurement of 14,75,290 numbers of Elastic Rail Clip Mk-III and 28,000 number of Elastic Rail Clip J Type. The petitioner herein participated in the tender and offered their rate and quantity for supply. The petitioner had offered the rate of Rs.47.99 per number and 50.07 per number and they offered to supply the full tendered quantity, i.e. 14,75,290 numbers and 28,000 numbers respectively. The total value of their offer was Rs.7,07,99,167.10 and Rs.14,01,960/- respecitvely.

(ii) The tenderers were requested to carefully go through the instructions and all conditions mentioned in para 1.3 & 1.4 of tender document. By submitted the offer, they undertake to abide by all types of conditions mentioned in para 1.4. The tenderers digital signature on the E-tender form will be considered as their confirmation that they have read and accepted all the conditions laid down in the documents as well as tender schedule, comprising of techno-commercial offer form and financial offer form, unless specific deviation is quoted in the techno-commercial offer form.

(iii) As per Clause 8.0 - Statement of Deviations clearly states that the tenderer should quote deviation to item description in the deviation page. Technical deviation from tender specification should be clearly stated in the deviation statement. The deviation if any from IRS conditions of contract & Special conditions of tender should also be clearly stated in the deviation statement of e-tender/offer. The offers with technical deviations and IRS/Special Tender Conditions are liable to be ignored/rejected. Whether technical deviation are improvement over tendered specification or otherwise should be indicated. If the tenderer does not quote any deviation, it will be construed that the tenderer has quoted for the tendered description and accepted all the conditions.

(iv) The petitioner had not put any deviations in the prescribed format as stated above in their e-offer, ie., Part-D - Technical deviation statement and Part F- Commercial deviation statement. Further, under Part G - Special conditions & Checklist to Bidders - the petitioner has stated 'Yes' under 'The bidder agrees to supply the tendered stores at the rates quoted by him in accordance with the IRS conditions of Contract and/or Special conditions and/or Other conditions specified/attached with the tender. Whereas, the petitioner mentioned certain remarks under Financial Statements of e-offer, for which the respondents remarks were furnished in the Letter of

Acceptance dated 05.12.2016 and 21.10.2016 respectively regarding 'Statutory levies and Octroi charges'.

(v) The original validity for the offer submitted by the petitioner was available up to 07.12.2016. As per existing procedure in finalization of tender, the respondents was issued requisition for extension of validity of offer vide letter dated 24.11.2016. However, the tender was finalized well within the original validity period and the letter of acceptance was issued on 05.12.2016 and 21.10.2016 respectively and a copy of the same was also sent through email and fax.

(vi) The respondents have issued letter of acceptance on 05.12.2016 and 21.10.2016 respectively to the petitioner based on e-offer submitted by them on finalization of tender. The petitioner has not put forth any conditions under Part D - Technical Deviation and Part F - Commercial deviation and further under Part G - the petitioner has stated that they have agreed to supply the tendered item as per IRS conditions of contract, special conditions of contract and other conditions attached with the tender. As such, the letter of acceptance issued by the respondents was legal and binding upon the petitioner. As per the tender/contract conditions, the respondents have agreed to pay the petitioner for any increase in statutory levies / new imposts during the original delivery period on production of documentary evidence. The petitioner had not disputed the original period of delivery for the supplying the tendered item while submitting the e-offer as such, the tender conditions insisted by the respondents for agreeing with the increase in statutory levies / new imposts during the original delivery period on purchaser's account is in order. Regarding Octroi charges', the respondents have agreed to issue the 'Octroi exemption certificate' to the petitioner to produce the same before the concerned authorities. The petitioner had agreed these two conditions in the earlier two purchase orders issued by the respondent under Reference No.(i) W.503/CN/TF/OT/2015-16/01/359/58128, dated 18.12.2016 for supply of 6,95,274 numbers and (ii) W.503/CN/TF/OT/2013-14/337/58116 dated 09.02.2015 for supply of 4,34,668 numbers.

(vii) The petitioner has not put-forth any conditions in the prescribed format as specified in the tender conditions while submitting their e-offer. Therefore, the letter of acceptance dated 05.12.2016 and 21.10.2016 respectively, issued by the respondent cannot be construed as 'Counter Offer' as alleged by the petitioner. The petitioner's letter 15.12.2016 and

31.10.2016 has been replied by the respondents vide their letters dated 20.12.2016 and 14.11.2016 respectively.

(viii) As per Clause 1.1 of the tender conditions, 'the tenderers digital signature on the E-tender form will be considered as their confirmation that they have read and accepted all the conditions laid down in the documents as well as tender schedule'. The letter of acceptance dated 05.12.2016 and 21.10.2016 respectively issued by the respondents were as per the terms and conditions of tender/contract and offer submitted by the petitioner.

(ix) As per Clause 10.4 of tender/contract conditions, in case the successful tenderer fails to submit the requisite security deposit even after 60 days from the date of issue of letter of acceptance, the contract shall be terminated and penalty equivalent to the requisite security deposit of the contract shall be imposed and the same shall be recovered from the pending dues from anywhere on Indian Railways / Public Sector Units / other Government Organizations.

(x) The petitioner has accepted that the bid validity was available upto 10.12.2016, the letter of acceptance was sent through mail on

06.12.2016 and by fax on 07.12.2016 and this was also acknowledged by the petitioner vide letter dated 15.12.2016 and they did not dispute the acceptance issued on 05.12.2016. The letter of acceptance dated 05.12.2016 and 21.10.2016 respectively issued by the respondent is in order and binding with the petitioner to perform the contract as per the terms and conditions of contract.

(xi) As per Clause No.1.3 of 'instructions to tenderers', 'the contract shall be governed by IRS conditions of contract, instructions to tenders, special conditions of contract, additional special condition applicable to a particular tenderer as given under respective links in the home page of the Indian Railway E-procurement portal. Accordingly, the respondent issued instructions to their accounts department to encash the BG No.ME-74-15, dated 16.11.2015, issued by Candra Bank, Kolkatta for Rs.10,00,000/- as security deposit under other Purchase Order No.W.503/CN/OT/2015-16/58128, dated 18.02.2016. The encashment advised issued by the respondent is as per conditions governed with the contract and legally valid and binding with the petitioner.

(xii) The denial of Letter of Acceptance lead to re-tender and delay in procurement of said critical item for ongoing targeted projects, this has resulted in lot of inconvenience to the respondent organisation for completing and commissioning the important projects. Hence it is contended that the letter of acceptance was issued as per tender condition and termination notice is also issued as per the tender conditions. Hence the respondents seeks dismissal of both the writ petitions.

5. The learned counsel appearing for the petitioner would submit that though the petitioner has made offer in respect of the tender floated by the respondent, since certain conditions were not finalised and agreeable to the petitioner, they have not agreed for the tender. When the matter stood thus, all of a sudden, the Railways issued work order (letter of acceptance) on 05.12.2016 and 21.10.2016 respectively after the bid validity period of the petitioner No.1 has expired in respect to the said tender. Letter of Acceptance contain certain counter offers and the respondents have also arbitrarily directed the petitioner to submit security deposit, whereas the petitioner has not agreed with the said conditions as the same is a counter offer and not acceptable to the petitioner.

6. The learned counsel appearing for the petitioner further contended that the respondents cannot thrust the work on the petitioner, in such a scenario, it cannot be said that the contract has been concluded and the respondents cannot plead that as per tender and contract conditions they can forfeit the deposit.

7. It is also contended by the learned counsel for the petitioner that merely because in subsequent tenders certain conditions have been accepted by the petitioner, the same cannot be a ground to legalize the present contract which has not been concluded. Hence it is the submission of the learned counsel appearing for the petitioner that as the counter offer made by the respondents has not been accepted by the petitioner, the contract is not a concluded contract and therefore the respondents cannot forfeit the EMD amount and/or recover the same from other contracts. Therefore, the learned counsel seeks to quash the impugned orders passed by the respondents.

8. Whereas, the learned standing counsel appearing for the Railways appearing for the respondents submitted that all the conditions put forth by the petitioner have been clearly taken note of and in fact the railways has agreed to the same and despite the said fact that the petitioner has not come forward to execute the work, therefore as per the contract conditions the EMD has to be recovered and forfeiture ordered to recover the same from other contracts.

9. It is the further contention of the learned counsel appearing for the respondents that even in the subsequent contracts, the petitioner has agreed the subsequent contract on the same conditions raised by the respondents. Therefore, the entire action of the respondents is only on the basis of the contract conditions. Hence, the learned counsel prays for dismissal of both the writ petitions.

10. I have heard the learned counsel on either side and also perused the entire materials available on record carefully.

11. The fact that the railways has floated tenders on 04.07.2016 and 15.06.2016 respectively is not disputed. The tender offer has been submitted in respect of two contracts by the petitioner on 02.08.2016 and 26.07.2016 respectively. It is relevant to extract the relevant tender conditions in the tender schedule viz., Clause 8.0 which deals with Statement of Deviations, reads as follows:

> "*Clause 8.0 : STATEMENT OF DEVIATIONS:* *The tenderer should quote*

deviation to item description in the deviation page.

1. Technical deviations from tendered specification should be clearly stated in deviation statement.

2. The deviations if any from IRS conditions of contracts & special conditions of tender should also be clearly stated in the deviation statement of e-tender/offer.

3. The offers with technical deviations and IRS/Special Tender Conditions are liable to be ignored / rejected.

4. Whether technical deviations are improvement over tendered specification or otherwise should be indicated.

5. If the tenderer does not quote any deviation, it will be constructed that the tenderer has quoted for the tendered description and accepted all the conditions."

12. Clause 9 deals with EMD. Clause 10.4 deals with Security Deposit. The amount of Security Deposit to be furnished is 10% of the total value of contract subject to upper ceiling of Rs.10,00,000/- for contracts valuing upto Rs.10,00,00,000/- and Rs.20,00,000/- for contracts valuing above Rs.10,00,00,000/-. The successful tenderer shall have to submit the requisite security deposit (SD) within 30 days from the date of issue of Advance Acceptance Letter (AAL) or acceptance of counter offer as the case may be. Extension of time for submission of SD beyond 30 days and upto 60 days from the date of issue of AAL may be given by a minimum JAG level officer. Clause 10.4 makes it very clear that the requisite security deposit has to be furnished within 30 days from the date of issue of advance acceptance letter or acceptance of counter offer as the case may be.

13. Clause 14 deals with Statutory Levies. Clause14.1.(a)(ii) reads as follows:

> *"Clause14.1.(a)(ii) In no case any claim for increase in Excise duty due to increase in sales turn over during the currency of the contract will be admissible."*

Clause 14.1(a)(iv) states that excise duty will be paid subject to production of documentary evidence, whereas Clause 14.1.(a)(ii) says that in case any claim for increase in excise duty due to increase in sales turnover during the currency of the contract will be admissible.

14. Clause 22 deals with Octroi exemption certificate. The purchaser will not bear any octroi charges. If required Southern Railway will issue octroi exemption certificate (OEC) only. In the event of OEC not being honured by the concerned Municipal Authority, the Octroi charges become payable, the supplier will have to bear the Octroi charges as per IRS conditions of contract.

15. The respondents gave a letter to the effect that to enter remarks / reasons of submitting alternate offer. The railways should provide Octroi Exemption Certificate and/or 'road permits' if required and also made it clear that excise duty will be charged extra as applicable on the date of dispatch. The present rate is 12.5 percent and CST/VAT will be charged extra as applicable on date of dispatch. Present rate is 5 percent and the respondents have given a counter offer. It is also made clear that the offer would remain valid upto 10.12.2016 and thereafter subject to the respondents confirmation. Price variation clause is also stated to be applicable. The counter offer was given to that effect in the repeated letters. Whereas in the letter of acceptance issued by the Southern Railways dated 05.12.2016 and 21.10.2016 respectively, it is made clear that Excise duty of 12.50% extra against documentary evidence. New Imports and Statutory Variation Clause makes it clear that as per the tender conditions within the original delivery period against documentary evidence. With regard to Octroi, it is made clear that the purchaser will not bear any octroi charges. If required Railways will issue octroi exemption certificate only. In the event of octroi exemption certificate not being honoured by the concerned municipal authority, and octroi charges become payable, the supplier will have to bear the octroi charges.

16. For the above letter, reply was sent by the petitioner on 15.12.2016 and 31.10.2016 respectively wherein, the petitioner made it clear that railway should provide Octroi exemption certificate or road permits if required. Whereas Railways has added that in the event of octroi exemption certificate not being honoured by the concerned municipal authority, and octroi charges become payable, the supplier will have to bear the octroi charges which differs with the petitioner's offer and it is also stated that the petitioner's offer has not been accepted in toto and therefore the same is not binding on the petitioner. The petitioner has also expressed their regret and inability to accept the counter offer made by the respondents.

17. Thereafter, in the communication sent by the railways on

20.12.2016 and 14.11.2016 referring to the earlier purchase orders insisted the petitioner to accept the contract and requested to submit the requisite bank guarantee for issuance of purchase order and the said letters have also indicated that if the petitioner has not accepted the present offer, the same will be intimated to RDSO as well as other Railways to consider the petitioner future tenders and appropriate action will also be initiated as per IRS conditions of contract. In this letter dated 20.12.2016 and 14.11.2016, it is indicated that there is no concluded contract and it is only in the process of offer and acceptance and in the letter dated 20.12.2016 and 14.11.2016, the Railways has made it clear that if their offer is not accepted, they will intimate to RDSO as well as other Railways to consider petitioner's future contract and appropriate action also will be initiated as per IRS conditions of contract.

18. Thereafter, a legal notice was sent by the petitioner on 20.01.2017 insisting their offer to be accepted by the Railways, whereas reply was sent on 07.02.2017 by the Railways indicating that earlier contracts were accepted with the same condition, therefore this contract also has to be accepted and requested the petitioner to furnish security deposit.

19. Thereafter, on 08.03.2017 and 01.02.2017 respectively termination notice was issued to the effect that as the petitioner failed to submit the requisite security deposit within 60 days from the date of issue of Letter of Acceptance as per Clause 10.4 of the tender conditions, the above contract is terminated and penalty of Rs.10,00,000/- and Rs.1,40,196/- respectively will be recovered from the petitioner's dues pending with the Indian Railways.

20. The correspondence referred to above makes it very clear that there are only offers and counter offers between both sides and before the contract is finalised between the parties, the Railways has issued notice to the effect that if the petitioner is not ready to accept the contract, the same will be intimated to other Railways and RDSO in respect of future contracts. Thus, letter dated 20.12.2016 and 14.11.2016 respectively makes it very clear that the contract has not been finalised between the parties.

21. The Delhi High Court in ***Raipur Alloys & Steel Ltd., Vs. Union of India*** reported in ***1993 (25) DRJ*** has held that offer accepted by conditional letter of acceptance is no unequivocal acceptance and no concluded contract came into existence.

22. The Delhi High Court in ***Gautam Solar Pvt. Ltd., Vs. Energy***

Efficiency Services Limited reported in ***2021 SCC OnLine Del 4233*** has held in paragraph 23 as follows:

> *"23. In our view, there is no doubt or ambiguity in the relevant clause discussed hereinabove as contained in the Qualifying Requirements contained in Annexure II. However, even if there was any doubt, we would invoke the Doctrine of "verba chartarum fortius accipiuntur contra proferentem." The Respondent in the present case was the author of the terms and conditions of the tender. If the Respondent had intended to consider the Annual Turnover of only the last three years, it would neither have used the word "any 3 years", nor specifically mentioned the four years, including 2016-17. The wordings of the Annexures would have been different from those as framed herein."*

23. In the tender conditions, Clause 14.1(a)(ii) it has been clearly stated that in no case any claim for increase in Excise duty due to increase in sales turnover during the currency of the contract will be admissible. In Clause 14.1(a)(iv) it has been stated that Excise duty will be paid subject to production of documentary evidence. Thus, there is ambiguity in both the

Clauses.

24. In the tender conditions, Clause 22 stipulates that octroi charges would not be paid by the purchaser, whereas the respondents will issue Octroi Exemption Certificate and/or 'road permits' if required and also made it clear that excise duty will be charged extra as applicable on the date of dispatch. The present rate is 12.5 percent and CST/VAT will be charged extra as applicable on date of dispatch. Price variation clause is also made as one of the offer.

25. When the process is in the stage of offer and counter offer and the contract has not been concluded between the parties, the respondent railways cannot thrust the work on the petitioner merely on the ground that the petitioner had earlier accepted the same conditions in the subsequent tenders and purchase orders have also been issued in favour of the petitioner.

26. Such view of the matter, this Court is of the view that there is no concluded contract between the parties and therefore the question of termination of the contract and levy of penalty does not arise at all and accordingly the impugned orders are liable to be quashed and accordingly quashed and both the writ petitions are allowed. Consequently, the connected miscellaneous petitions are closed. No costs.

20.10.2022

Index : Yes / No
kk

To

1. The Secretary to Government,
   Ministry of Railway,
   Rail Bhawan,
   New Delhi - 110001.

2. The General Manager,
   Southern Railway,
   Construction Branch,
   Egmore, Chennai - 600008.

3. Chief Administrative Officer,
   Southern Railway,
   Construction Branch,
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5. Assistant Executive Engineer,
   Construction/Stores/MS,
   Southern Railway, Construction Branch,
   Egmore, Chennai - 600008.

N.SATHISH KUMAR, J.

kk

PRE DELIVERY COMMON ORDER
in W.P.Nos.19947 & 19948 of 2017
and W.M.P.Nos.21514 to 21517 of 2017

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