



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 26.08.2020

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WP (MD) Nos.8752, 8762 & 9557 of 2020

and

W.M.P. (MD) Nos.8616, 8619, 8620, 8049, 8050, 8054

in W.P. (MD) NO.8752 of 2020 :

R.Muthukumar

... Petitioner

Vs

1.The Principal Secretary to
the Government of Tamil Nadu,
Public Works Department,
Secretariat, Chennai.

2.The General Manager,
National Bank for Agricultural and
Rural Development,
State Project Department,
G-Block, Bandra - kurla Complex,
Bandra (East), Mumbai - 400 051.

3.The Superintending Engineer,
Public Works Department,
Building (C&M) Circle, Trichy.

... Respondents

Prayer: Writ petition is filed under Article 226 of the Constitution of India, to issue a writ of certiorari, to call for the notification issued by the third respondent in Tender Notice in No.06/2020-21/SE/B/C & M/TRY / dated 21.07.2020 and quash the same with regard to SLICE No.10.

in W.P. (MD) NO.8762 of 2020 :

R.Muthukumar

... Petitioner



Vs .

1.The Superintending Engineer,
Public Works Department,
Building (C&M) Circle, Trichy.

2.Mr.Prakasham, Superintending Engineer,
Public Works Department,
Building (C&M) Trichy Circle, Trichy.

... Respondents

Prayer: Writ petition is filed under Article 226 of the Constitution of India, to issue a writ of certiorarified mandamus, to call for the records of the first respondent in letter No.F-6/DB/JDO.2/2020 date 07.07.2020 and quash the same as illegal and arbitrary and inconsequence thereof direct the first respondent to finalise the tender of the petitioner for construction of Boys Hostel in Government ITI campus at Pudukottai in Pudukottai District covered in the tender notice No.20/2019-20-/BCM/Try/ dated 03.03.2020.

in W.P. (MD)NO.9557 of 2020 :

R.Muthukumar

... Petitioner

Vs .

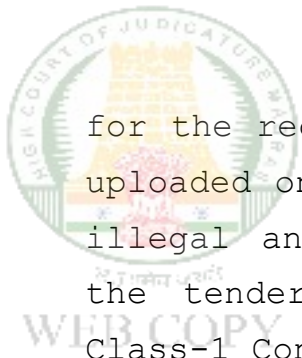
1.The Principal Secretary to
the Government of Tamil Nadu,
Public Works Department,
Secretariat, Chennai.

2.The General Manager,
National Bank for Agricultural and
Rural Development,
State Project Department,
G-Block, Bandra - kurla Complex,
Bandra (East), Mumbai - 400 051.

3.The Superintending Engineer,
Public Works Department,
Building (C&M) Circle,
Trichy.

... Respondents

Prayer: Writ petition is filed under Article 226 of the Constitution of India, issuing a writ of certiorarified mandamus, thereby call



for the records relating to qualification and price tender notice uploaded on 29.07.2020 and quash Clause 2(iii) and V of the same as illegal and arbitrary and direct the third respondent to conduct the tender process by enabling the petitioner and all eligible Class-1 Contractors to participate in the tender process.

For petitioner
in all cases : Mr.P.Ganapathi Subramanian

For Respondents
in all cases : Mr.S.R.Rajagopal
Additional Advocate General
assisted by Mr.M.Rajarajan,
Additional Government Pleader

COMMON ORDER

The petitioner is a Class I Contractor registered with the Public Works Department. The Superintending Engineer, PWD (C&M) Circle, Trichy - 1 issued tender notice dated 03.03.2020 inviting sealed tenders from the Public Works Department's registered contractors for the purpose of carrying out the work of construction of Boys Hostel Building (for 100 students) in Government Industrial Training Institute Campus at Pudukkottai in Pudukkottai District. The approximate value of the work was fixed at Rs.299.80 lakhs. The last date for submission of application of tenders was 24.03.2020. The petitioner states that apart from himself, four other contractors had also taken part in the tender process. Though the last date for receipt of tender was notified as 24.03.2020 in the tender notification, there was no progress. The participants were informed that the tenders will be opened on 15.06.2020. Even on that date, the tender applications were not opened.

2.The petitioner sent a representation on 26.06.2020 demanding that the tender process should be finalized. In the said representation, the petitioner had made a serious allegation that unless bribe amount was paid, the tender process would be aborted. The tender inviting authority by communication bearing Letter No.F-6/DB/JDO.2/2020 dated 07.07.2020 informed the petitioner that the Tender Award Committee in its meeting held on 02.07.2020 had rejected the petitioner's tender as it turned out to be a single tender. The committee had decided to go for a re-tender so as to invite more competition. Thereafter the tender inviting authority issued a fresh tender notification dated 21.07.2020. But it turned out to be a package tender comprising as many as 10 works. The tender notification is as follows :



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**GOVERNMENT OF TAMILNADU
PUBLIC WORKS DEPARTMENT / BUILDINGS ORGANIZATION
BUILDINGS (C&M) CIRCLE, TRICHY-1.**

SHORT TERM TENDER NOTICE No. 06 / 2020-21 / SE / B / C&M / TRY / Dated: 21.07.2020

PRE QUALIFICATION APPLICATION TENDER

FORM OF CONTRACT: LUMPSUM (TWO COVER SYSTEM) / ITEM WISE RATE TENDER

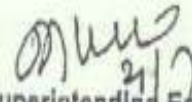
For and on behalf of the Governor of Tamilnadu, the Superintending Engineer, PWD, Buildings (C&M) Circle, Trichy invites sealed tender for the following works at his Office upto 3.00 PM on 18.08.2020 in two sealed covers. The Pre-Qualification application will alone be opened at 3.30 PM on same day.

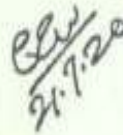
Sl. No	Name of Work	Approx. value of work in Lakhs (including GST @ 12%)	Amount of Earnest Money Deposit (in Rupees)	Period of completion	Tender Schedule available date
2		3	4	5	6
1.	PACKAGE PUDUKKOTTAI DISTRICT				
	SLICE-1: Construction of 10 Class Rooms, One Science Lab, Boys Toilet 2 No, Girls Toilet 2 No, Drinking Water Facility and Compound Wall in Government High School MOLUDAIYANPATTI in Karambakudi Taluk at Pudukkottai District	242.18	8,29,000/-	12 Months	From 23.07.2020 to 17.08.2020 Upto 5.45 PM
	SLICE-2: Construction of 12 Class Rooms, One Science Lab, Boys Toilet 1 No, Girls Toilet 1 No and Drinking Water Facility Government Higher Secondary School MALAIYUR in Karambakudi Taluk at Pudukkottai District	244.58		12 Months	
	SLICE-3: Construction of 6 Class Rooms, Boys Toilet 2 No, Drinking Water Facility and Compound Wall in Government Higher Secondary School ARIMALAM in Thirumayam Taluk at Pudukkottai District	140.54		7 Months	
	SLICE-4: Construction of 6 Class Rooms, Boys Toilet 1 No, Girls Toilet 1 No and Drinking water facility in Government High School NERATTUNILAI in Thirumayam Taluk at Pudukkottai District	110.96		7 Months	
	SLICE-5: Construction of 4 Class Rooms, Boys Toilet 1 No, Girls Toilet 1 No and Drinking Water Facility in Government Higher Secondary School SATHIYAMANGALAM in Kulathur Taluk at Pudukkottai District	81.50		6 Months	
	SLICE-6: Construction of 5 Class Rooms, One Science Lab, Boys Toilet 1 No, Girls Toilet 1 No, Drinking Water Facility and Compound Wall in Government Higher Secondary School MUCKKANAMALAI PATTI in Iluppur Taluk at Pudukkottai District	167.12		5 Months	
	SLICE-7: Construction of 4 Class Rooms, One Science Lab, Girls Toilet 2 No and Drinking Water Facility in Government (Girls) High School SILATTUR in Aranthangi Taluk at Pudukkottai District	107.67		7 Months	
	SLICE-8: Construction of 4 Class Rooms, Boys Toilet 1 No, Girls Toilet 1 No, Drinking Water Facility and Compound Wall in Government Higher Secondary School YEMBAL in Avyudaiyarkoil Taluk at Pudukkottai District	121.35		5 Months	
	SLICE-9: Construction of 4 Class Rooms, Girls Toilet 3 No, Drinking Water facility and Compound Wall in Government (Girls) Higher Secondary School PONPUDUPPATTI in Ponnaravathy Taluk at Pudukkottai District	116.10		7 Months	
	SLICE-10: Construction of Boys Hostel Building (For 100 Students) in Government Industrial Training Institute Campus at Pudukkottai in Pudukkottai District. (Second Call)	304.23		8 Months	
	Total	1636.23			



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1. Tender Documents can be downloaded at free of cost from the following websites www.intenders.gov.in & www.tenders.tn.gov.in
2. The tender Documents can also be obtained directly from the office of the Superintending Engineer, PWD, Buildings Construction and maintenance Circle, PWD Campus, Cantonment, Trichy by remitting the requisite cost Rs.15,000/- + GST Rs.1,800 /- through Bank Chalan during office hours.
3. The officer in favour of the EMD should be remitted to: Executive Engineer, PWD., Buildings (C&M) Division, Pudukkottai.
4. Minimum Eligibility of the Contractors: Class I contractors Registered in PWD Above Rs.75 lakhs.
5. Details regarding the class of tenderers, Tender specification and other conditions are available in the above website.
6. The applicants are cautioned that the Qualification Application containing any deviation from the contractual terms and conditions, specification or other requirements will be rejected as non-responsive and low performance reliability.
7. The evidences on the minimum qualification criteria mentioned in the Pre Qualification Application form should be furnished in Cover-I without any omissions at the time of submission of prequalification tender itself. Any Omissions in this regard will be summarily rejected.
8. If the last date of issue of Tender Schedule or last date for receipt of Tender happens to be a holiday, Tender Schedule will be issued on the next working day and Tenders will be received up to 3.00PM on the next working day
9. Price Adjustment Clause is applicable for all the individual works except for the work mentioned against Slice No.5.
10. Any Clarification will be entertained during office hours on working days at the office of the Superintending Engineer, PWD, Buildings Construction and maintenance Circle, PWD campus, Cantonment, Trichy .may contact office over Phone No. 0431-2462604.


Superintending Engineer, P.W.D.
Buildings (C&M) Circle, Trichy-1.


21.7.20



3. Clause 2(iii) and V of the tender document set out the following pre-qualification conditions. They are as follows :

QUALIFICATION & PRICE TENDER NOTICE

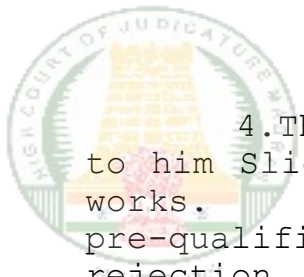
FORM OF CONTRACT/ LUMP SUM AGREEMENT / TWO COVER SYSTEM

1. INVITATION :

Tender under sealed two cover tender system i.e. qualification schedule & price tender (item rate tenders) are invited for and on behalf of the Governor of Tamil Nadu by the Superintending Engineer, PWD., Buildings Construction and Maintenance Circle, Trichirapalli-1. One Cover contains EMD and Qualification conditions and other details and the second over containing price tender schedule.

2. FOR SPECIAL ATTENTION:

- i. Only the contractors registered with Tamilnadu State Public Works Department under **Class I (as per revised classification) with monetary limit above Rs.75.00 lakhs (Rupees Seventy Five Lakhs)** and with proven track record are only eligible. In such a case, the applicant should furnish the following documents to satisfy the criteria.
- ii. The Applicants should have been in the same name and style in the Civil Engineering Construction field at least for the past FIVE years.
- iii. The Applicants should have completed **at least one "BUILDING" work of similar nature with value not less than Rs.818.12 Lakhs (Rupees Eight Crore Eighteen Lakhs and Twelve Thousand only) 50 % of value of work including GST 12% under a single agreement in any one of the preceding "Five Years"**. For this purpose, buildings like Industrial sheds, workshops will not be considered.
- iv. Execution of Civil and Electrical works in a single agreement as per Go.Ms. No. 16 PW.(G2) /Dept. / Dt 17.01.2018
 - a. This project is proposed to be executed with Civil and Electrical works in a single agreement as are package
 - b. The civil contractor while offering for tendering has to furnish an undertaking from the electrical engineer who is having Electrical License issued from Electrical licensing board, Govt. of TamilNadu stating that the concerned electrical works will be executed under his supervision
 - c. Electrical contractor had to engage Qualified Civil Engineers with good credentials in civil Engineering works. They have to produce consent letter from civil Engineering stating that they are willing to work in that particular site
- v. Annual turnover of the Applicant should not be less than **Rs.2454.35 Lakhs (Rupees Twenty Four Crores Fifty Four Lakhs and Thirty Five Thousand) 1.50 times of value of work including GST 12% per year in any one of the preceding "FIVE" years.**

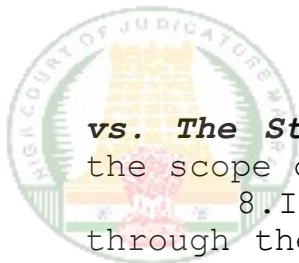


4.The petitioner is having two fold grievances. According to him Slice No.10 ought not to have been clubbed along with other works. He is also aggrieved by the imposition of the aforesaid pre-qualification eligibility requirements. Challenging the rejection of his earlier tender and challenging the subsequent tender process, these three writ petitions have been filed.

5.The learned counsel for the petitioner took me through the pleadings as well as the materials enclosed in the typed set of papers and called upon this Court to interfere in the matter. His specific allegation is that the entire process has been skewed so as to favour certain persons. He also would claim that since he did not comply with the illegal demands made by the tender inviting authority, the tender inviting authority had chosen to reject his earlier tender. The petitioner has arrayed the tender inviting authority in person. He also seriously questioned the claim of the tender inviting authority that in the earlier tender process, the petitioner's bid was alone found technically eligible and therefore, it became a single bid. The petitioner had given details of the other participants also. He also would contend that Slice No.10 is a deposit work and therefore, clubbing the same along with the tender works is in violation of G.O (Ms) No.17, Public Works (G2) Department, dated 15.02.2019.

6.The learned Additional Advocate General Shri.S.R.Rajagopal appearing for the respondents denied all the allegations made by the learned counsel for the petitioner. He reiterated that the earlier tender process elicited only a single eligible tender namely that of the petitioner and that therefore, it was rightly rejected. He strongly contended that it is not open to this Court to interfere with the said decision.

7.When the tender inviting authority was considering issuing a second notification, it was realised that a number of other works were also to be carried out and in order to invite more competition, the authority took a conscious decision to club Slice No.10 along with the other works. He relied on the judgment of the Hon'ble Division Bench made in WA No.3302 of 2019 dated 04.11.2019 in support of his contention that the validity of the package system having been sustained by the Hon'ble Division Bench, this Court is squarely bound by the same. As regards the contention that G.O (Ms) No.17, Public Works (G2) Department, dated 15.02.2019 has been infringed, the learned Additional Advocate General would contend that only if Slice No.10 is a deposit work, the said G.O will kick in and not otherwise. He drew my attention to the fact that the Additional Chief Secretary to Government, Labour and Employment Department, Government of Tamil Nadu had himself filed an affidavit in this regard and that therefore, the work in question cannot be termed as a deposit work. Once Slice No.10 is considered as a non deposit work, then there is nothing for this Court to adjudicate. He also placed reliance on the decisions of the Hon'ble Supreme Court reported in **(2007) 14 SCC 517 (Jagdish Mandal vs. State of Orissa and Ors.)** and **(2012) 8 SCC 216 (Michigan Rubber (India) Ltd.**



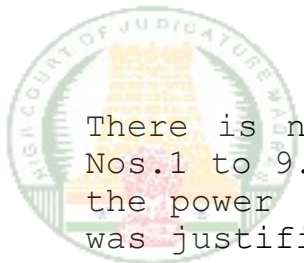
vs. The State of Karnataka and Ors), to drive home his point that the scope of interference in such matters is highly limited.

8.I carefully considered the rival contentions and went through the materials on record. I must sustain the contention of the learned Additional Advocate General that the decision of the tender inviting authority to reject the tender if it turns out to be a solitary bid cannot be questioned. Likewise, it is not clear as to whether Slice No.10 is a deposit work or not. It is for the petitioner to substantiate that the said work is a deposit work and that G.O(Ms) No.17 dated 15.02.2019 can be invoked. The petitioner has not been able to do so. The affidavit filed by the Secretary to Government is also not directly on the point. Be that as it may, in as much as the petitioner has not discharged his onus as regards the character of the work, I do not want to go further into the matter.

9.The true issue that arises in these cases does not turn on the character of the work whether it is deposit work or not may not really be material. The issues raised in these writ petitions cannot be dealt with in compartments. The entire sequence of events will have to be appreciated from a holistic perspective. The tender inviting authority had issued the notification way back on 03.03.2020 for the work of construction of Boys' Hostel building at Pudukkottai. The last date for receipt of tenders was 24.03.2020. There is absolutely no justification in sitting over the matter for more than three and half months thereafter. The original tender process was terminated only on 02.07.2020. The Tender Award Committee took the decision to terminate the tender process in order to go for greater competition. It is this enormous delay that had given rise to serious suspicion in my mind. The petitioner would allege that 5% commission was demanded from him. However, I am not in a position to render any finding and I leave it at that.

10. By G.O (Ms) No.3, Labour and Employment (S1) Department dated 03.01.2020, sanction was accorded for a sum of Rs.3880.40 lakhs as non-recurring expenditure towards construction of hostel with mess facilities in twelve districts including the Boys' Hostel for Government ITI, Pudukkottai. That is why, the original notification dated 03.03.2020 pertained to construction of Boys Hostel Building (for 100 Students) in Government Industrial Training Institute Campus at Pudukkottai and Women's Hostel Building in Government Industrial Training Institute Campus at Pullambadi in Trichy District.

11.The impugned tender notification dated 21.07.2020 comprises as many as ten works. Slice 1 to 9 pertain to construction activities of High Schools and Higher Secondary Class Rooms in various taluks in Pudukkottai District. Obviously, Slice Nos.1 to 9 pertain to Education department while Slice No.10 pertains to Labour and Employment Department. These two departments have entrusted the works independently to Public Works Department.



There is no reason as to why Slice No.10 was clubbed with Slice Nos.1 to 9. Here, the question is not whether the authority has got the power to club or not. The question is whether the authority was justified in exercising the power of clubbing. This is all the more so because, the works pertain to two distinct departments. Clubbing can be resorted to if the clubbed works are integrally linked. That is clearly not the case here. Slice Nos.1 and 2 pertain to works in two different villages in Karambakudi Taluk. Slice Nos.3 and 4 pertain to two different works in Thirumayam Taluk. Slice No.5 pertains to Kulathur Taluk. Slice No.6 pertains to Illuppur Taluk. Slice No.7 pertains to Silatur Taluk. Slice No.8 pertains to Avudaiyarkoil Taluk. Slice No.9 pertains to Ponnamaravathy Taluk. Slice No.10 is to be carried out at Pudukkottai.

12.The learned Additional Advocate General contends that courts ought not to poke their nose in tender matters beyond a point and that the decision should be left to the prerogative of the Government. In my view, the concept of prerogative cannot keep company with the concept of rule of law. In any event, the decision making process is subject to judicial scrutiny. We are a democracy and our Constitution contains Part IV in which the Directive Principles of State Policy have been laid down. Of course, as per the Article 37, the provisions contained in Part IV shall not be enforceable by any court. But, the principles laid down therein are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. Article 39 states that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. That is why, we have what is known as competition law. Government must have due regard to the constitutional values while awarding contract (***vide West Bengal State Electricity Board vs. Patel Engineering Co. Ltd. and Ors, (2001) 2 SCC 451***). The terms of the tender process must be formulated in such a way that it fosters competition. The small or medium level players must not left out. Only then there will be healthy competition in the long run.

13.The Government of Tamil Nadu enacted the Tamil Nadu Transparency in Tenders Act, 1998 with the object of ensuring healthy competition. The works in question are building works. It is not rocket science. If there is no corruption and if there is proper supervision, "A Class" buildings can be constructed. Let us look at the temples around us. They were constructed several hundred years ago and they are still standing firm as rocks. It is not the case of the Government that there are no Class I contractors in Pudukkottai District. But, the learned Additional Advocate General submitted that in respect of the second tender notification, there were only three eligible contractors. They are as follows :

<https://hcservices.ecourts.gov.in/hcservices/>



"(i)M/s.Sri Ventakeshwara Engineering Contractors,
No.84, B/3, SS Complex, Trichy Road, Namakkal.

(ii)M/s.S.S.Associates,
622, Vanniyar Nagar, Alagapuram, Periya Pudhur,
Salem.

(iii)M/s.Shiva Nagammai Engineering Contractors,
D3, 3rd Floor, Shankar Abodes,
19, Seshapuram Tennur, Trichy-17."

Not one contractor from Pudukkottai could make it. This is because of the imposition of the high threshold conditions and requirements. The petitioner had specifically stated in his affidavit that in the entire State of Tamil Nadu, there are hardly 15 contractors who can fulfil the impugned eligibility requirements. All the impugned tender works pertain to Pudukkottai and there is not even a single contractor who could be eligible. It is not as if Pudukkottai contractors had not constructed government buildings earlier. The petitioner himself has been in the field for so many years. The current manthra of the Central Government is "go local". But, by clubbing all the works and by imposing high threshold conditions, the Government made it impossible for local participation.

14. The respondents have not placed any file notings from which one can conclude that there was justification for including slice No.10 in the notification under challenge. The Hon'ble Supreme Court in the decision reported in (2016) 16 SCC 818 (Afcons Infrastructure Ltd. V. Nagpur Metro Rail Corpn. Ltd.) held that the decision of the tender authority should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision making process should be perverse and not merely faulty or incorrect or erroneous. Applying the said yardstick, I can categorically hold that including slice No.10 in the impugned notification is both unreasonable and perverse. It also smacks of arbitrariness. The respondents have claimed before me as if the impugned move was to invite greater competition. In my view, it has achieved the opposite purpose. Incorporating stiff pre-qualification conditions can be justified if the nature of the tender works warrants the same. As I already noted, the subject works are only for construction of buildings and nothing else. Slice No.10 was originally notified independently and it was not clubbed with any other work. The respondents ought to have drawn my attention to the relevant file notings contemporaneously made for clubbing it with other works. They have not done so. Any Class-I contractor can carry out the subject works. I am not able to discern anything from the decision making process as to why a high threshold pre-qualification requirement was incorporated. It is this total absence of reason or justification that makes the decision making process both arbitrary and unreasonable.



15.The learned Additional Advocate General would train his guns on the conduct of the petitioner. He would state that the petitioner is a professional litigant. He seriously faulted the conduct of the petitioner in submitting a bid in response to the second notification. The petitioner knew that he was not qualified to take part and yet, he had chosen to offer his bid. I am not able to agree with the said contention. It is true that the petitioner is disqualified from taking part in the second tender notification. That is why he has challenged the threshold requirements. But he appears to have done so so that he is in the know of things. The petitioner had filed an additional affidavit in which very serious allegations have been made. Since it was filed at the last moment, the respondents did not have an opportunity to file a reply and therefore, I am not going into the same. I am referring to it only to stress the fact that the petitioner could have access to what was going on because he was also one of the participants.

16.Yet another aspect disturbs me. These are high value tenders. The tender inviting authority had not chosen the online mode. Only if the tender process is conducted on the digital platform, there will be transparency and there will be less scope for manipulation. In the case on hand, it is for the respondents to explain as to why online mode was dispensed with. If the tender applications are received only in physical form, it is always possible that there can be manipulation and tinkering. I do not for a moment suggest that such irregularities had taken place. But I cannot help observing by not resorting to e-tenders, the respondents have invited such allegations.

17.Since I have held that the respondents had arbitrarily and without any reason clubbed Slice No.10 along with other works, I have to necessarily interfere. The tender notification dated 21.07.2020 is quashed to the extent it includes slice No.10 along with other works. The respondents are directed to issue a fresh notification in respect of slice No.10.

18.WP (MD)Nos.9557 & 8752 are accordingly allowed as indicated above. WP(MD)No.8762 of 2020 is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (AD-II)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)



Skm

To:

- 1.The Principal Secretary to
the Government of Tamil Nadu,
Public Works Department,
Secretariat, Chennai.
- 2.The General Manager,
National Bank for Agricultural and
Rural Development,
State Project Department,
G-Block, Bandra - kurla Complex,
Bandra (East), Mumbai - 400 051.
- 3.The Superintending Engineer,
Public Works Department,
Building (C&M) Trichy Circle, Trichy.

+1 CC to Spl GP (SR-15453 to 15455[F] dated 31/08/2020)

WP (MD) Nos. 8752, 8762
& 9557 of 2020
26.08.2020

VB (09.09.2020) 12P 5C