



W.P(MD)Nos.25676, 22870, 22871 and 22872 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 03.11.2023

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THE HON'BLE MR.JUSTICE G.R.SWAMINATHAN

W.P(MD)Nos.25676, 22870, 22871 and 22872 of 2023
and

W.M.P.(MD)Nos.21848, 21849, 21850, 19118, 19119,
19120, 19121, 19122 and 19123 of 2023

W.P.(MD)No.25676 of 2023:-

K.Rajamohamed

... Petitioner

Vs.

- 1.The Chief Engineer (Highways Projects),
Office of the Chief Engineer (Highways),
3rd Floor, Integrated Chief Engineers Office Buildings,
No.76, Sardar Patel Road, Guindy,
Chennai – 600 025.
- 2.The Superintending Engineer,
Highways Department (Construction and Maintenance Circle),
Tirunelveli Circle, No.70, Thiruvananthapuram Road,
Palayamkottai, Tirunelveli – 627 002.
- 3.The Divisional Engineer,
Highways Department (Construction and Maintenance Circle),
Quality Control Division,
Kollam - Thirumangalam Road,
Tirunelveli.

... Respondents



W.P(MD)Nos.25676, 22870, 22871 and 22872 of 2023

Prayer : Writ Petition 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 order passed by the 2nd respondent vide Ka.No.4538/2023-24/Va5 dated 29.09.2023 and quash the same as illegal and consequently directing the respondents to open the Pre-Qualification Bid and Price Bid of the petitioner and to issue work order within the time frame stipulated by this Court.

For Petitioner : Mr.B.Saravanan, Senior Counsel,
For Mr.D.Kirubakaran

For Respondents : Mr.Veera Kathiravan,
Addl. Advocate General,
Assisted by Mr.K.Balasubramani,
Spl. Government Pleader.

W.P.(MD)No.22870 of 2023:-

K.Raja Mohammed

... Petitioner

Vs.

1.The Superintending Engineer,
Highways Department Construction and Maintenance Circle,
Tirunelveli Circle, Tirunelveli.

2.The Divisional Engineer (Highways),
Quality Control Division,
Tirunelveli.

... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the impugned order in

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Lr.No.TRP 90/2023-24/D5 published online dated 13.09.2023 on the file of the respondent No.1 and quash the same as illegal and consequently direct the respondent No.1 to consider the tender documents submitted by the petitioner and open the Pre Qualification Bid and Price Bid for the work of TNV 30 Widening from single Lane to Intermediate Lane, Strengthening improvements to riding quality construction of Retaining wall and reconstruction of Box culvert in Government Roads of Sankarankovil (H) C & M Sub-Division within the time frame stipulated by this Court.

For Petitioner : Mr.B.Saravanan, Senior Counsel,
For Mr.D.Kirubakaran

For Respondents : Mr.Veera Kathiravan,
Addl. Advocate General,
Assisted by Mr.K.Balasubramani,
Spl. Government Pleader.

W.P.(MD)No.22871 of 2023:-

K.Raja Mohammed

... Petitioner

Vs.

1.The Superintending Engineer,
Highways Department Construction and Maintenance Circle,
Tirunelveli Circle, Tirunelveli.

2.The Divisional Engineer (Highways),
Quality Control Division,
Tirunelveli.

... Respondents



W.P.(MD)Nos.25676, 22870, 22871 and 22872 of 2023

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the impugned order in Lr.No.TRP 87/2023-24/D5 published online dated 13.09.2023 on the file of the respondent No.1 and quash the same as illegal and consequently direct the respondent No.1 to consider the tender documents submitted by the petitioner and open the Pre Qualification Bid and Price Bid for the work of Widening from single Lane to Intermediate Lane, Strengthening improvements to riding quality construction of Retaining wall and reconstruction of Box culvert in Government Roads of Sivagiri (H) C & M Sub-Division (TNV 27) within the time frame stipulated by this Court.

For Petitioner : Mr.B.Saravanan, Senior Counsel,
For Mr.D.Kirubakaran

For Respondents : Mr.Veera Kathiravan,
Addl. Advocate General,
Assisted by Mr.K.Balasubramani,
Spl. Government Pleader.

W.P.(MD)No.22872 of 2023:-

K.Raja Mohammed

... Petitioner

Vs.

1.The Superintending Engineer,
Highways Department Construction and Maintenance Circle,
Tirunelveli Circle, Tirunelveli.



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2.The Divisional Engineer (Highways),
Quality Control Division,
Tirunelveli.

... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the impugned order in Lr.No.TRP 86/2023-24/D5 published online dated 13.09.2023 on the file of the respondent No.1 and quash the same as illegal and consequently direct the respondent No.1 to consider the tender documents submitted by the petitioner and open the Pre Qualification Bid and Price Bid for the work of Widening from Two Lane to Two Lane with paved Shoulders and Strengthening at Km109/0-111/0, Strengthening at Km 101/615, 102-0, 103/0-104/540, 107/9-109/0 of Tiruchanthur 0 Palayankottai – Ambasamuthira – Tenkasi _ Courtallam – Shenkottai Road including reconstruction of Box culvert at 101/8, 103/10(i), (ii) and 109/10 (TNV 26) within the time frame stipulated by this Court.

For Petitioner : Mr.B.Saravanan, Senior Counsel,
For Mr.D.Kirubakaran

For Respondents : Mr.Veera Kathiravan,
Addl. Advocate General,
Assisted by Mr.K.Balasubramani,
Spl. Government Pleader.



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COMMON ORDER

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Heard the learned senior counsel for the writ petitioner and the learned Additional Advocate General assisted by the learned Special Government Pleader for the respondents.

2.The Superintending Engineer (Highways), Construction and Maintenance, Tirunelveli issued tender notifications on 19.07.2023 and 20.07.2023 inviting applications from eligible contractors for three road works under CRIDP 2023 – 24. The last date for submission of the applications was originally 16.08.2023. Since corrigendum was issued, the last date was extended to 23.08.2023. The petitioner was one of the applicants, who responded to the notifications. One of the documents that was required to be submitted was quality control certificate relating to the working conditions of plant and machinery. Since the petitioner could not obtain the same before the last date, he filed W.P.(MD)Nos.22102 and 22116 of 2023 for directing the tender accepting authority to accept and consider the quality control certificate obtained by him on 23.08.2023. The writ petitions were disposed of on 22.09.2023 in the following terms:-

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“12.This Court feels that the officials, who are dealing with these contract matters, in order to ensure the best interest of the State, are imposing onerous conditions. In this case, the tender inviting authority has imposed certain conditions, which are extracted as under for clarity:-

*“MINIMUM MANDATORY REQUIREMENT OF
PLANT AND EQUIPMENT FOR THIS WORK
(Proof of Ownership must be enclosed)*

1.	Central Hot Mix Plant	1 No.
2.	Paver Finisher	1 No.
3.	Static Roller	1 No.
4.	Vibratory Roller (TANDEM)	1 No.
5.	Concrete Mixer Machine	2 No.
6.	Pin Vibrator	2 No.

Note:1) Necessary documents for the ownership of C.M.P. Paver Finisher, Vibratory Roller, Static Roller and Concrete Mixer Machine and Pin Vibrator should be enclosed along with the tender schedule. Further current working condition certificate for the above plants should be obtained from the Divisional Engineer (H) Quality Control concerned and enclose the original certificate along with the prequalification tender document for which certificate should be after the date of Tender Publication.

2) Contractor should compulsorily mention the contractor code assigned to him / her.”



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13.From the above, one of the conditions is that a Divisional Engineer has to give a certificate as to the working conditions of the machineries and along with that certificate, the tender document has to be submitted. In the event if the Divisional Engineer delays the issuance of certificate and chose to issue the certificate only in favour of few people, then the process of fair competition in the tender process itself would be defeated. The concept of inviting tender through public auction itself is to ensure more number of participants. This type of conditions would certainly defeat the object of public auction on these tenders.

14.Yet another condition is that the participants should own certain machineries. These machineries, which are required to be in the possession of the Contractor at the time of applying for the tender, can very well be hired at the time of execution of the work. It is the look out of the Contractor in executing the work. The justification of the Department in imposing this condition is that they want to ensure that the projects are completed within the stipulated time. This can be ensured by imposing certain penalties. The Contractors are participating in the tender with some Earnest Money Deposits. They are expected to deposit 10% of the amount at the time of award of contract. In the event,



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if there is any delay, the Department can fix some penalty against the Contractors, who are responsible for the delay and shall also recover the damages for the delay in execution of the works. But the sad state of affairs is that nobody is sticking-on to this condition and almost none of the Contractors is completing the work within the stipulated time.

15.By imposing these type of onerous conditions, the officials are eliminating the competitions and this would ultimately end with favoritism. Therefore, it is high time for the Department to ensure that reasonable conditions alone are imposed as tender conditions.

16.In this case, since the petitioner is not having any document to show that he has approached the third respondent in time, this Court is not inclined to issue any positive direction as prayed for. At the same time, the fact remains that the petitioner is having the machineries. The third respondent himself has issued a certificate in favour of the petitioner on the possession and the quality of the machineries on 18.01.2023. There cannot be much difference between 18.01.2023 and 23.08.2023. This Court is also taking note of the earlier order passed in WP(MD)No.20942 of 2023. The evaluation of the technical



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bid is also not yet over. Therefore, the respondents may consider the case of the petitioner in the light of the certificate dated 18.01.2023 and the certificate dated 23.08.2023, without sticking-on to the technicalities, if it is otherwise eligible.”

Pursuant to the said direction, the tender accepting authority passed order dated 29.09.2023 rejecting the petitioner's request for considering the earlier quality control certificate dated 18.11.2023. Challenging the same, W.P.(MD)No.25676 of 2023 came to be filed.

3.The tender applications were taken up for technical bid evaluation on 24.08.2023. On the said date, since the petitioner had not furnished the quality certificate obtained after issuance of tender notifications, all the three tenders submitted by the petitioner were rejected. Challenging the same, the petitioner filed W.P.(MD)Nos.22870, 22871 and 22872 of 2023.

4.The learned senior counsel for the writ petitioner reiterated all the contentions set out in the affidavits filed in support of the writ



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petitions and called upon this Court to set aside the impugned orders and grant relief as prayed for.

5.The respondents have not filed any counter affidavit in W.P.(MD)No.25676 of 2023. The writ petition was listed for admission on 20.10.2023. It was ordered to be listed for final disposal on 30.10.2023. On the said date, it was adjourned to 31.10.2023 and thereafter, it is being taken up for disposal today ie., 03.11.2023.

6.The learned Additional Advocate General took me through the rejection orders and contended that they are well reasoned and that this Court ought not to interfere in the matter. He pointed out that Clause 9 of the tender notification dated 20.07.2023 contains the following conditions:-

“9.The contractor should produce the documents for own possession of sufficient Plants & Machineries and obtain certificate from the Divisional Engineer (H), (QC) concerned after the date of publication of Tender Notice as specified in the tender documents for working condition of the Plants & Machineries.”



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Since this document was not furnished by the petitioner on 23.08.2023, the authority rightly rejected the petitioner's tenders. He would further add that the tender applicant is bound by the terms of the tender notifications. He relied on the decisions of the Hon'ble Supreme Court reported in **(2022) 6 SCC 127 (N.G.Projects Limited Vs. Vinod Kumar Jain)** and **2023 LiveLaw (SC) 467 [Tata Motors Limited Vs. The Brihan Mumbai Electric Supply & Transport Undertaking (Best)]** in support of his contention that the Writ Court ought to exercise judicial restraint in tender related matters. He called upon this Court to sustain the impugned orders and dismiss the writ petitions.

7.I carefully considered the rival contentions and went through the materials on record. The order dated 22.09.2023 made in W.P.(MD)Nos.22102 and 22116 of 2023 had already been extracted. The respondents have not filed any writ appeals questioning the said orders. The learned Additional Advocate General strongly submitted that since the learned Judge had only employed the expression “the respondents may consider”, the authorities did not find it necessary to challenge the said order.



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8.It is true that in Paragraph No.16 of the order, the learned Judge had stated that the Court was not inclined to issue any positive direction. But then, such a view was taken because the learned Judge felt that the writ petitioner failed to prove that he made an application on 11.08.2023 itself.

9.In the affidavit filed in support of W.P.(MD)No.22870 of 2023, the petitioner had a categorical averment that he submitted that the application on 11.08.2023 itself for grant of quality control certificate. The writ petitioner was present in person and I wanted to know to whom he gave the application. He submitted that he gave the application in person to the Assistant Divisional Engineer (Construction and Maintenance), Tenkasi. Fortunately, the said official was also present in Court. I appealed to the conscience of the said official and asked to state if really the petitioner gave the application in person. I am happy to record that the said official fairly and frankly confirmed the petitioner's assertion as correct. He added that he did not forward the petitioner's application to the Divisional Engineer (Highways), Quality Control Division, Tirunelveli. Thereupon, I asked the learned Additional



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Advocate General to contact the Divisional Engineer (Highways), Quality Control Division, Tirunelveli over mobile phone. The mobile phone was passed on to me. I posed a question to Thiru.Thiruvengada Ramalingam, Divisional Engineer (Highways), Quality Control Division, Tirunelveli to clarify if the quality control certificates are issued based on applications directly received from the contractors or if they are received through the field level officers such as the Assistant Divisional Engineer (Construction and Maintenance), Tenkasi. Shri.Thiruvengada Ramalingam informed me that in some cases, the applications are received through the Assistant Divisional Engineers and in some cases directly.

10.I would hazard a guess that if this aspect of the matter had been brought to the attention of my brother Judge, a positive direction would have been issued in W.P.(MD)Nos.22016 and 22116 of 2023.

11.The learned senior counsel for the petitioner draws my attention to the order dated 30.11.2022 made in W.P.No.32170 of 2022. Paragraph Nos.2 to 9 of the said order read as follows:-

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“2. The respondents called for tenders for various works on 12.10.2022, 13.10.2022, 14.10.2022 and 18.10.2022. Totally four tenders covering various works were called called for by the respondents. For all these tenders, the petitioner had filed the tender documents and the date for opening the tender has been fixed as 02.12.2022. One of the prerequisite condition is that, the tenderers should produce or upload along with the tender document, the plant and machinery certificate to be issued by the concerned authority ie., the 3rd respondent.

3. Even though the petitioner was having the earlier certificate dated 09.07.2022, in order to participate in the present four tenders, the latest certificate issued by the 3rd respondent has to be obtained and produced or to be uploaded, which the petitioner could not do because, even though the petitioner has made an application to that effect to the 3rd respondent to get the certificate, it has not been given to him and therefore, at this juncture, the petitioner has moved the present writ petition seeking for a writ of mandamus directing the respondents to issue the plant and machinery certificate to the petitioner as specified in the terms of documents for working condition of the plant and machinery or accept the earlier certificate issued on



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09.07.2022 in order to participate in the four tenders mentioned in this writ petition.

4. Heard Mr.S.Doraiswamy, learned counsel for the petitioner, who after having reiterated the aforesaid, in fact was originally seeking for a direction asked for and when this writ petition came up for hearing in the morning session, Mr.B.Vijay, learned Additional Government Pleader appearing for the respondents has produced a copy of such certificate ie., plant and machinery certificate issued by the 3rd respondent dated 25.11.2022 and would submit that, the said certificate has already been given to the representative of the petitioner. However, the learned counsel for the petitioner has denied the same as the petitioner has not so far received the certificate.

5. At this juncture, in order to resolve the issue whether the certificate issued by the 3rd respondent dated 25.11.2022 can be uploaded now through the portal of the respondents if it is an e-tender system in order to get such a clarification from the respondents, learned Additional Government Pleader took time till the afternoon session.

6. In the afternoon session when the case is taken up for hearing, the learned Additional Government Pleader



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has produced the following communication issued by the 3rd respondent in Lr.No.490/A1/2022 dated 30.11.2022 where he has stated the following:

“I wish to state that the Tender submitted by M/s.DSR Sons India Engineers Private Limited, No. 49, 1 st Floor, HIG, NH-1, Vallal MGR Street, Maraimalai Nagar, Chengalpattu District will be considered if the machinery certificate issued by the Divisional Engineer (H) Quality Control on 25.11.2022 is submitted in person to the tender inviting authority on or before tender opening date of 02.12.2022 and also the machinery certificate issued on 09.07.2022 by the Divisional Engineer (H), Quality Control which the petitioner has mentioned in his W.P.No.32170 of 2022 will also be considered. Divisional Engineer(H) Quality Control Division Chennai -25.”

7. Relying upon this communication, the learned Additional Government Pleader would contend that, if the petitioner produces the certificate of plant and machinery dated 25.11.2022 along with the earlier certificate dated 09.07.2022 in person before the second respondent on or before 02.12.2022, that would be accepted by the second respondent as a valid certificate for the purpose of considering the tender documents already submitted by the petitioner for all the four tenders.

8. I have considered the submissions made by the learned counsel for both sides and have perused the materials placed on record.



9. *In view of the stand taken by the learned Additional Government Pleader appearing for the respondents, especially in the context of the communication now issued by the 3rd respondent dated 30.11.2022, this Court is inclined to dispose of this writ petition with the following order:*

- ◆ *That it is for the petitioner to produce the plant and machinery certificate dated 25.11.2022 which has now been handed over to the learned counsel for the petitioner along with the earlier certificate dated 09.07.2022 which is already in the possession of the petitioner to the second respondent on or before 02.12.2022.*
- ◆ *On such production, those certificates shall be accepted by the 2nd respondent and based on which, the tender documents submitted by the petitioner for all the four tenders shall be accepted for scrutiny and process in accordance with the tender conditions.*
- ◆ *It is made clear that for want of production of the plant and machinery certificate, the tender documents submitted by the petitioner for all the four tenders shall not be rejected.”*



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12.The order dated 22.09.2023 made in W.P.(MD)Nos.22106 and 22116 of 2023 filed by the petitioner should be understood and appreciated in the light of the order dated 30.11.2022 made in W.P.No.32170 of 2022. It can be seen therefrom that failure to submit the quality control certificate on the last date for submission of tender was not seen as fatal. It was felt that if the said certificate could be made available before the technical bid was considered, it was deemed to be in order. The tender applications were deemed to be substantially responsive.

13.There is a beautiful story in the life of Lord Buddha. Ananda was present as usual. To the question if God exists, Buddha gave different answers to different individuals. When Ananda asked Buddha as to why he gave inconsistent answers, Buddha replied that he was answering the questioners and not the question. Deriving inspiration from this, I must clarify that I am not laying down any proposition of law as such. Relief is granted only considering the factual matrix obtaining in this given case. The petitioner had submitted his application for issuance of quality control certificate on 11.08.2023 itself. Of course, he



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did not go before the third respondent then itself in person. Instead, he had gone before the Assistant Divisional Engineer (Construction and Maintenance), Tenkasi on the said date. In some of the cases, the said officer had forwarded the applications. But unfortunately, in the case of the petitioner, such forwarding was not done. The petitioner was under the bonafide impression that his application also would have been forwarded. I make it clear that Shri.Rajasekar, Assistant Divisional Engineer (Highways), Construction and Maintenance, Tenkasi shall not be faulted for not having forwarded the petitioner's application. That is because he was not under any obligation to do so. He shall also not be faulted for stating the truth before this Court. Stating the truth before the Court is something to be encouraged and complimented. Since the petitioner was under the bonafide impression and since it has been the practice all these years that the applications are given by the tender applicants before the field level officers who in turn forward the same, the present situation had arisen.

14.In any event, on a proper reading of the order dated 22.09.2023 made on the earlier occasion, I am of the view that the purport of it was



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to nudge the respondents to accept the case of the petitioner. This was because the petitioner had obtained the certificate sought for a day prior to technical bid evaluation itself. The tender inviting authority will in future incorporate a condition that application for quality control certificate will be received directly by the authority concerned.

15.The whole object of conducting tender process is to encourage competition. The authority must get the best quotation. The number of participants should be as high as possible. The petitioner is a regular player. He was under the legitimate expectation that his application would be forwarded. He stated before the Court that he had been regularly following up the matter. His bona fides can be seen from the fact that he had tenaciously been fighting the litigation. He had also produced all the relevant documents before the technical scrutiny was taken up. The department is not going to be the loser. Its financial interests are fully protected. If the petitioner fails to pass muster at the technical scrutiny for any other reason, this Court will not come to his rescue. I am of the view that for non-submission of the quality control certificate on 23.08.2023, the petitioner ought not to suffer this is



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because the certificate had been obtained after the date of tender notifications. The tender inviting authority had failed to keep in view clause 5.17 of the tender notifications which is as follows:-

“5.17 If the tender is not substantially responsive to the requirement of the pre-qualification particulars and it will be rejected by the employer and may not subsequently be made responsive by the tenderer having given additional particulars.”

As per clause 5.16, for the purpose of tender evaluation a substantially responsive is one which confirms pre-qualification particulars. The very expression “substantially responsive” indicates that certain minor lapses can be condoned. They should not go to the root of the matter. An applicant must fulfil certain eligibility criteria. It could pertain to experience and financial capacity and possession of infrastructure. The claims of the petitioner regarding possession of eligibility can be termed as particulars. They have to be substantiated by documents. If the claimant has the eligibility but has omitted to include some document, the tender inviting authority can consider the application as substantially



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responsive and take it up for evaluation. It all depends on over all facts and circumstances. No rigid formula can be laid down. In this case, the petitioner can be granted allowance only because of the fact that the application was submitted on 11.08.2023 and the certificate was obtained before the technical scrutiny date and this Court had earlier indicated that the petitioner's case deserves to be considered.

16.In this view of the matter, the orders impugned in these writ petitions are set aside and the writ petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

03.11.2023

NCC : Yes/No
Index : Yes / No
Internet : Yes/ No
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Issue order copy on 08.11.2023.



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G.R.SWAMINATHAN, J.

ias

To:-

- 1.The Chief Engineer (Highways Projects),
Office of the Chief Engineer (Highways),
3rd Floor, Integrated Chief Engineers Office Buildings,
No.76, Sardar Patel Road, Guindy,
Chennai – 600 025.
- 2.The Superintending Engineer,
Highways Department (Construction and Maintenance Circle),
Tirunelveli Circle, No.70, Thiruvananthapuram Road,
Palayamkottai, Tirunelveli – 627 002.
- 3.The Divisional Engineer,
Highways Department (Construction and Maintenance Circle),
Quality Control Division,
Kollam - Thirumangalam Road,
Tirunelveli.

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