(2022) 04 KL CK 0129

In the High Court Of Kerala

Case No : Writ Petition (C) Nos. 23679, 26212, 26762 Of 2021

K.V. Jacob & Sons — APPELLANT

Vs

Cochin Smart Mission Ltd — RESPONDENT

Date of Decision : 22-04-2022

Acts Referred:
Constitution of India, 1950 — Article 14, 226
General Financial Rules (GFRs), 2017 — Section 171

Citation : (2022) 04 KL CK 0129

Hon'ble Judges : N. Nagaresh, J

Bench : Single Bench

Advocate : R.V.Sreejith Jelson, J.Edampadam, K.Jaju Babu, S.Subhash Chand, M.U.Vijayalakshmi, K.V.Manoj Kumar

Final Decision : Dismissed

Judgement

N. Nagaresh, J

1. The petitioners are before this Court seeking to declare that they are entitled to get the performance security submitted by them reduced from 10% to 3% and to get retention amounts released in view of the orders of the Government of India and Government of Kerala.

2. The petitioners are civil contractors. The petitioner in W.P.(C) No.23679/2021 executed an agreement with the respondents for the development of roads for Division I and II under Smart City Mission, Kochi. Ext.P1 letter of acceptance was issued by the 1st respondent on 06.09.2019. The petitioner provided Performance Guarantee.

3. The petitioner in W.P.(C) No.26212/2021 was awarded the work for construction of three minor bridges and two foot over bridges. The petitioner furnished Performance Security at the rate of 5%. An agreement was executed on 09.06.2020.

4. The petitioner in W.P.(C) No.26762/2021 was entrusted with the work of

development of other roads in Ernakulam ABD area under Smart City Mission, Kochi and development of smart roads in Ernakulam ABD area under Smart City Mission, Kochi. The petitioner was served with letter of acceptance dated 09.04.2019. The petitioner furnished Performance Security at the rate of 10%.

5. The petitioners state that as part of the Atmanirbhar Bharat Package, the Government of India issued Ext.P3 communication dated 12.11.2020 announcing that the Performance Security on contracts will be reduced to 3% instead of 5% to 10%. EMD will not be required for tenders and it will be replaced by Bid Security Declaration. Retention money was to be released in proportion to the work already executed in accordance with the contract specification.

6. The Government of India issued Ext.P5 OM dated 12.11.2020 reducing the Performance Security from existing 5-10% to 3% of the value of the contract for all existing contracts. The benefit of the reduced Performance Security was to be denied only in contracts under dispute where arbitration / court proceedings have already started or contemplated.

7. The petitioners requested the respondents to release the security deposits. However, the respondents did not yield. The respondents took a stand that they are governed by GO(P) No.7/2021/Fin dated 07.01.2021. The petitioners stated that the Central Government has framed Atmanirbhar Bharat Package for providing relief measures. The respondents are bound to extend the benefit contemplated by the Central Government. The OM dated 12.11.2020 clearly provides that the Performance Security is reduced from 5-10% to 3% for all existing contracts. The action of the Government of Kerala in issuing the GO(P) dated 07.01.2021 substantially departing from the OM issued by the Government of India, is illegal and unsustainable.

8. The learned counsel for the petitioners argued that the GO dated 07.01.2021 creates two classes of persons, those who have not signed agreement and those who have signed agreement. Those who have not signed agreement are extended the benefit of the Government of India OM dated 12.11.2020 whereas those who have signed agreement are denied the benefit. The classification is illegal and unconstitutional. It does not satisfy the twin test of Article 14 laid down by the Apex Court in State of West Bengal v. Anwar Ali Sarkar [1952 SCR 284]. The classification made is not based on any intelligible differentia. The differential treatment has no rational relationship to the object sought to be achieved.

9. The learned counsel for the petitioners argued that the petitioners have been subjected to hostile discrimination. The respondents are bound to return the Performance Security collected from the petitioners in excess of 5%. The interest of the Cochin Smart Mission Limited is protected by the Government of India OM since there is no complete return of Performance Security. Performance Security of 3% will remain with the respondents. The respondents are therefore compellable to release the Performance Security, in terms of the Government of

India OM. The GO dated 07.01.2021 is liable to be quashed to the extent it is not made applicable to the works where agreements have been signed by the winning bidder.

10. The 1st respondent-Cochin Smart Mission Limited resisted the writ petition filing statement. The Standing Counsel submitted that Performance Security at the rate of 5% to 10% was collected from the contractors as per the RFP conditions. The Government of India issued OM dated 12.11.2020 reducing the Performance Security from existing 5-10% to 3% of the value of the contract for all existing contracts. Based on the said Government of India OM, the Government of Kerala issued GO dated 07.01.2021 specifying that Performance Security / Security Deposit to be submitted at the time of executing agreement is reduced from 5% to 3%. However, the GO dated 07.01.2021 specified that the Government Order is made applicable to all new tenders as well as works which have been tendered and awarded, but agreements have not been signed by the winning bidder. Since the petitioners had executed agreements before 07.01.2021 and as the works undertaken by the petitioners are not new tenders, the benefit of GO dated 07.01.2021 cannot be extended to the petitioners.

11. I have heard the learned counsel for the petitioners and the learned Standing Counsel representing the respondent-Cochin Smart Mission Limited. I have also heard the Senior Government Pleader appearing for the State of Kerala and the learned Assistant Solicitor General of India representing the Government of India.

12. By OM dated 12.11.2020, the Government of India, Ministry of Finance decided to reduce Performance Security from existing 5-10% to 3% of the value of the contract for all existing contracts. The benefit of such reduction was to be denied only to the contracts under disputes wherein arbitration / court proceedings have been already started or contemplated. The Government of India OM dated 12.11.2020 will apply only to contracts which are governed by Rule 171 of General Financial Rules (GFRs), 2017 unless the OM is adopted by any other authority as such. The said OM will not apply to the contracts awarded by Cochin Smart Mission Limited.

13. The Government of Kerala has issued GO(P) No.7/2021/Fin dated 07.01.2021 relaxing the requirements of Performance Security / Security Deposit, Bid Security / Earnest Money Deposit and Additional Performance Guarantee for the execution of Public Works in the State. Paragraphs 4 to 6 of the GO dated 07.01.2021 reads as follows:

4. Government have examined the matter in detail and are pleased to order as follows.

(1) Performance Security / Security Deposit to be submitted at the time of executing the agreement is reduced from the existing rate of 5% to 3% of the contract amount.

(2) Correspondingly Bid Security / Earnest Money Deposit is reduced from 2.5%

to 1.5% of the estimated amount.

(3) Additional Performance Guarantee is waived for the low quoted items on the condition that the bidder shall furnish an undertaking to execute all low quoted items in full as per contract terms.

5. The above relaxations on account of Covid-19 pandemic are made applicable for works initially for one year and would be reviewed post that date.

6. This Government Order is made applicable to all new tenders as well as works which have been tendered and awarded, but agreements have not been signed by the winning bidder.

It is therefore evident that the said GO is made applicable only to new tenders and in respect of works which have been tendered and awarded, but agreements have not been signed by the winning bidder.

14. In the case of the works undertaken by the petitioners in these writ petitions, admittedly, those are not works undertaken after 07.01.2021. The agreements in respect of the works in question have been signed by the petitioners before 07.01.2021. Therefore, GO dated 07.01.2021 will not apply to the contracts undertaken by the petitioners.

15. The contention of the petitioners is that exclusion of contractors like the petitioners from the purview of GO dated 07.01.2021 for the reason that the petitioners have already executed agreements for the work, is arbitrary and discriminatory. The exclusion would offend Article 14 of the Constitution of India.

16. This Court is not inclined to accept the said argument for the reason that the petitioners are not claiming any fundamental or statutory rights. The issue involved is purely within the realm of contract laws. The petitioners have executed agreements with open eyes. What is granted under GO dated 07.01.2021 is only a concession. The petitioners cannot claim any concession in contractual matters invoking writ proceedings under Article 226 of the Constitution of India.

The writ petitions are therefore devoid of any merits and are dismissed.