(2022) 11 KL CK 0262

In the High Court Of Kerala

Case No : Writ Appeal Nos. 615, 713, 726, 941 Of 2022

M/s Skilled Constructions Company Ltd — APPELLANT

Vs

Union Of India — RESPONDENT

Date of Decision : 22-11-2022

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Kerala High Court Act, 1958 — Section 5
General Financial Rules (GFRs) 2017 — Rule 171

Citation : (2022) 11 KL CK 0262

Hon'ble Judges : S. Manikumar, CJ;Shaji P.Chaly, J

Bench : Division Bench

Advocate : Sunil Jacob Jose, B. Ramachandran, K.Jaju Babu, M.U.Vijayalakshmi, K.V. Manoj Kumar

Final Decision : Dismissed

Judgement

S. Manikumar, CJ

1. Being aggrieved by the judgment passed in W.P.(C) Nos. 23679, 26212 and 26762 of 2021 dated 22.04.2022, W.A. Nos.615, 713, and 726 of 2022 are filed by the petitioners, whereas, W.A. No.941 of 2022 is filed by the State and its instrumentalities, challenging the judgment in W.P.(C) No. 4140 of 2022 dated 8.4.2022.

2. After considering the submissions, by judgment dated 22.04.2022 in W.P.(C) Nos. 23679, 26212 and 26762 of 2021, writ court ordered thus:

"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 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.

3. Whereas, by judgment dated 8.4.2022 in W.P.(C) No.4140 of 2022, writ court ordered as under:

"16. Exts.P4 to P6 Office Memorandum issued by the Government of India, Ministry of Finance on 12.11.2020 would ordinarily apply only to the Departments under the Government of India. The said Office Memorandum will not apply to the contracts executed on behalf of the Government of Kerala automatically.

17. The Government of Kerala, however, followed the O.M. dated 12.11.2020 of the Government of India and issued GO (P) No.7/2021/Fin. dated 07.01.2021. As per the G.O. dated 7. 01.2021, the Performance Security / Security Deposit is to be submitted at the time of executing the agreement was reduced from 5% to 3%. The Earnest Money Deposit was reduced from 2.5% to 1.5%. The Additional Performance Guarantee was completely waived for the low quoted items on condition that the bidders shall furnish an undertaking to execute all low quoted items in full as per contract terms.

18. The said Government Order dated 07.01.2021 was made applicable only to new tenders and to the works which have been tendered and awarded but agreements being not signed by the winning bidder. The tenders in question to which the petitioners responded were subsequent to 7. 01.2021. When the relaxations were extended in the year 2022, only the relaxations relating to Performance Guarantee was extended for a further period up to 31.03.2023.

19. While examining the applicability of Government Orders dated 07.01.2021 and 15.03.2022, one has to look at the contents of the Government Orders and the context under which those were issued. Those Government Orders were issued in the backdrop of Covid-19 pandemic. The Government was of the view that on account of slowdown in economy and acute financial crunch among the contractors due to Covid-19 pandemic, relaxation should be granted to contractors who undertake public works in the State. There was also a request by the Government of India in that regard.

20. Under the circumstances, the Government on 07.01.2021 ordered that Performance Security/ Security Deposit be reduced from 5% to 3% of the contract amount and the corresponding Bid Security/ EMD be reduced from 2.50% to 1.50%. Additional Performance Guarantee was waived for low quoted items. Paragraph 5 of the Government Order dated 07.01.2021 stated that the relaxations are on account of Covid-19 pandemic and were made applicable for works initially for one year and would be reviewed post that date.

21. The Government Order dated 07.01.2021 made it clear that the order is

applicable to:

(1) All new tenders, and

(2) Works which have been tendered and awarded but agreements have not been signed.

The term 'All new tenders' would mean tenders floated on or after 07.01.2021. 'Works which have been tendered and awarded but agreements have not been signed' would take in tenders floated and awarded prior to 07.01.2021 but agreements not signed before 07.01.2021.

22. In the case of the petitioner in W.P.(C) No.2558 of 2022, the Notice Inviting Tenders (NIT) was floated on 06.12.2021 and in the case of the petitioner in W.P.(C) No.4140 of 2022, bids were invited on 22.12.2021. Since both the NITs were published after 07.01.2021, those are 'new tenders' as contemplated in the G.O. dated 07.01.2021 and the concessions/relaxation granted as per G.O. dated 07.01.2021 would apply to the petitioners. Therefore, the respondents are not justified in demanding 5% Performance Security, 2.5% EMD and Additional Performance Guarantee.

23. The argument of the respondents is that before execution of the agreement, the validity period of the G.O. dated 07.01.2021 has expired on 06.01.2022. The Government has issued a new G.O. dated 15.03.2022, paragraph 3 of which reads as follows:

"3. The Government has examined the matter in detail and are pleased to extend the relaxation in Performance Guarantee ordered as per Government Order read as 3rd paper above for a further period up to 31.03.2023."

The new G.O. dated 15.03.2022 has retained relaxation only in respect of Performance Guarantee and there will be no relaxation for EMD or Additional Performance Guarantee, contend the respondents

24. Even assuming that the G.O. dated 15.03.2022 provides for relaxation of Performance Guarantee alone, the petitioners' tenders should be governed by the G.O. dated 7. 01.2021. This is because the provisions of the G.O. dated 7. 01.2021 would apply to all new tenders floated during the currency period of the G.O. which is up to 06.01.2022. The fact that no agreement was executed during the currency of the G.O. dated 07.01.2021 cannot take away the right accrued on the petitioners under the said G.O.

25. It is true that the G.O. dated 15.03.2022 is the order now in existence. The said G.O. would be applicable to new tenders floated on and from 07.01.2022 and to works tendered and awarded prior to 07.01.2022 but agreements have not been signed. Even then, the G.O. dated 07.01.2021 has conferred a corresponding right on the petitioners, which cannot be taken away retrospectively.

For the afore reasons, the petitioners are entitled to succeed.

The writ petitions are therefore allowed.

Consequently, it is declared that the tenders awarded to the petitioners, which are in issue in these writ petitions, will be governed by the G.O. dated 07.01.2021. The petitioners shall be permitted to execute agreements granting the petitioners all relaxation permissible under the G.O. dated 07.01.2021."

4. Brief facts leading to the filing of W.A. Nos. 615, 713 and 726 of 2022 are as under:

4.1 Appellants/writ petitioners are registered companies, engaged in contractual works. They were awarded with contractual works for the development of roads and bridges by Cochin Smart Mission Ltd., represented by its Chief Executive Officer, Kochi. Pursuant to the same, the writ petitioners were served with letters of acceptance. Except the appellant in W.A. No.615/2022, rest have submitted performance security, which amounts to 10% of the total contractual value, as required by the respondents. The appellant in W.A. No.615/2022 submitted performance security at 5%. Work commenced in November, 2019 and is going smoothly. While so, due to the outbreak of COVID-19 Pandemic and resultant lockdown, the companies have to face serious financial crunches.

4.2 Appellants/writ petitioners have further stated that, in order to mitigate the hardships suffered by the contractors, Government of India, Ministry of Finance had announced 'Atma Nirbhar Bharat Package' and issued Office Memorandums, wherein it was stipulated that the performance security should be reduced to 3% instead of 5-10%, and retention amount is recommended to be released, in proportion to the work already executed, in accordance with the contract specification. It was also assured that Earnest Money Deposit (EMD) will not be required for tenders and it will be replaced by Bid Security Declaration.

4.3 In terms of the above, writ petitioners submitted requests to the Chief Executive Officer, Cochin Smart Mission Ltd., through Project Management Consultant (PMC), for reducing the performance security and to release the retention amount, by reducing it to 3%. However, the Chief Executive Officer informed the writ petitioners that their requests cannot be acceded to, in view of the directions contained in G.O.(P) No.7/2021/Fin. dated 7.1.2021, that 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. According to the writ petitioners, the benefit of the Office Memorandums issued by the Central Government and State Government are being denied to them since they had signed the agreements before the memorandums. In such circumstances, appellants/writ petitioners have filed the respective writ petitions for the reliefs stated supra.

4.4 The writ petitioners further contended before the writ court that since the Central Government have framed 'Atma Nirbhar Bharat Package' for providing relief measures, the respondents are bound to extend the benefit contemplated by the Central Government that the Office Memorandums clearly provide that the performance security is reduced from 5-10% to 3% for all existing contracts. According to the writ petitioners, the action of the Government of Kerala in issuing the Government Order dated 7.1.2021 substantially departing from the Office Memorandums issued by the Union Government is illegal and unsustainable.

5. W.A. No.941/2022 is filed by the State of Kerala and its officials, who are the respondents before the writ court, challenging the judgment dated 8.4.2022 passed in W.P.(C) No.4140/2021, by which, the writ petition was allowed declaring that the tenders awarded to the petitioners, which are in issue, will be governed by the Government Order dated 7.1.2021 and that the petitioners shall be permitted to execute agreements granting all relaxation permissible under the said Government order.

6. The respondent/writ petitioner has filed W.P.(C) No.4140/2021 seeking a writ of certiorari to quash Exhibit-P3 Letter of Acceptance/ selection notice issued by the Superintending Engineer, Kozhikode, respondent No.3 therein, to the extent it directs the writ petitioner to furnish the performance guarantee worth 5% of the value of the work and additional performance guarantee worth Rs.25,18,655/-; and also for a direction, by way of writ of mandamus, commanding the 3rd respondent to modify the Letter of Acceptance limiting the performance guarantee to 3% of the value of the work and totally waiving the additional performance guarantee, in terms of Exhibits-P4 to P6.

7. Facts leading to the filing of W.P.(C) No.4140/2022 is that based on the notice inviting tender issued by respondent No.3 dated 22.12.2021, writ petitioner was selected as the lowest bidder and Exhibit-P2 tender was submitted by him. Exhibit-P3 Letter of Acceptance was issued by the 3rd respondent, by which, the offer made by the writ petitioner was accepted. As notified in the notice inviting tender, writ petitioner was asked to give performance guarantee. In Ext-P3 Letter of Acceptance, the employer was asked to submit a performance guarantee at 5% of the contract value. It was also notified that the additional performance guarantee of Rs.25,18,655/- shall also be deposited for the unbalanced bid and that both the performance guarantee and additional performance guarantee should be submitted before executing the agreement. The modalities of payment were also notified in Exhibit-P3 selection notice.

8. According to the appellant - State of Kerala, the prayer made in W.P.(C) No.4140/2021 to quash the selection to the extent it notifies the submission of performance guarantee and additional performance guarantee, is liable to be rejected on account of the fact that no vested/ contractual right is accrued to the writ petitioner, as no concluded contract has been entered into. In Exhibit-P1 notice inviting tender, it was specifically noted that the bidders are liable to submit bank guarantee on account of selection and also additional performance guarantee.

9. Appellant - State of Kerala has further contended that writ court by the

impugned judgment has declared that tenders awarded to the petitioners will be governed by Government Order dated 7.1.2021 and the writ petitioners shall be permitted to execute agreement granting all relaxation, permissible under the said GO. According to the appellant, the very approach made by the learned single Judge is that the rights already conferred cannot be taken away retrospectively. It is also submitted that there is no vested right and writ petitioner therein is obligated to submit performance guarantees as notified in the selection notice.

10. Appellant further contended that it is true that in the Government order dated 7.1.2021, certain relaxations have been ordered. But, those relaxations/ concessions, according to the appellant, cannot be claimed as a right by the writ petition. Here, the selection notice was issued much after the expiry of the Government order dated 7.1.2021. The application of the said Government order was only upto 6.1.2021. It is further submitted that the relaxations in the Government order dated 7.1.2021 were reviewed by the State Government and the relaxation in respect of additional performance guarantee has been stopped.

11. Refuting the allegations, claims and demands raised by the writ petitioners, the General Manager of Cochin Smart Mission Limited, has filed a counter affidavit before the writ court, inter alia, contending that on account of the slow-pace in the economy, due to COVID-19 Pandemic, Ministry of Finance, Government of India, had issued Office Memorandum dated 12.11.2020 reducing the performance security from the existing 5-10% to 3% of the value of contract for all the existing contracts. Based on the said OM, Government of Kerala have issued an order dated 7.1.2021, in which paragraph 4.1 states that performance security/security deposit to be submitted at the time of executing agreement is reduced from the existing rate of 5% to 3% of contract amount. However, the order vide paragraph 6 has clarified that this Government order is made applicable to all the new tenders as well as works which have been tendered and awarded, but agreements have not been signed by the winning bidder. That apart, the said Government order clearly mentioned that the same is applicable only to new tenders. Hence, it is contended that CSML is not in a position to reduce the performance guarantee for the project work as per the Letter of Acceptance since it was awarded long prior to the date of the said Government order and agreement executed and that CSML is following the Government order dated 7.1.2021 in the matter of performance security.

12. Learned single Judge after considering the submissions and the materials on record, including the Government orders dated 7.1.2021 and 15.03.2022, has passed the impugned judgments, the relevant portion of which is extracted above.

13. Being aggrieved, the appellants in W.A. Nos. 615, 713 and 726 of 2022 contended that writ court failed to take note of their specific claim that the Constitutional guarantee conferred by Article 14 of the Constitution of India has been violated through the discrimination practiced on them by respondents, by

creating two different classes of contractors from among a homogeneous class, i.e., those who have signed the agreement prior to the Government order dated 7.1.2021 and those after the said order. In support of the said contention, appellants have relied on the decision of the Hon'ble Supreme Court in State of W.B. v. Anwar Ali Sarkar reported in 1952 SCR 284.

14. That apart, it is contended that the specific contention of the appellants that the contract undertaken by them is a project implemented using the Central Government fund, and therefore, the subject Office Memorandums/guidelines issued by the Central Government are necessarily to be implemented in its true letter and spirit and was overlooked by the writ court.

15. It was further contended that the writ court ought to have appreciated the context in which 'Atma Nirbhar Bharath Package' and the subsequent Office Memorandums were issued by the Central Government. There cannot be any dispute to the fact that COVID-19 Pandemic has hit one and all in the world. All these Office Memorandums and Government order impugned in the writ petitions were issued to support the contractors as well as the infrastructure industry. According to the appellants, when the State is extending a benefit during the time of a crisis, it cannot differentiate between its citizens, who are all similarly placed and deny the benefits to one set of citizens.

16. According to the appellants, the only exclusion for grant of the benefit under OM dated 12.11.2020 was the existence of any dispute wherein arbitration/Court proceedings have already started. The OM dated 12.11.2020 was specific that the benefit will be conferred on all existing contracts and, therefore, the inclusion of a condition contrary to those found in the basic document gave rise to the Government order dated 7.1.2021 is illegal.

17. Appellant - State of Kerala in W.A. No.941/2022 has contended that there is no vested right to the bidder to seek modification of the selection notice and terms and conditions of agreement. What is provided in the Government order dated 7.1.2021 is a concession/relaxation, particularly in view of the specific terms of the contract that the selected bid shall submit performance guarantee and additional performance guarantee as notified. In support of its contention, appellant has relied on the decision of the Hon'ble Supreme Court in V. Pechimuthu v. Gowrammal reported in (2001) 7 SCC 617 wherein, it was held that relaxation/concession cannot be enforced as a right.

18. According to the appellant State of Kerala, the declaration of the writ court that as per Government orders dated 7.1.2021 and 15.03.2022 performance guarantee/security deposit is liable to be reduced to 3% and additional performance guarantee was waived for low quoted items etc., are unsustainable.

19. Based on the above, learned counsel for the appellants, as well as learned Government Pleader appearing for the State, made submissions.

20. Heard the learned counsel for the respective parties and perused the material

on record.

21. Office Memorandum dated 12.11.2020 issued by Government of India, Ministry of Finance, Department of Expenditure, New Delhi, is reproduced hereunder"

"No. F.9/4/2020-PPD

Government of India

Ministry of Finance

Department of Expenditure

Procurement Policy Division

512, Lok Nayak Bhawan, New Delhi

Dated the 12th November, 2020

OFFICE MEMORANDUM

Subject: Performance Security.

As per Rule 171 of General Financial Rules (GFRs) 2017, Performance Security is to be obtained from the successful bidder awarded the contract for an amount of five to ten percent of the value of the contract to ensure due performance of the contract. Similar provisions also exist in the Manual for Procurement of Works 2019 and Manual for Procurement of Consultancy & other Services 2017 issued by this Department.

2. The Government is in receipt of many representations that on account of slowdown in economy due to the pandemic, there is acute financial crunch among many commercial entities and contractors, which in turn is affecting timely execution of the contracts. lt has also been represented that this may affect the ability of contractors to bid in tenders and hence reduce competition. Requests are being received for reduction in quantum of Security Deposits in the Government contracts.

3. In view of all above, it is decided to reduce Performance Security from existing 5-10% to 3% of the value of the contract for all existing contracts. However, the benefit of the reduced Performance Security will not be given in the contracts under dispute wherein arbitration/court proceedings have already started or are contemplated.

4. Further, all tenders/contracts issued/concluded till 31.12.2021 should also have the provision of reduced Performance Security.

5. In all contracts where Performance Security has been reduced to 3% in view of above stipulations, the reduced percentage of Performance Security shall continue for the entire duration of the contract and there should be no subsequent increase of Performance Security even beyond 31.12.2021. Similarly,

in all contracts entered into with the reduced percentage of Performance Security of 3%, there will be no subsequent increase in Performance Security even beyond 31.12.2021.

6. Wherever, there are compelling circumstances to ask for Performance Security in excess of three percent as stipulated above, the same should be done only with the approval of the next higher authority to the authority competent to finalize the particular tender, or the Secretary of the Ministry/ Department, whichever is lower. Specific reasons justifying the exception shall be recorded.

7. These instructions will be applicable for all kinds of procurements viz. Goods, Consultancy, Works, non-consulting Services etc and are issued under Rule 6(1) of the GFRs 2017.

Sd/- (Kotluru Narayana Reddy)

Deputy Secretary to the Govt. of India"

22. Government order, G.O.(P) No.7/2021/Fin., dated 7.1.2021 issued by the Additional Chief Secretary, Finance (Industries & Public Works - B) Department, Government of Kerala, Thiruvananthapuram, reads thus:

"GOVERNMENT OF KERALA

Abstract

Finance Department — Covid - 19 pandemic - 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 –

Orders issued

FINANCE (INDUSTRIES & PUBLIC WORKS - B) DEPARTMENT

G.O.(P) No.7/2021/Fin.

Dated, Thiruvananthapuram, 07.01.2021

Read :- 1) G.O.(P) No.429/2015/Fin dated 28.09.2015

2) G.O.(P) No. 01/2019 /Fin dated 10.01.2019

3) G.O.(P) No.168/2019/Fin dated 07.12.2019

4) OM No. F 18/4/2020 - PPD dated 13.05.2020

5) OM No. F 9/4/2020 - PPD dated 12.11.2020

6) Circular No.62/2020/Fin dated 27/10/2020

ORDER

As per the Government Order read as 1st paper above, It was ordered that, Performance Guarantee, the amount collected at the time of executing contract agreement will be 5% of the Contract Value (Agreed PAC) and the deposit will be retained till the expiry of Defect Liability Period. Atleast 50% of this deposit shall be collected in the form of Treasury Fixed Deposit and rest in the form of Bank Guarantee or any other forms prescribed in the revised PWD Manual. As per this Government Order, Additional Performance Guarantee is the additional amount to be deposited for unbalanced price i.e., for works quoted below estimate rate. Additional Performance Guarantee will be required if works quoted between 11% to 25% below estimate rate. Government Order read as 2nd paper above says that, if the quoted amount of the lowest bidder (L1) is x% below the estimated PAC, the Additional Performance Guarantee shall be (x-10)% of estimated PAC. Subsequent to this Order, clarifications were issued regarding calculation of Additional Performance Guarantee for percentage rate contracts and item rate contracts vide the Government Order read as 3rd paper above.

2) On account of slowdown in the economy and acute financial crunch among the contractors due to COVID-19 pandemic. Government of India issued following guidelines vide Office Memoranda read as 4th and 5th papers above and State Governments were requested to consider issuing similar instructions in respect of procurement by the State Government, by State Government Public Undertakings, Local Bodies and all agencies controlled by them.

i) Reduction in Performance Security from existing 5-10% to 3% of the value of the contract.

ii) No provisions regarding Bid Security should be kept in the Bid Documents in future and only provisions for Bid Security Declaration should be kept in the Bid Documents.

iii) No provision should be kept in the Bid Documents regarding Additional Security Deposit/Bank Guarantee (BG) in case of Abnormally Low Bids.

3. As per the Circular read as 6th paper above. It was ordered that the Additional Performance Guarantee may be released in proportion of successful completion of items having low rates. Several contractors and Associations submitted representations requesting to extend the benefits covered by the relief measures announced by the Government of India to the State Government Contractors also.

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 2.50% to 1.50% 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.

By Order of the Governor

RAJESH KUMAR SINGH

ADDITIONAL CHIEF SECRETARY (Finance)"

23. The question emerges for consideration is, as to whether any interference is required to the judgments of the learned single Judge.

24. Admittedly, as per the notification dated 7.1.2021, the 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 and correspondingly bid security/earnest money deposit is reduced from 2.50% to 1.50% of the estimate amount. Further, additional performance guarantee, for the execution of public works in the State, is waived for the low quoted items on condition that the bidder shall furnish an undertaking to execute all low quoted items in full as per the contract terms. In fact, the benefit of Ext-P14 notification dated 7.1.2021 was extended to the contractors, who have not executed any agreement.

25. The case projected by the appellants is that no classification need be made between the contractors, who have already executed the agreement, and the contractors, who have not, after the bid was accepted. In our considered opinion, the benefit of Performance Security/Security deposit, Bid Security/Earnest Money Deposit and Additional Performance Guarantee was extended by the Government only to those persons who have not executed the agreement, apparently for the reason that there was a slow down in economy and acute financial crunch among the contractors, due to COVID-19 Pandemic.

26. It was taking into account the abovesaid situation, Government of India have issued the guidelines as per the memorandums referred to in Exhibit-P14 order dated 7.1.2021 and State Governments were requested to consider issuing similar instructions in respect of procurement of the State Government, by State Government Public Undertakings, Local Bodies and all the agencies controlled by them.

27. Evidently, from the persons who have already executed the contract, Government have secured the Performance Security, Bid Security and additional Performance Guarantee, and therefore, the contract obligations for conference of the contract was acted upon by the parties in its entirety. Government thought it fit not to re-open the same by re-paying or adjusting the Performance Security, Bid Security and additional Performance Guarantee, given on higher terms and conditions. Moreover, the contractors, who have already executed the agreement, cannot turn around and say that they are entitled to get the benefit of the notification subsequently issued by the State Government, in order to deal with the economic crunch.

28. Therefore, it can be deduced that there is no discrimination between the contractors for the basic reason that the persons, who have executed the agreement and paid the Performance Security, Bid Security and executed the additional Performance Guarantee have to be treated as a separate class from the contractors whose bids were accepted, but agreements were not executed. Material on record also discloses that the Government was of the clear opinion that such a benefit can be extended to such persons for the reason that they are yet to execute an agreement and carry out the obligations in terms of the notice inviting tenders, after the outbreak of Covid-19 Pandemic, lock down's, and consequential adverse situations, prevailed in the community.

29. Taking into consideration the above aspects, we are of the considered view that there is no discrimination or unreasonable classification by and between the contractors, who have executed the agreement, and the contractors who were yet to execute the agreement, entitling to secure the benefits as per the Government order dated 7.1.2021. Therefore, we do not find any reason to interfere with the judgment passed by the learned single Judge in W.P.(C) Nos. 23679, 26212 and 26762 of 2021 dated 22.04.2022.

30. Insofar as the writ appeal filed by the State and its instrumentalities against the judgment dated 8.4.2022 in W.P.(C) No.4140 of 2022 is concerned, it is categoric and clear that in the said judgment, which is impugned therein, learned single Judge has taken note of the order dated 7.1.2021 (Exhibit-P4) and arrived at the conclusion that the term “all new tenders” recited in the G.O. dated 7.1.2021 would mean tenders floated on or after 7.1.2021. Writ court also entered into a finding that works which have been tendered and awarded but agreements have not been signed, would be entitled to get all the benefits on account of the tenders floated and works awarded prior to 7.1.2021, but agreements have not been signed before 7.1.2021.

31. However, in the impugned judgment, the learned single Judge has clearly found that the bids in respect of the petitioner in W.P.(C) No.4140 of 2022 were invited on 22.12.2021, which is after the issuance of Government order dated 7.1.2021, and therefore, the petitioner therein is entitled to get the benefit of the said Government Order. It was accordingly, in the judgment leading to W.A. No.941 of 2022 dated 8.4.2022, learned single Judge held that the respondents

are not justified in demanding 5% performance security, 2.5% EMD and additional performance guarantee.

32. It is also to be taken note of, that before execution of the agreement, the validity period of the Government order dated 7.1.2021 expired on 6.1.2022 and thereupon, Government have issued a new order dated 15.3.2022, wherein clause (3) specifies that the Government have examined the matter in detail and are pleased to extend the relaxations in the Performance Guarantee ordered as per Government order dated 7.1.2021, for a further period up to 31.03.2023. But the fact remain, even assuming that the Government order dated 15.03.2022 provides for relaxation of the Performance Security alone, the tenders floated by the Government and the offer made by the writ petitioner therein were governed by the G.O. dated 7.1.2021, which was in force till 6.1.2022.

33. Considering the above aspects, we are of the view that the learned single Judge was right in arriving at the conclusions discussed above. Moreover, State Government have not made out a case of any jurisdictional error or other legal infirmities, susceptible to be interfered with the judgment dated 8.4.2022 in W.P.(C) No.4140 of 2022, in exercise of the powers conferred under Section 5 of the Kerala High Court Act.

Resultantly, the writ appeals have no sustenance and accordingly, they are dismissed. No costs.

