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(2022) 05 KL CK 0129

In the High Court Of Kerala

Case No : Writ Appeal No. 1689 Of 2021

Durolac APPELLANT

Vs

State Of Kerala RESPONDENT

Date of Decision : 25-05-2022

Acts Referred:

Micro, Small and Medium Enterprises Development Act, 2006 — Section 2(e), 11
Kerala High Court Act, 1958 — Section 5

Citation : (2022) 05 KL CK 0129

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

Bench : Division Bench

Advocate : Sebastian Joseph, K.V.Manoj Kumar, Millu Dandapani, K.I.Mayankutty Mather

Final Decision : Dismissed

Judgement

Shaji P.Chaly,J.

1. The captioned appeal is preferred by the Petitioner in W.P.(C) No.4692 of 2021, challenging the common judgment of the learned Single Judge dated 12.10.2021, in the above specified writ petition and other connected matters, whereby, the learned Single Judge dismissed the writ petition holding that the works tendered by the Public Works Department, State of Kerala, is a civil contract and the appellant is not entitled to get the benefits of Exts. P3 ,P4 and P5 order / notifications issued by the Central and State Governments, extending benefits of public procurement policy for Micro and Small Enterprises registered under the National Small Scale Industrial Corporation. Brief material facts for the disposal of the appeal are as follows:

2. Appellant is a newly registered Micro, Small and Medium Enterprise Unit (MSME Unit) manufacturing paints and allied products. According to the appellant, the unit provides services such as painting and allied works in connection with the products manufactured by the unit. It is the case of the appellant that, as it is a small enterprise, it is eligible for certain incentives while

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participating in tenders for public procurements as per Exts.P3 to P5 orders/ notifications issued by the Union as well as the State Governments, for promoting the small scale sector. It is further submitted that the incentives so declared by the respective Governments include exemption from EMD, Waiver of Security Deposit and Tender set free of costs. While so, the appellant submitted a bid for participating in Ext.P10 tender notice, for painting and other repair works without remitting EMD and tender fee. However, by Ext.P12, the tender submitted by the appellant has been rejected, stating that EMD exemption certificate is not valid. According to the appellant, the rejection was made as per Ext.P13 Government Order issued by the Finance Department, wherein it is directed that the incentives extended by the State and Central Governments for M.S.M.E Units cannot be applicable for Civil/Electrical/Infrastructure contracts. According to the appellant, Ext.P13 is not applicable to the appellant unit, since the appellant is a newly registered manufacturing unit and hence, the service of painting and allied works rendered with their own products would not come under the ambit of civil contract. Therefore, according to the appellant, rejection of the tender of the appellant is illegal and it adversely affects the legal rights of the appellant pursuant to Exts.P3 to P5 orders/notification issued by the Central and State Governments, to protect the interest of Small Scale Enterprise Units.

3. The Executive Engineer, PWD Department; the 2nd respondent, has filed a detailed statement in the writ petition, refuting the claims and demands raised by the appellant. According to the 2nd respondent, Ext.P3 order issued by the Government of India, Ministry of Micro, Small and Medium Enterprises, dated 14.10.2011, is confined to Government purchase and price preference policy for Micro and Small Enterprises in order to help them to market their products; however the facility is not extended to civil works. It is also submitted that Ext.P4 order issued by the Ministry of Micro, Small and Medium Enterprises is also a Public Procurement Policy which has not mentioned any activities relating to civil works to be undertaken by the Micro and Small Enterprises. It is further submitted that Ext.P5 notification issued by the State Government also is in respect of the price procurement policy of the State Government in relation to the Micro and Small Enterprises, however, it is not granting any benefit to civil contracts. Therefore, according to the State and its officials, Ext.P10 notification inviting tender is a civil work relating to special repairs of the new building of the IHRD College of Engineering, Chengannur, which is a rate contract. Thus it is stated that, the appellant and such Micro & Small Enterprises are not entitled to get the benefit of the notifications relied upon by the appellant in so far as civil works are concerned.

4. The learned Single Judge, after taking into account the submissions made by the rival parties and other contesting respondents, has dismissed the writ petitions holding that the appellant is not entitled to get the benefits of the order/ notifications relied upon by the appellant, since Ext.P10 notice inviting tender is substantially civil works, whereas the orders/ notifications grant benefits to Micro & Small Enterprises for procurement of the goods manufactured by the Micro &

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Small Enterprises and the services to be rendered therefore. It is thus challenging the legality and correctness of the findings of the learned Single Judge, the appeal is preferred.

5. The paramount contention advanced by the appellant is that the non acceptance of the tender submitted by the appellant is grossly illegal, arbitrary and contrary to the evolved object of the promotion of the Micro & Small Enterprises; and the action of the 2nd respondent, the Executive Engineer, PWD, is in gross violation of Exts.P3, P4 and P5 orders issued by the Central and State Governments. It is further submitted that, Ext.P13 order issued by the Additional Chief Secretary (Finance), is an executive order taking away the statutory benefits conferred on the appellant by virtue of the Micro, Small and Medium Enterprises Development Act, 2006, (hereinafter, the Act, 2006) and with such an executive order nullifying the benefits of a legislation is not legally permissible. Learned counsel for the appellant has further submitted that, as per Section 2(e) of the Act, 2006, "Enterprise is defined as industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to industry specified in the First schedule to the Industries (Development and Regulation) Act, 1951, or engaged in providing or rendering of any service or services". Therefore, according to the appellant, the work in the nature of Ext.P10 tender notification would come under the provisions of the Act, 2006, and the appellant is entitled to get the benefits of Exts.P3 to P5 order/ notifications.

6. We have heard the learned counsel for the appellant, Sri. Sebastian Joseph Kurisumoottil, Sri. K.V.Manoj Kumar, learned Special Government Pleader appearing for the 1st and 2nd respondents, Sri. Millu Dandapani appearing for the 3rd respondent and Sri. K.I.Mayankutty Mather appearing for the 4th respondent.

7. The sole question to be considered is whether any interference is required to the judgment of the learned Single Judge. In order to appreciate the contentions put forth by the rival parties, the description of work contained in Ext.P10 notice inviting tender dated 25.01.2021, is extracted hereunder:

Brief Description This estimate is prepared based on the request no of work D2/666/15 dated 02.05.2018 and 16.1.2021 of the Principal, IHRD College of Engineering. Items included in the estimate are scapping and cleaning the old water proof cement painted surface, applying cement primer on the cleaned surface, applying emulsion paint on walls, replacing the damaged window glasses, water proofing of leaking RCC roof etc.

8. A consideration of the nature of work would show that it is substantially a civil work with respect to special repairs of the new buildings of the IHRD College of Engineering, Chengannur, which includes scapping and cleaning of old water proof cement painted surface, applying cement primer on the cleaned surface,

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applying emulsion paint on walls, replacing the damaged window glasses and water proof of leaking RCC roof etc. In Ext.P3 order of the Ministry of Micro, Small and Medium Enterprise, Government of India, certain benefits are granted to the Micro and Small Enterprises registered with the National Small Industries Corporation, such as issue of Tenders forms free of cost; exemption from payment of Earnest Money; Waiver of Security Deposit up to the monetary limit for which the unit is registered; and price preference up to 15% over the quotation of Large Scale Units; and in addition to the above, 358 items are reserved for exclusive purchase from MSC Sector. However, the order shows that the Government of India in its effort to help MSE's in order to market their products, facilities/benefits referred to above are given. Ext.P4 issued by the Ministry is to the effect that the departments and the public sector undertakings shall procure minimum of 20% of their annual value of goods or services from Micro and Small Enterprises and thereby, the Ministry by exercising the power under Section 11 of the Act, 2006, notified the Public Procurement Policy in respect of procurement of goods and services produced and provided by Micro and Small Enterprises. The State Government, as per Ext.P5 notification dated 07.11.2013, has also extended the facilities/benefits in regard to the price preference policies and in respect of goods and services produced and provided by Micro and Small Enterprises. In fact, Ext.P13 order issued by the Additional Chief Secretary (Finance), Government of Kerala, dated 03.01.2021, clarifies that the benefits/facilities would not be extended for Civil/Electrical/Infrastructure contracts; and the Earnest Money Deposit/Security Deposit/Performance Guarantee play a vital role in civil works to confirm statutory execution of contract over a considerable period as well as ensuring quality of work.

9. The learned Single Judge has considered the contentions of the rival parties, taking into account the principles of law laid down by the Apex Court in Kone Elevators India Pvt. Ltd. v. State of Tamil Nadu [2014(7) SCC 1] and Larsen and Toubro Ltd. v. State of Karnataka [2014 (1) SCC 708] wherein, the nature of works in a works contract was considered by the Apex Court, and has arrived at the conclusions in the judgment impugned.

10. We have considered the rival submissions made across the Bar and perused the pleadings and available material on record, and we are of the opinion that the findings rendered by the learned Single Judge that Ext.P10 notice inviting tender is substantially a civil work, which would not get the benefits or facilities as per Exts.P3 to P5 orders/notifications issued by the State and Central Governments , has no legal infirmity or jurisdictional error. This we say because the nature of the work contained in the tender notice would make it clear that more than procurement of goods, substantial civil works are to be carried out for repairing the building, and painting and other allied works are only incidental to the main civil works. To put it otherwise the painting and other allied works are only a very minor and fractional work when compared to the civil works to be carried out. The orders relied upon by the appellant only extend the benefit of procuring goods manufactured by the small enterprises and the services to be

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rendered on the supply so made; however, it is not intended to provide any benefit or facility in the matter of substantial civil contracts .

12. In that view of the matter, we are of the considered opinion that the Exhibit.P12 order issued by the 2nd respondent rejecting the tender submitted by the appellant claiming benefits of Exts.P3 to P5 orders/notifications, cannot be said to be arbitrary or illegal. Upshot of the above discussion is that the appellant has not made out any case of jurisdictional error or other legal infirmities to make any interference with the judgment of the learned Single Judge in an intra court appeal filed under Section 5 of the Kerala High Court Act.

Needless to say the writ appeal fails and accordingly it is dismissed.

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