IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.5533 of 2018

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M/s Larson & Toubro Limited, Electrical & Automation, Control & Automation, a Company incorporated under the provisions of the Companies Act, 1956 having its Unit at Electrical & Automation Campus, A- 600, TTC Industrial Area, Shil- Mahape Road, Navi Mumbai, 400710, and its registered office at L & P House, N.M. Marg, Ballard Estate, Mumbai- 400001, through its Authorized Representative, Deepak Kumar, son of Late H.P. Sharma, resident of 4/238, Vijayant Khand, Gomtinagar, P.O. & P.S. Vibhuti Khand, District- Uttar Pradesh.

... ... Petitioner

Versus

1. Bihar State Power Transmission Company Limited, Vidyut Bhawan, 4th Floor, Bailey Road, Patna, through its Managing Director.
2. The Managing Director, Bihar State Power Transmission Company Limited, Vidyut Bhawan, 4th Floor, Bailey Road, Patna.
3. Bihar Electricity Regulatory Commission, Vidyut Bhawan Annexe, Bailey Road, Patna.
4. The Chief Engineer (Project-I), Bihar State Power Transmission Company Limited, Vidyut Bhawan, 4th Floor, Bailey Road, Patna.
5. M/s. Secure Meters Limited, through its Director having its Head Office at Pratapnagar Industrial Area Udaipur 313003.

... ... Respondents

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Appearance :

For the Petitioner/s	:	Mr. Y.V. Giri, Sr. Advocate
		Mr. Suraj Samdarshi, Advocate
For Respondents 1,2&4	:	Mr. Vinay Kirti Singh, Sr. Advocate
		Mr. Anand Kumar Ojha, Advocate
		Mr. Ashok Karna, Advocate
		Mr. Vijay Verma, Advocate
For Respondent No. 5	:	Mr. Ardhendumauli Kumar Prasad, Advocate
		Mr. Shashi Shekhar Kumar Prasad, Advocate
For Respondent No. 3	:	Mr. Rajani Kant Mishra, Advocate
		Mr. L.L. Pandey, Advocate

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CORAM: HONOURABLE JUSTICE SMT. NILU AGRAWAL
C.A.V. JUDGMENT

Date : 12-12-2018

Heard Mr. Y.V. Giri, learned Senior Counsel assisted by Sri Suraj Samdarshi, for the petitioner, Mr. Vinay Kirti Singh, learned Senior Counsel assisted by Mr. Anand Kumar Ojha for the respondent nos. 1, 2 and 4 i.e. Bihar State Power Transmission Company Limited (hereinafter referred to as the Transmission

Company), Mr. Rajani Kant Mishra, learned counsel for the Bihar Electricity Regulatory Commission (hereinafter referred to as the BERC) and Mr. Ardhendumauli Kumar Prasad assisted by Mr. Shashi Shekhar Kumar Prasad, learned counsels appearing on behalf of respondent no. 5.

2. Petitioner in the present writ application has sought the following reliefs :

> *(i) For a direction to the respondent authorities and in particular respondent no. 2 to 4, not to finalize the notice inviting tender bearing NIT No. 37/PR/BSPTCL/2017, till final adjudication of the application filed by the petitioner before the Bihar Electricity Regulatory Commission for clarification/ amendment of the provisions contained in the Bihar Electricity Grid Code, 2010.*
>
> *(ii) For a direction to the respondent authorities and in particular respondent no. 2 and 4 not to issue letter of intent or execute any agreement with the respondent no. 5 for supply and installation of energy meters, in furtherance of the N.I.T. No. 37/PR/BSPTCL/2017.*
>
> *(iii) For a declaration that the specification of meter required to be procured through N.I.T. No. 37/PR/BSPTCL/2017 is tailor made so as to suit the convenience of the respondent no. 5 and with a view to eliminate the petitioner from participating in the bid process and thus, insertion of such specification is an arbitrary exercise of discretionary power conferred upon the respondent authorities.*
>
> *(iv) For a declaration that the terms of invitation of tender and in particular the*

> *specification of the meter has been incorporated to favour the respondent no. 5 at the cost of public money, which is contrary to the law laid down by the Hon'ble Apex Court; and for any other relief or reliefs to which the petitioner is found entitled.*

3. Petitioner has preferred I.A. No. 2802 of 2018 wherein he has sought amendment and addition in the pleading and prayer incorporated, as it has been stated that during pendency of the writ application 3rd party right in favour of respondent no. 5 has been created and Letter of Intent (LOI) has been issued on 28.03.2018, which is Annexure-11 and 11/A, as such, the following reliefs have been prayed :

> *"(v) For setting aside and quashing Letters of Intent bearing Nos. 9 and 10 both dated 28.03.2018 issued by the above Transmission Company in favour of respondent No. 5 pursuant to NIT No. 37/PR/BSPTCL/2017.*
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> *(vi) For staying the operation of Letters of Intent bearing Nos. 9 and 10 both dated 28.03.2018 issued by the above Transmission Company in favour of respondent No. 5 pursuant to NIT No. 37/PR/BSPTCL/2017 during pendency of the present writ petition."*

4. I.A. No. 6255 of 2018 has also been filed by the petitioner on 14.08.2018 wherein the prayer before the Commission to amend the Clause 15.7(2)(v) of the Bihar Electricity Grid Code, 2010 (hereinafter referred to as the Code,

2010) has been rejected by order dated 27.07.2018 and additional relief has been claimed by the petitioner, which is as follows :

> *"(vii) For quashing of the order dated 27.07.2018 passed by the respondent no. 3 in Case No. 8/2018 and 9/2018."*

5. I.A. No. 6859 of 2018 was filed on 31.08.2018 by the respondent no. 5 wherein he has alleged that the petitioner has commercial relations with M/s NE Energy Solutions Private Ltd. and has authorised the M/s NE Energy Solutions Pvt. Ltd. to perform its commercial transactions and the MTE India (P) Ltd. has relations with M/s NE Energy Solutions Pvt. Ltd. whereby MTE India (P) Ltd. has also been authorised to submit bid on its discretion.

6. Considering the nature of prayer made in the Interlocutory Applications, which would have a bearing on the merit of the writ application, IA Nos. 2802 of 2018, 6255 of 2018 and 6859 of 2018 are allowed.

7. Petitioner is a Company incorporated under the provisions of the Companies Act, 1956. Respondent nos. 1, 2 and 4 i.e. the Transmission Company came out with the Notice Inviting Tender (NIT) being NIT No. 37/PR/BSPTCL/2017 for supply, installation, testing and commissioning of Device Language Message Specification (DLMS) complaint 0.2s Class ABT type

energy meter with implementation of 100% metering, data acquisition and ABT monitoring for transmission and sub-transmission stations from 220 KV level to 33 KV level, monthly energy accounting and service maintenance for a period of five years and all other accessories as per technical specifications. The NIT was published in newspaper on 20.11.2017 (Annexure-1 to the writ application) specifying pre-bid clarification to be on 05.12.2017, receipt of tender up to 18.12.2017 and date of opening the tender was fixed on 19.12.2017. The said general information and schedule format of the NIT was prescribed with class and specification required to be installed under Clause-1.2.1 and the eligibility criteria fixed for participation was specified under Clause-6 of the said NIT, as contained in Annexure-2 to the writ application. On examination of the NIT, the petitioner came to know that the specification of the meter specified in the NIT is based on the Code, 2010 issued under the authority of BERC wherein one of the conditions incorporated was the test terminal blocks under Clause 15.7(2)(v) of the Code, 2010 which specifies as under :

> *"Test Terminal Blocks:*
> *The test terminal blocks shall be provided on all meters to facilitate testing of meters in service. Main & back up meters of inter state/major generating stations shall be having the feature of draw out type modular units and shall have*

> *automatic CT short circuiting so that meter can be taken out for testing without shut down requirements."*

8. It is manifest that the Code, 2010 has been framed under Section 181, read with Clause (h), sub-section(1) of Section 86 of the Electricity Act, 2003. Petitioner represented before respondent no. 3 for change in specification of external mounting arrangement of meter system. It was brought to the notice that the meters required in the tender are of special type 'draw out type' meters which was available with only single manufacturer and the same curtails healthy competition by excluding other manufacturers and favours only one manufacturer. The petitioner requested for amendment of the Clause which was intended only for changes in the external arrangement pertaining to mounting of the meter which is outer assembly part of the meter and the same could have been of any type of arrangement including draw out type arrangement. Such deviation from specification as submitted by the petitioner is itself incorporated in Clause 32 of tender documents and in its discretion by the Transmission Company could have been amended for fair and wider participation of tenderers. The internal specifications of Availability Based Tariff (ABT) meter would remain the same. It was also brought to the notice of the respondent no. 3 that the Central Electricity Authority

(hereinafter referred to as the CEA) guidelines do not specify the type of meter (draw out type) in the regulations for installation and operation of meter, which is Annexure-4 to the writ application. Respondent no. 3 vide Annexure-5 issued letter to the respondent no. 2 dated 18.01.2018 that three manufacturers including the petitioner have represented before the BERC stating therein that the specification of the meter (draw out type) has been designed in such a way that only a single meter manufacturer will be eligible for participation which curtails healthy competition, hence, it is stated that necessary action had to be taken at the end of respondent no. 2 as the subject-matter was beyond the purview of the BERC. Again on 29.01.2018 vide Annexure-6 petitioner represented before the BERC stating therein that on discussion with the Transmission Company it transpired that the aforesaid specification has been adopted considering the Code, 2010 Chapter-6 Clause 15.7 which specifies requirement of draw out type meter module with automatic C.T. short circuiting facility. It is also stated that since the aforesaid feature was proprietary to one particular manufacturer, it was not possible for any other manufacturer to have such external mounting arrangement. The petitioner made specific request that as the insertion of the aforesaid specification was in view of the requirement directed by the BERC in its Code, 2010, therefore, requested for a re-look at the Code, 2010 and thus requested to make the specification generic and vendor neutral for fair competition among the tenderers. The petitioner also requested that other reputed organisation like CEA, West Bengal, Uttar Pradesh etc. do not have such vender specific feature of draw out type meter included in their specification. Having failed to receive any response, the petitioner then moved the BERC giving rise to Case No. 09 of 2018 for clarification of the aforesaid clause of the tender. The said application before the BERC was filed on 22.02.2018 fixing the date of hearing as 13.03.2018. The respondent Transmission Company had extended the date of opening of the tender but eventually the respondent no. 4 decided to open the tender on 06.03.2018 and the private respondent no. 5 was able to secure the tender. The petitioner then moved this Court in present writ application on 22.03.2018 and when letters of intent bearing No. 09 and 10 both dated 28.03.2018 had been issued in favour of respondent no. 5 awarding the work of supply and installation of meter etc. under the above NIT, the petitioner sought amendment of his prayer by challenging the said letters and award to the private respondent no. 5 vide I.A. No. 2802 of 2018 which is Annexure-11 and 11-A to the writ application. Since the petitioner had already moved the BERC being Case No. 09 of 2018 this Court in its order dated 01.05.2018 had ordered as under :

> *"It is expected that the Bihar Electricity Regulatory Commission will proceed in the matter and take expeditious decision on merits on the issues raised by the petitioner. It is made clear that pendency of the writ application shall not stand in the way of a final decision by the Bihar Electricity Regulatory Commission."*

9. The BERC decided the case of the petitioner along with the case of another manufacturer M/s Genus Power Infrastructure Ltd. and order has been passed by the BERC on 27.07.2018 in Case No. 08 of 2018 and 09 of 2018 wherein the BERC found no merit in the prayer of the petitioner to amend Clause 15.7(2)(v) of the Code, 2010 and the said order has also been challenged by way of Annexure-1 to I.A. No. 6255 of 2018.

10. Mr. Y.V. Giri, learned Senior Counsel for the petitioner submits that the procurement of meter is guided by regulations framed by the Central Electricity Authority (Installation & Operation of Meters) Regulations, 2006 (hereinafter referred to as the Regulations, 2006) and in such regulations the energy accounting and audit meters has been defined under Regulation 2(l) and interface meter has been defined under Clause 2(n). The specification of interface meters as also

consumer meters have been defined in Schedule (Part II, III and IV) and nowhere any reference of draw up rack-mounted type meters have been referred. Even the amendment carried out on 04.06.2010 in the Regulations, 2006 does not refer to any such meter as has been referred in the NIT. He submits that the Code, 2010 prescribes a uniform policy and lays down rules, guidelines and standards to be followed by all users of grid in the State of Bihar to plan, develop, operate and maintain the power system in the State in the most efficient reliable economic and secure manner in integration with the Eastern Regional Grid as per the provision of Indian Electricity Grid Code (IEGC) notified by the Central Electricity Regulatory Commission (hereinafter referred to as the CERC) from time to time. He submits that Chapter-6 Section 15 deals with metering in the Code and 15.2 is the objective to define minimum acceptable standards of metering which shall provide proper metering of various operating system parameters for the purpose of accounting, commercial billing and settlement of electrical energy and to provide information which shall enable to operate the system in economic manner. He refers to Clause 15.5 wherein the relevant standards as specified in the CEA's standards/ regulations notified on 17.03.2007 had to be conformed. He submits that Clause 15.7(2)(v) is inconsistent with the Regulations, 2006 and also in consistent with the objectives of the Code, 2010 as the present NIT does not take economic factor into consideration. The Code, 2010 has been issued in exercise of power conferred under Section 181 read with Section 86(1)(h) of the Electricity Act, 2003 whereas there is a specific provision for prescribing the standard of metering under Section 172(2)(c), 73(e) and 55(1) of the Electricity Act, 2003 which fall within the domain of the CEA. The CEA has also prescribed the standards of meters for all categories including the consumers and has not specified the draw out type meter having automatic C.T. short circuiting facility, as such, the incorporation of the same in the Code, 2010 does not conform to the Regulations, 2006 and is itself contradictory as on the one hand it stipulates compliance of Regulations, 2006 and on the other hand additional requirement has been inserted without authority, as such, the manufacturers like the petitioner despite being eligible as per the Regulations, 2006 do not qualify in terms of the Code, 2010.

11. He further refers to various sections of the Electricity Act, 2003 wherein the authority has been defined in Section 3(6) whereby “authority means the Central Electricity Authority referred to in sub-section (1) of Section 70”. He then refers to Section 70(1) of Part IX of the Electricity Act, 2003 and

submits that the CEA is the sole authority to prescribe standards for meter to be used. He then refers to Section 73-D wherein the functions and duties of the Authority has been specified and one of the duties is to direct and in particular to specify the grid standards for operation and maintenance of transmission lines and sub-section (e) of Section 73 specifies the conditions for installation of meters for transmission and supply of electricity. He also refers to Section 55 of the Electricity Act, 2003 wherein Clause (i) specify that supply of electricity by the licensee would be in accordance with regulations to be made by the authority and Clause (ii) specifies that for proper accounting and audit in the generation, transmission and distribution or trading of electricity, the authority should direct the installation of meters by a generating company or licensee at such stages of generation, transmission or distribution or trading of electricity and at such location of generation, transmission or distribution or trading as it may deem necessary. He then referred to Section 79 of the Electricity Act, 2003 with specific reference to Clause-(h) wherein the CERC shall specify Code, 2010 having regard to grid standards and also Section 86 with special reference to Clause-(h) wherein the BERC would specify State Grid Code consistent with the Grid Code specified under Clause (h) of sub-section (1) of Section 79, as such, the contention of the petitioner is that the Code, 2010 had to conform to the relevant standards of installation and operation of meters notified on 17.03.2007 being the CERC. Petitioner then refers to various sections of the CERC, which is Annexure-9 to the writ application with specific reference to Section 2(1)(i)(n)(p)(u), which is extracted hereinbelow :

> *" (i) 'Energy Accounting and Audit Meters' means meters used for accounting of the electricity to various segments of electrical system so as to carry out further analysis to determine the consumption and loss of energy therein over a specified time period;*
> *(n) 'Interface Meter' means a meter used for accounting and billing of electricity, connected at the point of interconnection between electrical systems of generating company, licensee and consumers, directly connected to the Inter-State Transmission System or Intra-State_Transmission System who have to be covered under ABT and have been permitted open access by the Appropriate Commission;*
> *(p) 'Meter' means a device suitable for measuring, indicating and recording consumption of electricity or any other quantity related with electrical system and shall include, wherever applicable, other equipment such as Current Transformer(CT), Voltage Transformer(VT) or Capacitor Voltage Transformer(CVT) necessary for such purpose;*
> *(u) 'Standards' means 'Standards on Installation and Operation of Meters' given in the Schedule of these Regulations unless*

otherwise any other standard specifically referred;"

12. He, thus, submits that CERC nowhere specifies the draw out type meter having automatic CT short circuiting facility which has been incorporated in the Code, 2010 in Clause 15.7(2)(v), which is wholly without jurisdiction. He also refers to Section 3(1) which prescribes that the said Regulations, 2006 shall be applicable to meters installed and to be installed by all the generating companies and licensees who are engaged in the business of generation, transmission, trading, distribution, supply of electricity and to all categories of consumers. He further refers to Section 5 which prescribes standards of all interface meters, consumer meters and energy accounting and audit meters which shall conform to the standards with special reference to sub-clause (b) which have to be conformed with the standards of installation and operation of meters and specified in the schedule annexed to the regulation and amended from time to time. He then points out that the standards common to all meters as per the schedule does not also prescribe draw out type meters and its amendment (Annexure-10) in the year 2010 does not also prescribe for any draw out type meter with automatic CT short circuiting facility. He submits that the petitioner fulfills all the conditions and

specification as well as standards prescribed by the Regulations, 2006 and its amendment in the year 2010.

13. Another contention of the petitioner is that the objective in respect of electric meter in the State Transmission System together with the acceptable standards of metering is to enable to operate the system in economic manner as postulated in Clause 15.2 of the Code, 2010. He brings to the notice of this Court the financial aspect as the draw out type meter without automatic CT short circuiting facility is available in the price range of Rs. 35000/- to 45,000/- whereas the price of draw out type meter with automatic CT short circuiting facility is in the range of Rs. 1.10 lakhs and the burden has to be ultimately shifted on to the consumers. He submits that procurement of such specified meters at an exorbitant high price of Rs. 1.25 lakhs to 1.50 lakhs per unit to the awardee of the tender would amount to a burden on the exchequer and would not conform to the economic manner as per the objective as contained in Clause-15.2 of the Code, 2010. He further submits that award of tender in favour of respondent no. 5 is against the public interest causing unnecessary burden to the exchequer and to the consumers at large. Yet another contention has been put forth by the petitioner stating therein that reputed organisation like CLPGCIL RERC West Bengal, Uttar Pradesh etc.

have no such vendor specific feature of draw out type meter with automatic CT short circuiting facility which is the specification prescribed in the NIT under challenge as incorporated in Clause 5.39.2 of the said NIT.

14. However, during pendency of the writ application Case No. 09 filed by the petitioner was heard along with Case No.08 and has been decided by respondent no. 3, the BERC, under order dated 27.07.2018 finding no merit, which the petitioner has challenged by way of I.A. No. 6255 of 2018 seeking quashing of the said order.

15. To substantiate his argument, learned Senior Counsel for the petitioner refers to the case of ***Central Power Distribution Co. & Ors. vs. Central Electricity Regulatory Commission & Anr.*** since reported in ***(2007) 8 SCC 197*** stating therein that power of the BERC is subservient to the power of the CERC. The CERC has the plenary duty to regulate the Grid Code but since in the present case, the CERC had no such stipulation of draw out type meters with CT short circuiting facility, the Code, 2010 could not have imposed a condition as stipulated in Clause 15.7(2)(v) and, as such, the NIT not being consistent with the CERC can be challenged before this Court under Article 226 of the Constitution.

16. He then submits that the NIT is tailor-made to suit the convenience of a particular person with a view to eliminate all others from participating in the bidding process. The tender is open to judicial scrutiny under Article 226 in view of the observation made in the case of ***Meerut Development Authority vs. Association of Management Studies and another*** since reported in ***(2009) 6 SCC 171*** with special reference to paragraph 26.

17. He further refers to the case of ***Michigan Rubber (India) Limited vs. State of Karnatka & Ors.*** since reported in ***2012(8) SCC 216*** with special reference to paragraph 20 stating therein that judicial review cannot be denied in contractual matters as review is intended to prevent arbitrariness and must be exercised in larger public interest. He, thus, submits that the NIT No. 37/PR/BSPTCL/2017 is tailor-made to suit the convenience of respondent no. 5 at a far more higher price causing financial burden to the exchequer. The specification of draw out type metering module with automatic CT short circuiting facility has been adopted from the Code, 2010 and is not specified in the CERC which has a plenary power on the Grid Code, 2010. He submits that most of the manufacturers, who are currently manufacturing draw out type meter, do not have CT short circuiting facility except respondent no. 5 who was the only

tenderer in whose favour the tender was allotted. Hence, the petitioner has also challenged the order dated 27.07.2018 passed by the BERC in Case No. 09 of 2018.

18. A counter affidavit has been filed by respondent Transmission Company stating therein that the petitioner is a non-bidder with regard to NIT 37/2017 which is under challenge and has suppressed the fact and not brought on record that he had participated in the NIT No. 18/17 through its authorised stockist M/s Padampat Engineer for supply of draw out type meter with automatic CT short circuiting facility for ABT meter manufactured and marketed by the petitioner all over India. The petitioner had admitted no deviation against NIT 18/2017 which means it admits its ability to manufacture draw out type meter but since NIT 18/2017 had to be aborted as the Indian Railways withdrew its request to the Transmission Company otherwise the petitioner would have qualified as it had agreed upon draw out type meter. It is also submitted that the petitioner is not matching the specifications and bench mark fixed by the competent authority as the petitioner is interested in projection type ABT meter and not draw out type ABT meter since the BERC had itself specified in Code, 2010 to provide draw out type modular unit with CT short circuiting facility, which is at par with latest technology, and

several utilities in the country have already adopted this technology wherein with the said specification, the time consumption in shutdown is targeted to be reduced to the minimum. The real object behind the present writ application is seeking an amendment in Clause 15.7(2)(v) in the Code, 2010 and the said specification introduced in the NIT was for the tenderers to match the bench mark. The said Clause 15.7(2)(v) of the Code, 2010 was not challenged and any amendment could at best be applied prospectively after public hearing. Petitioner has not submitted his bid as it had no capacity to supply draw out type meter and, as such, the NIT does not suffer from any aberration or illegality. There can be no deviation on the terms of the NIT as the same has been made public for all the bidders. It was further submitted that the Code, 2010 has a statutory force being an instrument by the BERC, hence, all the action as per the Code, 2010 stands justified and fully complied. It was further submitted that petitioner is not entitled to seek any relief in contractual matters and the scope of judicial scrutiny of a contractual document adopted on non-discriminatory principles has not been interfered with as is well settled by decisions of the Supreme Court of India. It has also been contended that the CEA notification dated 17.03.2006 containing its regulations also provides that new technologies should be introduced and adopted by the distribution licensee and the recommendation of SAMAST and the specification released by the WRLDC also provide for such meter installation. Such products are in use by several utilities like DVC, NTPC, WBSETCL, WBSEDCL, JBVNL, MSETCL, GETCO, UPPCL, JSEB etc. and the NIT has been drafted and finalised in accordance with the Code, 2010 by subsequent vetting by CEA vide its letter dated 09.08.2016.

19. Mr. Vinay Kirti Singh, learned Senior Counsel for the Transmission Company further submitted that in view of the decision rendered in the case of ***M/s Master Marine Services (P) Ltd. vs. Metcalfe & Hodgkinson(P) Ltd. & Anr.*** since reported in ***2005(3) 2005(3)PLJR 97(SC)*** at paragraphs 9 to 12 the Hon'ble Apex Court has laid down that the discretionary power under Article 226 has to be exercised with great caution and larger public interest is the main consideration. He further contends that the Code, 2010 has a legislative force unless interfered by the BERC, hence, seeks dismissal of the present writ application on the ground of maintainability/ suppression of fact, non-disclosure of material fact and misrepresentation. It has also been submitted that on behalf of petitioner one M/s Padampat Engineer had participated in NIT 18/17 issued by the Transmission Company for

draw out type meter with automatic CT short circuiting facility, which is the authorised stockist of the petitioner. He, thus, submits that the writ application is fit to be dismissed.

20. In reply to the said counter affidavit, the petitioner has filed a rejoinder stating therein that the petitioner is a separate legal entity from its authorised stockist M/s Padampat Engineer and the tender submitted by M/s Padampat Engineer was in its individual capacity having an eligibility criteria of it being an authorised stockist of any meter manufacturer. Counsel for the petitioner submits that the draw out type meter with automatic CT short circuiting feature is not manufactured by any Indian manufacturer and foreign manufacturers, such as, L&G, Schneider Electric do not conform to Indian standards as fixed by the Bureau of Indian Standards which stands incorporated in the above Regulations of the CEA. No other manufacturer except respondent no. 5 manufactures the said required meter and because of the serious deviations the petitioner did not submit its bid and sought amendment of the said clause in the NIT as well as in the Code, 2010. The said offending clause debarred the petitioner from participation which was a tailor-made clause for getting respondent no. 5 in the game and was illegal and that too on an unprecedented price.

21. A counter affidavit has also been filed by the BERC, respondent no. 3 stating therein that the Code, 2010 lays down the rules, guidelines, standards to be followed by all users of grid, which came into force on 20.07.2010 in exercise of the power conferred under Section 181 read with Clause (h) sub-section(1) of Section 86 of the Electricity Act, 2003. The Transmission Company invited the tender on 20.11.2017 and Section 3 of the Code, 2010 provides its management and Clause 2 of the same deals with procedure for change to be made which is as follows :

> *"3.1.2 No change in this Grid Code, however, small or larger shall be made without being deliberated and agreed by the Grid Code Review Panel and thereafter approved by BERC…."*

Thus, the specification of energy meter, as mentioned by Clause 15.7(2)(v) of the Code, 2010, is not non-suited to favour any one manufacturer nor is it tailor-made. Any change in the Code, 2010 has to be made by the Grid Code Review Panel.

22. Mr. Ardhendumauli Kumar Prasad, counsel appearing on behalf of respondent no. 5 challenges the maintainability of the writ application on the ground of being non-bidder in connection with NIT 37/2017 and submits that the present writ application has been filed to obstruct the award of contract in its favour, who qualified and price approved being the

L-I bidder. The tendering authority had found the respondent no. 5 fully suited for the work under the NIT 37/17 and now has a legitimate expectation that documentation and agreement would be executed post award of the contract. He further submits that the NIT 37/17 does not suffer from any violation of statutory guidelines and there is no justification to interfere in the bidding process connected to the NIT. Since petitioner is failing to meet the standards and specification it is obstructing the award of contract in favour of private respondent no. 5. It has also been contended that the petitioner has challenged the defect in the Code, 2010 after 8 years without any challenge for the last 8 years. In fact, such specified meters are being regularly installed not only by the Transmission Company of Bihar but also in the State of Maharashtra, West Bengal, Orrisa, Jharkhand etc. and petitioner had earlier participated in the tender floated by the Transmission Company vide NIT 18/2017 for supply of ABT meter with identical specification without any objection at any point of time. The petitioner itself is not a bidder and is questioning the NIT. Having not availed the opportunity, the petitioner has no locus to question the NIT or the result of the bidding process. It is also contended that the CEA provides for the regulation to regulate the installation and operation of meter. It also provides specifications including mechanical design of such meters. The utilities are at liberty to adopt new technology in terms of the CEA guidelines. The specification of the meter in the NIT has the approval of the CEA. It has further been contended that SAMAST (Scheduling, Accounting, Metering and Settlement of Transaction in Electricity) provides for recommendations with respect to the technical specification for energy meters. The National Grid Operator POSCO (WRLDC) had released specification for energy in line with the recommendation of SAMAST and the same has been approved by the Technical Committees. The draw out type meters had the approval of several regulatory bodies and is also manufactured by M/s Genus, who was one of the applicants before the BERC being Case No. 08/2018 which can be confirmed from their website. The petitioner has deliberately not disclosed that there is direction of the BERC to implement SAMAST at the earliest which is to reduce the time base from the existing 15 minutes to 5 minutes. The technology is to minimise the shutdown time and thus the draw out type ABT meter is a new technology shifting to more stringent time base of 5 minutes. It is on account of malafide intention to damage the business prospect of respondent no. 5 and an act of commercial and business rivalry that such challenge has been put by the petitioner. He submits that the specification of draw out type meters has been authorised in accordance with the Code, 2010. The Transmission Company has sent the DPR to the CEA for approval and the same has been approved by the CEA vide letter No. CEA/DPD/Metering/2016-1780 dated 09.08.2016, hence, the CEA, which is the Central Regulatory Authority, has approved the DPR. As per Clause 20 of the Regulations, 2006, utilities are free to adopt new technologies. Respondent no. 5 has also brought on record the order dated 27.07.2018 passed by the BERC in Case No. 09/2018 filed by the petitioner wherein amendment to Clause 15.7 (2)(v) of the Code, 2010, which had been sought by the petitioner, did not find favour with the BERC, which has also been challenged by the petitioner in I.A. No. 6255 of 2018. He further submits that principle of promissory estoppel would apply as after the issue of LOI in his favour on 28.03.2018 he spent about Rs. 5.50 crores but still agreement and documentation has not been done because of the malafide intention of the petitioner. Learned counsel for the private respondent also refers to the decision of ***Michigan Rubber (India) Limited*** (supra) with special reference to paragraph 19 stating therein that even a single tender cannot be said that the State has created a monopoly of business in favour of private party and is not in violation of Article 14 or encroaches upon fundamental rights of a class of intending tenderers under Article 19 of the Constitution as selection of a competent contractor for assigning job of supply of sophisticated article through open tender procedure is not an act of creating monopoly, as such, judicial interference is uncalled for. He also refers to paragraph 23 of the said judgment wherein principles with regard to tender or contractual matters has been formulated and stated that the State and its instrumentality acting in public interest in awarding contract, interference by Court is very restrictive since no person can claim a fundamental right to carry on business with the Government. It has also been observed in paragraph 35 that the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, malafide or actuated by bias, the Courts would interfere. In the present case, judicial scrutiny is uncalled for.

23. He further refers to a recent judgment of the Hon'ble Apex Court in the case of ***Municipal Corp., Ujjain & Anr. vs. BVG India Ltd. & Ors.*** since reported in ***(2018) 5 SCC 462*** wherein all the earlier judgments have been taken into consideration and special reference has been made to paragraphs 12, 13, 14, 16, 22 and 27 contending therein that only when a decision making process is so arbitrary or irrational that no

responsible authority proceeding reasonably or lawfully could have arrived at such decisions, power of judicial review can be exercised. However, if it is bonafide and in public interest the Court will not interfere in the exercise of power of judicial review even if there is a procedural lacuna. The principles of equity and natural justice do not operate in the field of commercial transactions. Wherever decision has been taken appropriately in public interest, the Court ordinarily should exercise judicial restraint.

24. Yet another limb of argument of the private respondent no. 5 is that the petitioner has challenged the order of the BERC in I.A. No. 6255 of 2018 instead of availing the alternative remedy provided under Section 111 of the Electricity Act, 2003. He submits that the amendment by way of I.A. No. 6255 of 2018 is not permissible as the petitioner moved the BERC on 12.02.2018 and the present writ application was filed on 22.03.2018. The LOI was issued after evaluating technical and financial bid and is a concluded contract. The specification was a technical upgradation but the petitioner seeks technical deviation to lower the bench mark. He submits that the allegation of tender being tailor-made is a misrepresentation and a serious allegation. He further submits that the entire project is in public interest and

the dispute is purely between two tenderers and there is no element of public interest involved in entertaining such a petition. For this proposition, he refers to the case of ***Raunaq International Ltd. vs. I.V.R. construction Ltd. & Ors.*** since reported in ***AIR 1999 SC 393*** and in the case of ***M/s Master Marine Services (P) Ltd.*** (supra).

25. Respondent No. 5 has also filed I.A. No. 6859 of 2018 wherein it has been stated that M/s NE Energy Solutions Pvt. Ltd. has a commercial relationship with the MTE Meter India (P) Ltd. and the petitioner has commercial relations with M/s NE Energy Solutions Pvt. Ltd. which has been authorised by the petitioner to perform its contractual relations and MTE Meter India (P) Ltd. has authorised to submit the bid on behalf of M/s NE Energy Solutions Pvt. Ltd., which has been replied by Mr. Y.V. Giri, learned Senior Counsel that the petitioner is a separate legal entity and no adverse inference can be drawn on that account. However, Mr. Prasad, learned counsel for the respondent no. 5 submits that since the petitioner has challenged the NIT and for the same cause he had approached the BERC and because of business rivalry such malicious application has been filed, with serious allegation of being tailor-made to suit the respondent no. 5, the writ application is fit to be dismissed with exemplary cost.

26. Heard the parties. Petitioner has challenged the incorporation of Clause 5.39.2 of the technical specifications of the NIT No. 37/PR/BSPTCL/2017 which has been adopted from Clause 15.7(2)(v) of the Code, 2010 on the ground that it has been incorporated to favour a single manufacturer at a very high cost which will have a bearing on the public exchequer. However, petitioner had preferred Case No. 09/2018 seeking amendment of Clause 15.7(2)(v) of the Code, 2010 and had also preferred the present writ application for the same relief. Code, 2010 has statutory force being an instrument by the BERC which lays down rules, guidelines, standards to be followed by all users of Grid which came into force on 20.07.2010 in exercise of the power conferred under Section 181 read with clause (h) sub-section (1) of Section 86 of the Electricity Act, 2003. Any amendment or change in the Grid Code has been specified in Clause-2 which requires deliberation and agreement by the Grid Code Review Panel which has to be approved thereafter by the BERC. The amendment sought in Clause 15.7(2)(v) in the terms of the NIT floated by the Transmission Company, that too after 8 years of the Code, 2010, is impermissible and, as such, the said plea of the petitioner is rejected. It has been contented by the petitioner that the Central Regulatory Authority, which frames guidelines for the

BERC and Code, 2010 does not specify draw out type meters with automatic CT short circuiting facility. From perusal of the CEA regulations, which is the Central Regulatory Authority, as per Clause 20 of the Regulations, 2006, speaks of adoption of new technologies and utilities are free to adopt new technologies with the approval of the appropriate commission or as per the regulations or directions of the appropriate commission or pursuant to the reforms program of the appropriate Government. The CEA provides for regulation to regulate the installation and operation of meter. It also provides specification including mechanical design of such meters. The utilities, however, are at liberty to adopt new technology in terms of the CEA guidelines as permitted in Clause 20 of the CEA Regulations, 2006. The Transmission Company in line with the recommendation of SAMAST had sent the DPR to the CEA for approval and the same has been approved by the CEA vide letter No. CEA/DPD/ Metering/2016-1780 dated 09.08.2016. The draw out type meter with CT short circuiting facility was as per the direction of the BERC to implement SAMAST at the earliest so as to reduce the time base from existing 15 minutes to 5 minutes which is a new technology shifting to most stringent time base of 5 minutes. Thus, the said clause introduced in the NIT is in line with Clause 15.7(2)

(v) of the Code, 2010 and does not suffer from any malafide intention to favour a single tender, more so, when the petitioner did not participate in the tender and was a non-bidder. It has been held in the decision rendered in the case of Michigan Rubber (India) Limited(supra) that even a single tender cannot be said to be a creation of monopoly of business in favour of a private party by the State and is not in violation of Article 14 of the Constitution or encroaches upon the fundamental rights of a class of intending tenderers under Article 19 of the Constitution.

27. So far as the selection of respondent no. 5 as a competent tenderer for assigning job of supply of sophisticated article through open tender procedure is concerned, it does not call for judicial scrutiny in such contractual matters.

28. So far as the contention of the petitioner that the draw out type meter with CT short circuiting facility has been tendered at an exorbitant high price of Rs. 1.25 lakhs to 1.50 lakhs and in the alternative the draw out type meter without CT short circuiting facility would have been available at the price range of Rs. 35,000/- to 45,000/-, is not within the purview of judicial scrutiny. It is for the utilities to adopt new technology in terms of the CEA guidelines. The specification of the meter in the NIT has the approval of the CEA and ordinarily the power of judicial

review ought not to be exercised if the authority proceeds reasonably and the act is bonafide and in public interest. The dispute is a contractual dispute between the two tenderers and in such matters the Court ordinarily should exercise judicial restraint. The writ application, thus, does not come under the purview of judicial review and held not maintainable.

29. Accordingly, the writ application is dismissed. However, petitioner is at liberty to avail the alternative remedy of appeal against the order dated 27.07.2018, passed by the BERC in Case No. 09/2018.

(Nilu Agrawal, J)

Rajesh/-

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