Court-I

Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

IA No.457 of 2014 In
Appeal No.292 of 2014

Dated: 20th March ,2015

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. N.M. Borah, Technical Member

In the matter of :-

Gujarat Gas Company Limited. ….Appellant

Versus

Petroleum and Natural Gas Regulatory Board & Anr.
….Respondents

Counsel of the Appellant(s) : Mr. Akhil Sibal
Ms. Apoorva Mishra
Ms. Pallavi Mohan
Ms. Shardha Deshmukh
Ms. Raveena Dhanuja

Counsel for the Respondent(s): Ms. Sonali Malhotra for **R-1**
Mr. Iti Agarwal for **R-2.**

O R D E R

1. In this appeal, the Appellant has challenged Order dated 20/10/2014 passed by the Petroleum and Natural Gas Regulatory

Board (**"Board"**). The appeal has been admitted by us. This application is for grant of stay of the impugned order.

2. The gist of the Appellant's case may be stated as follows:-

The Appellant, Gujarat Gas Company Ltd. is a Company engaged in the business of city gas distribution and marketing of natural gas and has laid and built various pipelines including a pipeline from Hazira to Ankleshwar viz. Hazira – Ankleshwar Natural Gas Pipeline ("**HAPI**") which was commissioned on 10.05.1999. The Appellant also owns and operates City Gas Distribution ("**CGD**") Network pipeline facilities in the State of Gujarat. Respondent No.1, Board is established under Section 3 of the Petroleum & Natural Gas Regulatory Board Act 2006 (PNGRB Act). Respondent No.2, United Phosphorus Ltd. (UPL) is a Company engaged in the business of manufacturing pesticides and chemicals and has a captive power plant situated at Jhagadia, Gujarat. Respondent No.2 entered into a Gas Supply Contract ("**GSC**") with the Appellant for supply and transportation

of natural gas in 2001 in order to get the gas to its Jhagadia power plant through the Appellant's facilities. The Appellant was supplying gas to Respondent No.2's plant in Jhagadia from the year 2002 to 2008. The GSC between Respondent No.2 and the Appellant was valid till 31/3/2008. The Appellant has laid a 23 Km. long pipeline from Amboli to Jhagadia ("**AMJH pipeline**") connecting one end to the Appellant's HAPI pipeline at Amboli and the other end at Respondent No.2's plant at Jhagadia unit. This pipeline has been catering to multiple customers of Jhagadia since 2005.

3. The Board vide letter dated 31/3/2008 directed the Appellant to make an application for authorization as per the notified CGD Authorizing Regulations as the Appellant was not an entity authorized by the Central Government. The Appellant made an application dated 21.07.2008 as per Regulation 18 of the CGD Authorizing Regulations. The Board vide letter dated 3/10/2008

directed the Appellant to make an application for authorization of HAPI pipeline in terms of the Pipeline Authorizing Regulations. The Appellant accordingly, made application dated 24.10.2008 for authorization of its HAPI pipeline. It is not necessary for the purpose of disposal of this application to state all the details of interaction between the Appellant, the Board and Respondent No.2. Suffice it to say that according to the Appellant due to a long standing relationship with Respondent No.2, the Appellant continued to have an arrangement with Respondent No.2 whereby the Appellant's transmission facilities were used for the delivery of gas to Respondent No.2's plant at Jhagadia under certain short term gas sales contracts valid till November 2008.

4. On 04.12.2008, as an interim arrangement, Respondent No.2 and the Appellant entered into a short term Gas Transport Agreement (GTA). As per this GTA, the Appellant's transmission facilities, distribution facilities and compression facilities were all to be used for the redelivery of gas now supplied by GAIL (Gas

Authority of India Ltd.) to Respondent No.2's plant. This alternative gas supply source of GAIL had to be resorted to since the Appellant was no longer able to meet the requirement of Respondent No.2 due to short supply of gas. Thereafter, a few more short term GTA's were executed between the parties till March, 2009, whereby the Appellant kept facilitating gas supplies to Respondent No.2's plant.

5. On 3.4.2009 the parties entered into a City Gas Network Distribution Agreement (CGNDA) for redelivery of gas to Respondent No.2. Thereafter several short term CGNDAs were executed between the parties. On 13/2/2009, Respondent No.2 made a complaint to the Board alleging that the Appellant was charging exorbitant transportation cost under the agreement entered between them for transportation of gas procured from the GAIL. It is the case of the Appellant that thereafter, correspondence ensued between the Appellant and the Board. The Appellant clarified its case. The Board by letter dated

27/7/2009 asked the Appellant to explain why the AMJH pipeline i.e. steel pipeline offshoot from main transmission pipeline ("**HAPI pipeline**") was being taken as a part of the CGD network by the Appellant. The Appellant replied *inter alia* stating that the said pipeline was a part of the Appellant's interconnected network and was being utilized for transporting natural gas from high pressure transmission mains and, hence, it has been included in the Appellant's CGD application. It is the case of the Appellant that following a meeting to resolve the matter and a series of correspondence between the parties, Respondent No.2 wrote an email on 02.02.2012 to the Appellant agreeing not to pursue the complaint. On 5/7/2012, the Appellant received authorization from the Board for HAPI pipeline and on 8/11/2012, the Board granted authorization to the Appellant for CGD network development of the Surat-Bharuch-Ankleshwar GA in terms of the CGD Networks Authorizing Regulations. Subsequently, the parties again executed a CGNDA on 24/7/2013. It is the Appellant's case that despite this, Respondent No.2 again made a

complaint before the Board on 28/8/2013 alleging exorbitant transportation charges being levied by the Appellant. On 4/9/2013, the Board passed a tariff order fixing the "Provisional" initial unit natural gas pipeline tariff for the HAPI pipeline. About 9 months thereafter, Respondent No.2 approached the Board by filing complaint dated 30/5/2014 under Section 25 read with Sections 11(a),11(e), 11(f)(iii), 12(1)(a), 12(1)(b), 12(2) and Sections 48 and 50 of the PNGRB Act. The Board heard the counsel for the parties. By majority of three members the Board accepted Respondent No.2's case and passed an order directing the Appellant, *inter alia,* to (a) approach the Board within 15 days for modification of authorizations granted in its favour by the Board for its natural gas pipeline network and CGD network and (b) charge its HAPI pipeline tariff from the Respondent, as determined by the Board and to make adjustments accordingly. Two members dissented from the view taken by the three members and wrote two separate dissenting judgments. The Appellant has challenged the said judgment in this Appeal.

6. Mr. Sibal, learned counsel appearing for the Appellant contended that the Appellant has a strong *prima facie* case. This is evident from the fact that two members of the Board have by reasoned orders decided in its favour. Counsel submitted that the Board erred in holding that the AMJH pipeline is a spurline of the HAPI pipeline. The Board also erred in holding that the Appellant is abusing its alleged dominant position and has engaged in restrictive trade practices. The Board also wrongly concluded that the Appellant had suppressed material facts regarding the status of the AMJH pipeline while seeking authorization. Counsel submitted that this observation about suppressing material facts was made without giving an opportunity to the Appellant to put forth its case. Counsel submitted that by directing the Appellant to seek modification of the authorizations granted to the HAPI pipeline and its CGD network, the Board is, in fact, trying to *suo moto* review its own order. The PNGRB Act and the Regulations framed thereunder do not provide for a review of its order once

authorization has been granted. Counsel submitted that in the entire proceedings before the Board, the Appellant was heard only once and even at that stage, the question of authorizations being wrong was never raised. Therefore, the Board has reached its conclusion without examining the exact nature of the network supplying gas to Respondent No.2's plant. Counsel submitted that the impugned order suffers from the vice of non-application of mind. Counsel submitted that the Board failed to adhere to the procedure prescribed under the PNGRB Act before coming to a conclusion that a *prima facie* case is made out against the Appellant that it was indulging in restrictive trade practices. The Board has also erred in holding that the complaint has been filed within limitation. Counsel submitted that the Board has wrongly recorded a concession allegedly made by the Appellant accepting Board's jurisdiction. Counsel submitted that the dissenting members have acknowledged the fact that the facilitation arrangement between the Appellant and Respondent No.2 is a legacy arrangement and includes the components of

transmission, distribution and compression. It has also been acknowledged by the dissenting members that at present there are no regulations to govern the arrangement between the Appellant and Respondent No.2 and, therefore, the Appellant cannot be said to have violated the Regulations framed by the Board. Counsel also contended that the length of the AMJH pipeline (23 km) is much more than 10% of the 72.3 km long HAPI pipeline and, hence the former does not fall under the tariff zone of the HAPI pipeline as per Section 2 h (ii) of PNGRB (Authorizing Entities of Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations, 2008. This submission has also been affirmed by the Dissenting judgment of Member Mr. K.K. Jha. Counsel submitted that the balance of convenience is in favour of the Appellant and irreparable injury would be caused to the Appellant if the impugned order is not stayed.

7. Learned counsel for the Board and learned counsel for Respondent No.2 vehemently opposed the application. They

supported the impugned majority order and refuted all submissions made by the Appellant's counsel. Counsel submitted that the Appellant does not have a *prima facie* case. They submitted that the Appellant is guilty of suppression of vital and material facts and has tried to mislead the Board as regards the status of AMJH pipeline while seeking authorization. Counsel contended that by the year 2005, the AMJH pipeline lost its character of a dedicated pipeline. The Appellant, further, unilaterally opted to convert the GTA into CGD Network Agreement disregarding the provisions of Regulations. The Appellant, admittedly, was supplying gas at above 1,71,000 SCMD to Respondent No.2 through AMJH pipeline. The highest supply rate permitted by Regulation through a pipeline of a CGD network is 1,00,000 SCMD and, therefore the AMJH pipeline cannot be treated as a part of a valid CGD network. The Appellant, however, deliberately misrepresented the AMJH pipeline as a part of its CGD network. Counsel submitted that Respondent No.2 had no other source of gas transmission except

the AMJH pipeline for its power plant at Jagadia which was taken undue advantage of by the Appellant to misuse its dominant position and to coerce Respondent No.2 to enter into various Agreements. Conduct of the Appellant has been adversely commented upon. Appellant is, therefore, not entitled to any relief. Balance of convenience does not tilt in favour of the Appellant. Counsel submitted that the Board has considered all the submissions of the Appellant in their proper perspective. The impugned order is well reasoned. Counsel submitted that the Appellant is liable to refund to Respondent No.2 approximately Rs.40 crores in line with the Impugned Order. The Application for stay, therefore, deserves to be dismissed.

8. Having read the majority judgment and the dissenting judgments, in the facts and circumstances of the case, we are of the opinion that this Appeal deserves to be heard at length. The appeal involves complicated factual/Regulatory issues as well as legal issues. Serious aspersions have been cast on the Appellant

which the Appellant's counsel has strenuously denied. Once we come to a conclusion that the Appeal deserves consideration, in the peculiar facts of the case, if the order directing the Appellant to seek modification of authorizations granted in its favour by the Board for its natural gas pipeline network and CGD network is not stayed, the appeal will become infructuous at this stage because the main issue involved in this case is whether the AMJH pipeline forms part of the CGD network or it is a spurline of the HAPI pipeline. This direction will, therefore, have to be stayed. We have also kept in mind the fact that there is no subsisting agreement between the Appellant and Respondent No.2. Hence, as it stands now, there is no question of the Appellant further charging any tariff and recovering money from Respondent No.2 in future. Question is of money already recovered by way of tariff in the past. The Appellant has been directed to charge its HAPI pipeline tariff and recover money from Respondent No.2 as determined by the Board and to make adjustment accordingly, that is to say, since the Board has now directed the Appellant to

treat the AMJH pipeline as part of the natural gas pipeline network i.e. HAPI pipeline, the Appellant will have to refund excess amount of tariff charged by it since the date of authorization and recovered by it from Respondent No.2 treating the AMJH pipeline as part of the CGD network. This amount is stated to be about Rs.40 crores by counsel for the parties. In the facts and circumstances of the case, we are of the opinion that on the Appellant furnishing bank guarantee of any nationalized bank for an amount of Rs.40 crores drawn in favour of Respondent No.2, impugned judgment should be stayed. Hence, the following order:

The impugned judgment dated 20.10.14 shall remain stayed during the pendency of this appeal except to the extent it directs the Appellant to pay a penalty of Rs. 1 lakh which order has already been complied with by the Appellant, subject to the Appellant's furnishing bank guarantee of any nationalized bank for the sum of Rs.40 crores drawn in favour of Respondent No.2

within four weeks from today. The said bank guarantee shall be kept alive till one month beyond the date of disposal of the appeal by this Tribunal.

9. We make it clear that we have not made any final observations on the merits of the case. Nothing said by us in this order should be treated as expression of our opinion on the merits of the case. All observations are of interim nature. Application is disposed of.

10. The main appeal is listed on **10.04.2015**

(Nayan Mani Borah)
Technical Member

(Justice Ranjana P. Desai)
Chairperson

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~~Reportable~~/Non-Reportable

MR