

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
[APPELLATE JURISDICTION]**

**APPEAL NO. 13 OF 2016 &
IA NOS. 25 & 425 OF 2016 &
IA NO. 229 OF 2017**

Dated: 26th May, 2017

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. B.N. Talukdar, Technical Member (P&NG)**

IN THE MATTER OF:

**M/S JAY MADHOK ENERGY)
PRIVATE LIMITED)
D-143, Defence Colony,)
New Delhi-110024)** **...Appellant**

AND

**PETROLEUM & NATURAL GAS)
REGULATORY BOARD)
1st Floor, World Trade Center,)
Babar Road,)
New Delhi-110001)** **...Respondent**

Counsel for the appellant(s) : Mr. Atul Y. Chitale, Sr. Adv.
Mr. Vineet Malhotra
Mr. Mohit Paul
Mr. Vishal Gohri
Mr. R.K. Mehta
Ms. Tanvi Kakar
Ms. Akansha Ghosh
Ms. Shruti Sharma Hazarika
Mr. Rakesh Dewan
Mr. Shubhendu Kaushik

Counsel for the Respondent(s) : Ms. Sonali Malhotra

Mr. Sumit Kishore
Ms. Aparna Vohra
Mr. Amit Sanduja

J U D G M E N T

PER HON'BLE MR. B.N. TALUKDAR, TECHNICAL MEMBER (P&NG)

1. In this Appeal filed under Section 33 of the Petroleum and Natural Gas Regulatory Board Act, 2006, the Appellant, M/s Jay Madhok Energy Pvt. Ltd. has challenged the order dated 28.09.2015 passed by the Respondent, the Petroleum and Natural Gas Regulatory Board (the Board).
2. The Appellant is a company who started as a trading and distribution company in 1985, later strategically, integrated into oil and gas exploration, production and city gas distribution activities.
3. The Respondent, Petroleum and Natural Gas Regulatory Board (the Board) is a statutory body constituted under the provisions of the Petroleum and Natural Gas Regulatory Board Act, 2006 ("PNGRB Act") to regulate "the refining, processing, storage, transportation,

distribution, marketing and sale of petroleum, petroleum products and natural gas excluding production of crude oil and natural gas so as to protect the interests of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas and to ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country and to promote competitive markets and for matters connected therewith or incidental thereto”.

4. The background of the appeal and the gist thereof as understood from the learned counsel of the Appellant and the documents submitted by the Appellant are as under: -

The Respondent on 23.07.2010, under the provisions of the Petroleum and Natural Gas Regulatory Board (Authorizing entities to lay, build, operate or expand city or local natural gas distribution network) Regulations, 2008 (hereinafter “Authorization Regulations”) invited bids for the geographical area of Jalandhar along with 6 other areas for grant of authorization for laying, building and

operating etc. for the CGD network in respect of these areas. On 18.02.2011, the Appellant submitted its bids for the geographical areas of Ludhiana, Jalandhar and Kutch (East) and on 06.09.2013, the Appellant was granted the said authorization for the geographical area of Jalandhar. Subsequently, the Appellant was also granted authorization for CGD network of Kutch (East) on 12.03.2015 and for Ludhiana on 25.06.2015. The instant case pertains to the geographical area of Jalandhar.

5. As per the Appellant, after receiving the authorization for the geographical area of Jalandhar on 06.09.2013 the Appellant came to know about the pendency of a Public Interest Litigation being Civil Writ Petition No. 13490 of 2008 before the High Court of Punjab and Haryana at Chandigarh involving the issue whether Compressed Natural Gas (CNG) station is a part of CGD network or not. Before the High Court of Punjab and Haryana M/s GAIL GAS took a stand that CNG station is not a part of CGD network whereas the bids of CGD network were invited by the Board on the basis of the fact that CNG

stations are an integral part of CGD network. The Scope of Work mentioned in the bid document included CNG station as a part of CGD network.

6. On 18.09.2013, when the PIL was listed before the High Court of Punjab and Haryana, the Union of India through Ministry of Petroleum and Natural Gas (MoPNG) filed an affidavit supporting the stand of M/s GAIL GAS that CNG station is not a part of CGD network.

7. On 17.09.2013, the Appellant appeared before the High Court of Punjab and Haryana and filed an application for impleadment. But, when the matter was listed on 18.09.2013 before the said court, the application of the Appellant for impleadment was not on record. Thereafter, however, by order dated 18.09.2013 the Appellant was impleaded as party. By the said order, the High Court of Punjab and Haryana had noted that the court would have to consider the question of CNG station as to the scope of the power of the Board keeping in mind the provisions of the PNGRB Act, 2006.

8. The Board filed its affidavits on 08.01.2013 and 03.07.2013 before the High Court of Punjab and Haryana stating the implications of non-inclusion of CNG station in the CGD network in this bid for Jalandhar. On 18.12.2013, the Board issued Public Notice wherein it informed all stakeholders that the issue as to whether CNG Stations are an integral part of City or Local Natural Gas Distribution (CGD) network and whether authorization from PNGRB is required for setting up of CNG station is an issue pending consideration and subjudice before the High Court of Punjab and Haryana at Chandigarh.

9. As the said dispute was pending before the High Court of Punjab and Haryana, the Appellant wrote several letters to the Board seeking clarity on the said situation however, there was no response from the Board.

10. On 01.10.2014, the Board issued a notice to the Appellant to appear before the Board on 30.10.2014 for first

hearing. The representative of the Appellant appearing before the Board filed its written submission requesting the Board to take a pragmatic view of the matter and extend the time to the Appellant so that the time for the project runs from the date of final decision of the court. The Appellant also filed its written submission subsequently on 07.11.2014 to the Board pointing out the order of the High Court and also the Board's own stand that the project would be in doubt if CNG station is not an integral part of the CGD network.

11. The Appellant wrote another letter to the Board on 10.03.2015 seeking extension of Zero Date for exclusivity period on the ground that the issue is subjudice and pending consideration in the High Court of Punjab and Haryana in Public Interest Litigation, but there was no response from the Board.
12. Thereafter, on March 05, 2015, Govt. of India issued draft guidelines asking for comments from various entities proposing that CNG stations are not part of CGD network

and no authorization from PNGRB is required for setting up of CNG station. It was also proposed that CNG station can be set-up by any entity. The Appellant sent a representation on 19.03.2015 to MoPNG stating that the said guidelines may not be approved as they would infringe upon the rights of the parties to whom the Board had already granted authorization. On the same subject, the Appellant also wrote to the Board on 20.03.2015 but without any response.

13. The Board issued another letter dated 11.05.2015 to the Appellant directing the Appellant to appear before the Board on 09.06.2015. The Appellant, as a response of this letter wrote to the Board on 02.06.2015 seeking adjournment of the meeting praying that the meeting be held after the decision of the High Court of Punjab and Haryana in Civil Writ Petition No. 13490 of 2008. The Board, however, refused to postpone the meeting and the Appellant accordingly appeared before the Board on 09.06.2015.

14. Before the Board, the Appellant again represented that since the issue is still pending consideration before the High Court of Punjab and Haryana, the zero date for exclusivity period may be extended till the final decision of the Government of India and the High Court of Punjab and Haryana. The Board did not deal with the request and directed the Appellant on 07.07.2015 to submit certain documents regarding the physical progress of the CGD network project.
15. On 13.07.2015, the Appellant wrote to the Board giving the progress of the project and also categorically stating that the Appellant is waiting for the final decision in regards to exclusion of the CNG from the CGD network since the project involves huge investment which would not be viable if CNG is not a part of the CGD network which has also been admitted by the Board itself. The Appellant did not receive any response to this letter but received the impugned order passed by the Board on 28.09.2015 encashing 25% of the bank guarantee submitted by the Appellant and directing the Appellant to

make good the encashed performance bank guarantee within two weeks of receipt of the letter. Hence the appeal of the Appellant to this Tribunal.

16. Since the Petroleum Bench of this Tribunal was not functional at the time of the appeal, the Appellant filed a writ petition before the High Court of Delhi being Writ Petition No. 10336 of 2015. The High Court of Delhi by its order dated 03.11.2015 directed the Board to restrain from taking any precipitative steps in pursuance to the non-replenishment of the bank guarantee by the Appellant and by subsequent order dated 15.12.2015 while disposing of the petition ordered that this Tribunal, upon becoming functional, shall take up the appeal and the interim order shall continue till the final order of this Tribunal.

17. We have heard Mr. Vineet Malhotra and Mr. Vishal Gohri, learned counsel appearing for the Appellant. We have perused the written submissions filed by them. Gist of the submissions is as under: -

- The Board failed to appreciate that in Civil Writ Petition No. 13490 of 2008, the issue as to whether CNG station is a part of CGD network is subjudice and pending consideration of the High Court of Punjab and Haryana at Chandigarh.
- The Board failed to appreciate that the Government of India issued draft guidelines wherein it was proposed that CNG stations are not part of CGD network and no authorization is required to set up CNG station and the CNG station can be set up by any entity. The government is yet to finalize the policy.
- The Board failed to appreciate that the bids had been invited on the basis of the fact that CNG stations are an integral part of CGD network. In the bid document, it is provided as under: -

"1.2 SCOPE OF WORK

The entities bidding for this work shall be required to lay, build, operate or expand the CGD networks to meet requirement of natural gas in domestic, commercial and industrial segments including Compressed Natural Gas in the vehicular segment in the said geographical area to be authorized and also comply with the relevant regulations.

The entities shall be required to carry out the development of CGD project in line with the regulations laid down by the PNGRB."

- The Board failed to appreciate that the Board itself had issued a Public Notice dated 18.12.2013, which is also prominently available in its website stating as under: -

"Sub: Setting up of CNG Station.

This public notice is being issued for information of stakeholders in the wake of recent press-reports that CNG Stations are not an integral part of a city or local natural gas distribution (CGD) network and that no authorization from PNGRB is required for setting up of CNG Stations.

All stakeholders are hereby informed that the above matter is subjudice in the Hon'ble Punjab and Haryana High Court."

- The Board failed to consider that it has itself before the High court taken a stand that viability of the entire project would be adversely affected and the project would not be viable if CNG is not an integral part of CGD network. The Board before the High court in this regard in its affidavit dated 08.01.2013 stated as under: -

"12. That as per processing of bids received under the 3rd round of bidding is underway. In the circumstances if the GGL were not to emerge as a successful bidder for Gas of Jalandhar, Ludhiana or Chandigarh, its signing of agreements with Punjab Roadways (PUNBUS) would effectively amount to procuring the high potential CNG business in these GAs by circumventing the process of competitive bidding which cannot be allowed. It is submitted that the bidders would have considered the CNG business of PUNBUS and other transport agencies in assessing the business potential for

working out these bids. By this kind of cherry-picking of major customers for CNG, the business potential of the entity that is going to be successful in the bidding process and the viability of the CNG network will be adversely affected."

- The Board failed to consider that the Union of India had purportedly filed an affidavit on 18.09.2013 before the High Court of Punjab and Haryana supporting the stand of M/s GAIL GAS that CNG station is not part of CGD network.
- The Board failed to consider that Division Bench of the Hon'ble High Court of Punjab and Haryana at Chandigarh comprising of Hon'ble Mr. Justice Sanjay Kishan Kaul, Chief Justice and Augustine George Masih, Judge by its order dated 18.09.2013 noted as under: -

"The affidavit has been filed by the Ministry of Petroleum and Natural Gas affirmed on 13.09.2013. The affidavit seeks to suggest that CNG station is not an integral part of City Gas

Distribution (CGD) network as envisaged under the Petroleum and Natural Gas Regulatory Board (PNGRB) Act, 2006 (hereinafter referred to as the Act) and, thus, no authorization from PNGRB is required for setting up of CNG stations.

A copy of this affidavit has, however, not been handed over to the PNGRB/respondent no.95. Learned counsel appearing for the said authority disputes this position and submits that the CNG stations cannot be carved out of the CGD network and in eight cities tenders have been so awarded and accepted by GAIL, as the GAIL has been the successful tenderer in four such cities. It is, thus, sought to be suggested that this issue has been raised by GAIL qua Jalandhar city as the GAIL has not been the successful tenderer.

The original records have been produced before us which show that there was an opinion obtained by the Ministry of Petroleum and Natural Gas from the Ministry of Law and Justice, Department of Legal Affairs to support its view as formulated on record.

The result of the aforesaid is that this Court would have to consider this question as to the scope of the power of PNGRB keeping in mind the provision of the said Act.”

- The Board failed to recognize the submissions made by the Appellant to extend the zero date of the project and instead encashed 25% of the bank guarantee. The relevant portion of one of the submissions made on July 13/14 of 2015 requesting extension of the zero date reads as under: -

“We reiterate our earlier submissions that zero date be extended, in view of our submission

that whether CNG is an integral part of CGD or not is yet to be finally decided by the Hon'ble High Court and surprisingly, Ministry of PNG has taken a stand that CNG is not a part of CGD and, in fact, has also issued draft guidelines to the effect that anyone can set up CNG station and no authorization is required from PNGRB. As per the own stand of PNGRB before the Hon'ble High Court, if CNG is not treated as a part of CGD, it will have adverse effect on the project viability."

18. We have heard Ms. Sonali Malhotra, learned counsel appearing for the Board and perused the Respondent's written submissions. Gist of the submissions is as under: -

- The Appellant has clearly violated the terms and conditions of the authorization dated 06.09.2013 by having no physical development of CGD network in Jalandhar geographical area. The reasons given by the Appellant for failure to achieve the targets were

also not found satisfactory by the Board. Consequently, in accordance with the terms and conditions of authorization and provisions under Regulation 16 (1)(c)(i) of the CGD Authorization Regulation of the Board, 25% of the PBG amount i.e. Rs.50 lakhs were encashed from the PBG vide order dated 28.09.2015.

- 25% of the bank guarantee was encashed as a first default because of non-achievement of the targets for infrastructure build-up and PNG domestic connections.
- The authorization was granted to the Appellant on 06.09.2013 and order for encashment of 25% of bank guarantee was passed on 28.09.2015. Two years had elapsed but there was no progress in the physical targets on the ground and the Appellant also admitted that there was no progress of the project on ground.

- The Appellant has always illegally and malafidely mentioned about the case pending before the High Court of Punjab and Haryana and has mischievously and malafidely used as a shield for non-compliance of terms and conditions of authorization. The pending case in the court does not have to do anything with invocation of bank guarantee.
- The Appellant's allegation of violation of principles of natural justice has no merit as the Board has provided ample opportunities to the Appellant of being heard and reasonable time has always been given to fulfill its obligations from time to time. The Appellant also has been cautioned on various occasions, inter alia, the letters dated 01.10.2014, 11.05.2015 and various hearings in accordance with provisions of Regulation 16 of CGD Authorization Regulations.
- There has been no stay order from the High Court of Delhi which prevents the Appellant from continuing

with the work in Jalandhar geographical area and hence bank guarantee has been invoked. In this respect, it relied upon the Supreme Court's order in the case of **State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation 1994 SCC (6) 597.**

- The allegation that after grant of authorization in favour of the Appellant, the Appellant came to know about the pendency of public interest litigation being Civil Writ Petition No. 13490 of 2008 before the High Court of Punjab and Haryana at Chandigarh is false. Application cum Bid Document ("ACBD") for Jalandhar at clause 2.5.2[6] under the guidelines for Preparing Feasibility Report ("FR") states that FR shall include the market survey and realistic gas demand assessment for each sector-residential /commercial/industrial/transport-all financial analysis to be based on these figures. Clause 2.5.2[14] of the same guidelines also states that FR must also include the credible plans for independently undertaking and

executing CGD project on a standalone basis, undertaking O&M activities for the CGD project on a standalone basis and for developing an in-house O&M team for the CGD network including organization structure and manpower requirement. Clause 2.5.2[16] under the guidelines also states that the FR must include Risk analysis of the project detailing the various risks associated with the project and confirmation that have been duly considered in making the FR. It is pertinent to mention here that, the entity as a bidder for Jalandhar GA must have satisfied itself and should have the prior information of the legal position/cases, the business empanelled in the preferred are and the risk profile of the project. This is also verified by the fact that soon after authorization on 06.09.2013, it filed an application for impleadment on 17.09.2013 i.e. within 11 days of authorization. It is further pertinent to mention here that, the bidding process lasted for more than 03 years. Without prejudice to rights and contentions, it is submitted that, the malafide of the

appellant is clearly evident as it is completely false and mischievous on the part of the Appellant to state that a fact which it did not come to know in more than three [3] years, suddenly became evident to the Appellant within 11 days of authorization.

19. We now need to know the crux of the case. The Appellant's contention is that when the Appellant was granted the authorization by the Board to lay, build, operate or expand city or local natural gas distribution network for the geographical area of Jalandhar under CGD Authorization Regulations, the CNG stations were included in the CGD network. We have examined the bid document in this regard and noted the following as provided in the scope of work in the bid document: -

"1.2 SCOPE OF WORK

The entities bidding for this work shall be required to lay, build, operate or expand the CGD networks to meet requirement of natural gas in domestic,

commercial and industrial segments including Compressed Natural Gas in the vehicular segment in the said geographical area to be authorized and also comply with the relevant regulations.

The entities shall be required to carry out the development of CGD project in line with the regulations laid down by the PNGRB."

20. We note from the above scope of work of the bid document that the CGD network under bidding also included CNG in the vehicular segment in the Jalandhar geographical area.

21. Contrary to this provision in the bid document, there has been a Public Interest Litigation (PIL) being Civil Writ Petition No. 13490 of 2008 before the High Court of Punjab and Haryana at Chandigarh on various issues including a claim that CNG station is not a part of CGD network. The same stand has also been taken by Union of India through Ministry of Petroleum and Natural Gas

(MoPNG) by filing an affidavit in the said court. In this regard, MoPNG has also issued draft guidelines to stakeholders asking for views wherein it has been proposed that CNG stations are not part of CGD network and no authorization is required to set up CNG station and it can be set up by any entity.

22. The Appellant's apprehension is that if the High Court of Punjab and Haryana makes a verdict in favour of the petitioner, this would adversely affect the viability of their CGD network project in the geographical area of Jalandhar. Similar apprehension has also been expressed by the Board itself vide its affidavit dated 08.01.2013 which states as under: -

"12. That as per processing of bids received under the 3rd round of bidding is underway. In the circumstances if the GGL were not to emerge as a successful bidder for Gas of Jalandhar, Ludhiana or Chandigarh, its signing of agreements with Punjab Roadways (PUNBUS)

would effectively amount to procuring the high potential CNG business in these Gas by circumventing the process of competitive bidding which cannot be allowed. It is submitted that the bidders would have considered the CNG business of PUNBUS and other transport agencies in assessing the business potential for working out these bids. By this kind of cherry-picking of major customers for CNG, the business potential of the entity that is going to be successful in the bidding process and the viability of the CNG network will be adversely affected."

23. As regards the PIL pending before the High Court of Punjab and Haryana, on 18.12.2013, the Board issued a public notice wherein it informed all stakeholders that the issue as to whether CNG stations are an integral part of CGD network and whether authorization from the Board is required for setting up of CNG Stations is an issue pending consideration and subjudice before the High Court of

Punjab and Haryana at Chandigarh. It is also fact that High Court of Punjab and Haryana in its order dated 18.09.2013, noted as under: -

“The result of the aforesaid is that this Court would have to consider this question as to the scope of the power of PNGRB keeping in mind the provision of the said Act.”

24. Since this PIL is still pending before the High Court of Punjab and Haryana, the Appellant approached the Board to consider the zero date of the project from the date of the final hearing by the said court. Since the Board has not acceded to this request, this request of the Appellant to the Board is also now the second prayer of the Appellant before this Tribunal.

25. We are not in a position to entertain the above prayer firstly because, the case is still pending before the High Court of Punjab and Haryana and secondly we do not know as to how the High Court's verdict will be

pronounced. At the same time, we do not want to deny the fact that if Union of India finally decides that CNG station is not a part of CGD network, in that case, it could affect the Appellant's CGD network project. As to what remedy in this case the Appellant can adopt or whether it has any case for adopting any available remedy, we are not inclined to comment. If any remedy is available and if the Appellant so desires, it may adopt it. The court seized of the same will deal with it in accordance with law. We have not expressed any opinion in this aspect.

26. We shall now examine the first prayer of the Appellant i.e. to quash the impugned order dated 28.09.2015. Vide the impugned order dated 28.09.2015, the Board encashed 25% of the performance bank guarantee (PBG) i.e. Rs.50,00,000/- (Rupees Fifty Lakhs only) from the PBG Guarantee No. 0276131LDER0012 with United Bank of India submitted by the Appellant because of breach of authorization by the Appellant in respect to laying infrastructure and providing PNG domestic connections. PBG has been invoked in accordance with provisions of

Regulation 16(1) of PNGRB CGD Authorization Regulations and the Appellant has been directed by the Board to make good the encashed PBG within two weeks of receipt of the letter dated 28.09.2015.

27. We note from the submissions of the Board that there has not been any stay order on encashment of the bank guarantee by the Board from the High Court of Delhi when the case was filed by the Appellant before the High Court of Delhi at the time of non-functioning of this Tribunal because of non-availability of the Technical Member (P&NG). The Board on this issue has relied upon the judgment of the **Supreme Court in State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation 1994 SCC (6) 597** which states as under:

“8.The grant of injunction is a discretionary power in equity jurisdiction. The contract of guarantee is a trilateral contract which the bank has undertaken to unconditionally and unequivocally abide by the terms of the contract. It is an act of trust with full faith to

facilitate free flow of trade and commerce in internal or international trade or business. It creates an irrevocable obligation to perform the contract in terms thereof. On the occurrence of the events mentioned therein the bank guarantee becomes enforceable. The subsequent disputes in the performance of the contract does not give rise to a cause nor is the court justified on that basis, to issue an injunction from enforcing the contract, i.e., bank guarantee. The parties are not left with no remedy. In the event of the dispute in the main contract ends in the party's favour, he/it is entitled to damages or other consequential reliefs.

9. It is settled law that the court, before issuing the injunction under Order 39, Rules 1 and 2, CPC should prima facie be satisfied that there is triable issue strong prima facie case of fraud or irretrievable injury and balance of convenience is in favour of issuing injunction to prevent irremediable injury. The court should normally insist upon enforcement of the

bank guarantee and the court should not interfere with the enforcement of the 4 (1982) 3 SCC 358 5 (1992) 2 SCC 330 contract of guarantee unless there is a specific plea of fraud or special equities in favour of the plaintiff. He must necessarily plead and produce all the necessary evidence in proof of the fraud in execution-of the contract of the guarantee, but not the contract either of the original contract or any of the subsequent events that may happen as a ground for fraud."

28. The law relating to Bank Guarantees has been well settled by the Supreme Court in several judgments. Unless there is fraud of the beneficiary or irretrievable harm or injury the Courts are not to interfere with the encashment of Bank Guarantees. The contract between the Bank and the beneficiary is held to be an independent contract irrespective of the dispute between the bank's customer and the beneficiary. The Delhi High Court has in a recent judgment in **Siti Energy Limited & Anr vs. PNGRB dated 02/02/2016 in W.P. (c) 125/2016** where

challenge to the validity of Regulations 7 and 18 of the said Regulations was raised, had an occasion to deal with the application praying that Respondent Board may be restrained from encashing Performance Bank Guarantee. The Delhi High Court reiterated the principles laid down by the Supreme Court with regard to the said issue. Following are the relevant observations of the Delhi High Court.

“25. The law relating invocation of bank guarantees is no longer res integra. The law is well settled that the interference by the Courts is permissible only where the invocation of the bank guarantee is against the terms of the guarantee or if there is any fraud. In the absence of the same, the bank is liable to pay the guaranteed amount without any demur whatsoever and the bank is bound to honour the guarantee irrespective of any dispute raised by its customer since a bank guarantee is an independent and a separate contract. It is also a well settled principle that fraud, if any, must be of an egregious nature, which would vitiate the very foundation of such a bank guarantee and the beneficiary seeks to take advantage of the situation. Allowing encashment of bank guarantee would result in irretrievable harm or injustice to one of the parties concerned has also been recognized by the Courts as a justifiable ground for interference, however, the harm or injustice contemplated must be of such an exceptional and irretrievable nature as would override the terms of the guarantee [vide ***U.P. Cooperative Federation Ltd. vs. Singh***]

Consultants and Engineers (P) Ltd. (1988) 1 SCC 174; Vinitec Electronics Private Ltd. vs. HCL Infosystems Ltd. (2008) 1 SCC 544; Himadri Chemicals Industries Ltd. vs. Coal Tar Refining Company (2007) 8 SCC 110; Mahatma Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engg. Coop. Ltd. (2007) 6 SCC 470.] In a recent decision ***M/s. Adani Agri Fresh Ltd. vs. Mahboob Sharif & Ors. (2015) SCC OnLine SC 1302***, the Supreme Court while reiterating the principles of law laid down in the above decisions further explained that the fraud, if any, must be of an egregious nature as to vitiate the underline transaction."

29. We observe that the Appellant in none of its submissions nor during any hearing before this court has alleged any fraud exhibited by the Board. Having regard to the principles laid down by the Supreme Court, we are of the opinion that this is not a case warranting our interference particularly when 25% of the PBG has already been encashed. On this ground alone, the Appeal deserves to be dismissed. However, we shall also now examine the case on merits.

30. The Appellant was granted authorization for the geographical area of Jalandhar on 06.09.2013 to lay, build, operate or expand city or local natural gas

distribution network. As per the CGD Authorization Regulations, the authorization is granted with certain terms and conditions which the authorized entity is obliged to comply with. Let us now understand the relevant regulations of the Petroleum and Natural Gas Regulatory Board (Authorizing entities to lay, build, operate or expand city or local natural gas distribution network) Regulations, 2008 pertaining to these terms and conditions.

31. Grant of authorization is issued to the selected entity after furnishing the performance bank guarantee. The entity is required to furnish this performance bank guarantee within 15 days of issue of the letter of intent (LOI). The performance bond is furnished for guaranteeing the timely commissioning of the proposed CGD network as per the prescribed target and also for meeting the service obligation by the selected entity during the operating phase of the project. After furnishing the performance bank guarantee and completing the other required formalities, the entity is granted the authorization.

Furnishing of performance bond is covered under Regulation 9 and grant of authorization is covered under Regulation 10.

32. Regulation 10 dealing with grant of authorization is linked to Regulation 11 which also talks of natural gas tie-up alongwith Financial Closure. Regulation 10 (2) reads as under:

“The grant of authorization is subject to the entity achieving a firm natural gas tie-up and a financial closure as per regulation 11.”

33. In the instant case, the Board in its impugned order dated 28.09.2015 stated that the Appellant met the requirement of two project milestones i.e. Financial Closure and Gas Supply Agreement as per extant regulations for CGD network. We, therefore, are not discussing any further on these two terms and conditions.

34. In the instant case, the reason for the Board to encash 25% of PBG has been non-compliance of the terms and

conditions pertaining to infrastructure build-up and PNG domestic connections. These physical activities need to be completed by the authorized entity as per the approved time schedule and Regulation 13 of the CGD Authorization Regulations authorize the Board to monitor the progress of these activities and advise remedial action. Regulation 13 of the said Regulations reads as under:

“13. Post-authorization monitoring of activities (pre-commissioning).

(1) An authorized entity shall provide, on a quarterly basis, a progress report detailing the clearances obtained, targets achieved, expenditure incurred, works-in-progress and other relevant information in the form at Schedule E.

(2) The Board shall seek compliance by the entity to the relevant regulations for technical standards and specifications, including safety standards through conduct of technical and safety audits during the commissioning phase as well as on an on-going basis thereafter for ensuring safe commissioning and operation of the CGD network.

(3) The Board shall monitor the progress of the entity in achieving various targets with respect to the CGD network project, and in case of any deviations or shortfall, advise remedial action to the entity.

35. The consequences of the default leading to termination of the authorization are clearly dealt with in Regulation 16.

Regulation 16 reads as under:

“16. Consequences of default and termination of authorization procedure.

(1) An authorized entity shall abide by all the terms and conditions specified in these regulations and any failure in doing so, except for *force majeure*, shall be dealt with as per the following procedure, namely:

(a) the Board shall issue a notice to the defaulting entity allowing it a reasonable time to fulfill its obligations under the regulations.

(b) no further action shall be taken in case remedial action is taken by the entity within the specified period to the satisfaction of the Board;

(c) in case of failure to take remedial action, the Board may encash the performance bond of the entity equal to percentage shortfall in meeting targets of inch-kms and/or domestic connections. Provided that, the value so encashed would be refunded, if the entity achieves the cumulative targets at the end of exclusivity period for exemption from the purview of common carrier or contract carrier. In case of failure to abide by other terms and conditions specified in these regulations, performance bond shall be encashed as under:

(i) 25% of the amount of the performance bond for the first default; and

- (ii) 50% of the amount of the performance bond for the second default:**

Provided that the entity shall make good the encashed performance bond in each of the above cases within two weeks of encashment failing which the remaining amount of the performance bond shall also be encashed and authorization of the entity terminated.

- (iii) 100% of the amount of performance bond for the third default and simultaneous termination of authorization of the entity.**

- (d) the procedure for implementing the termination of an authorization shall be as provided in Schedule G;
- (e) without prejudice to as provided in clauses (a) to (d), the Board may also levy civil penalty as per section 28 of the Act in addition to taking action as prescribed for offences and punishment under Chapter IX of the Act.

Clause (c) of Regulation 16 (1) above is material because encashment of PBG is done under this provision.

36. As clarified by the counsel for the Board, the infrastructure mainly includes laying of inch-kilometer steel pipelines and hence, the Board in all the review meetings compared the achievements made by the Appellant for laying of steel pipelines and PNG domestic

connections vis-à-vis the targets approved by the Board. As per agreed terms and conditions of authorization, the Appellant was required to achieve the following targets during the exclusivity period i.e. the first 5 years of the project.

| At the end of | Number of domestic connections (cumulative) | Inch-kilometer of steel pipelines (cumulative) |
|---------------|---|--|
| Year 1 | 46,800 | 7,020 |
| Year 2 | 93,600 | 14,040 |
| Year 3 | 140,400 | 21,060 |
| Year 4 | 187,200 | 23,400 |
| Year 5 | 187,200 | 23,400 |

In the project review meetings, above targets were considered by the Board to compare with actual achievements.

37. As per Regulation 13, the Board was reviewing the progress of the project with due notice to the Appellant. Till the date of hearing on 30.10.2014, not a single Quarterly Progress Report (QPR) was received by the Board from the Appellant. During discussion, the Board

however, observed that there was no physical progress at all in respect of laying of pipeline and providing PNG domestic connections. Later, the QPR dated 14.01.2015 submitted by the Appellant also did not show any progress as indicated below:

| Particulars | Cumulative (1 st Year) | Achievement |
|--------------------------------|-----------------------------------|-------------|
| PNG Domestic Connections (No.) | 46800 | NIL |
| Steel Pipeline (Inch-KM) | 7020 | NIL |

38. The Appellant vide its various communications reiterated that since the case is still pending before the High Court of Punjab and Haryana regarding supply of natural gas to the city of Jalandhar, the zero date for the project should start from the date of settlement of the case once and for all.

39. The Appellant was again called for hearing on 19.05.2015 in accordance with the provisions of Regulation 16(1) of CGD Authorization Regulations. The Appellant expressed its inability to attend the same and requested to reschedule the date of hearing to 2nd week of June, 2015.

The request of the Appellant was reviewed and the hearing was rescheduled on 09.06.2015. The Appellant again requested for further postponement of the hearing till the decision of the Punjab and Haryana High Court and until the draft guidelines are finally formulated and finalized by the MoPNG on CNG stations. The Board found no valid reason to postpone the hearing and the Appellant was directed to appear before the Board on 09.06.2015. The Appellant appeared on the scheduled date and time for the hearing, in which the Appellant was informed by the Board that the QPR, received on 25.05.2015 also continued to show no progress.

40. As regards the physical progress of the project, even after two years of authorization, there was no concrete evidence of physical development of the project. The QPR of the first quarter of 2015-16 also did not show any physical progress. Let us, however, examine the communication made by the Appellant to the Board vide its letter dated 13.07.2015 just prior to the issue of the impugned order dated 28.09.2015. This letter of the

Appellant while giving the progress of the project, has spelt out that the Appellant had land for setting up city gate station at Jalandhar, appointed M/s Nirmal Industries for developing this station, set up office at Jalandhar, and appointed M/s Deshpande for carrying out route survey work for laying of the steel pipelines etc. This letter, however, did not mention about any physical progress made on ground.

41. The counsel appearing for the Board has made a categorical statement before this court that ample opportunities were provided to the Appellant of being heard and reasonable time was granted to the Appellant to fulfill its obligations including cautioning the Appellant for action in accordance with provisions of Regulation 16 (1) of CGD Authorization Regulations through various communications and during various hearings. The Appellant has also admitted that there is no dispute on the issue of non-achievement of physical targets on the ground in terms of PNG domestic connections and laying of steel pipelines.

42. We, however, note from certain applications and documents submitted to this court by the Appellant wherein the Appellant made strong arguments as to why they could not carry out any physical activities on ground. The Appellant on 22.03.2017, submitted to this court a letter dated 19.01.2017 written by the Appellant to the Board wherein the Appellant while giving the progress of the project mentioned about non-availability of policy and permission for laying gas pipelines in the State of Punjab. On intervention of the Punjab and Haryana High Court, the Punjab Government has now constituted a single window system for issuing No Objection Certificates (NOCs) for CGD entities under the Department of Punjab Bureau of Investment Promotion (PBIP), Chandigarh who is now directly monitoring the applications for NOCs for gas pipelines. This refers to the order of the High Court of Punjab and Haryana dated 22.10.2016 in CWP No. 13490 of 2008. Subsequent to which the State of Punjab has taken the above steps.

43. We note from the same letter of the Appellant dated 19.01.2017 that as an interim measure, pending availability of policy and permission for laying gas pipelines, the Appellant has taken a proactive step. To expedite the CGD project in the interest of the public, it has finalized an arrangement with Indian Oil Corporation (IOC) to start the CNG facility at one of IOC's Retail Outlets (ROs) in Jalandhar by supplying natural gas through cascades. The Appellant is also in the process of short-listing 2-3 more ROs of IOC for setting up of CNG stations. Similar statement of the Appellant was also recorded in the order of the High Court of Punjab and Haryana dated 18.01.2017 in CWP No. 13490 of 2008.

44. In another order of the High Court of Punjab and Haryana dated 18.01.2017 in CWP No. 13490 of 2008, the court ordered as follows: -

"In view of the aforesaid position, it would be just and expedient that the Chief Secretary, Punjab, convenes a meeting of all concerned involved in the

finalization of the policy regarding rates to be paid for laying underground pipeline for City Gas Distribution Network for supply of CNG. The meeting shall consider the provisions of the 1962 Act and the earlier policies in this regard."

45. In the said order of the High Court of Punjab and Haryana, the following order was also issued: -

"In case, the decision for determining the amount payable for laying down underground pipelines and policy in this regard to take time, Jay Madhok Energy Pvt. Ltd. (Respondent No.96) may be given ad-hoc permission on the same terms as has been given by Municipal Corporation, Amritsar (Respondent No.100) to Gujarat State Petro Net Ltd. (Respondent No.98)."

46. The Appellant has also submitted the latest order of the High Court of Punjab and Haryana dated 05.04.2017 in respect of CWP No. 13490 of 2008 wherein an affidavit submitted by Shri D.P. Reddy, IAS, Additional Chief

Secretary, Department of Local Government Punjab has been recorded. Regarding the status of the policy being prepared by the Government of Punjab for laying CGD network in the state, it has been recorded as under: -

“The draft policy for laying CGDN in the State has been prepared, which has been approved by the Chief Secretary and is now to be placed before the Council of Ministers for consideration and approval. However, in view of the inputs on the draft policy and other changed circumstances it is submitted that a period of three months would be required.”

47. In the said order, a status report regarding progress of laying CGD network in geographical area of Jalandhar city has also been filed wherein the following submission made by the Appellant in the court has also been recorded.

“Mr. Chetan Mittal, Senior Advocate appearing for M/s Jay Madhok Energy Pvt. Ltd. (respondent no.96) submits that sanction for CNG outlet to be installed

at M/s Paul Filling Station on the Jalandhar-Pathankot Road, Jalandhar has been given. The construction work, it is submitted, would start within three days and the outlet would be made operational within 45 days thereafter i.e. by 25.05.2017.

It is submitted that the ad-hoc amount demanded by Municipal Corporation, Jalandhar (respondent no.97) alongwith GPR survey report would be submitted within 10 days from today."

48. In the same judgment, the court also ordered as below: -

"The State shall take effective steps to finalize its policy for the charges to be paid by the contractors for laying underground pipelines."

49. From the above orders of the High Court of Punjab and Haryana, it appears that the State of Punjab is not yet fully equipped to facilitate the entities involved in the CGD network in the State. We also agree with the views expressed by the learned counsel for the Appellant that

these policies and permissions of the State Government of Punjab are very much necessary for implementing the CGD network project.

50. As can be seen from above, we have examined the issue of encashment of the PBG at length and also noted the reasons at length as to why the Appellant could not make any visible progress in the project. As the law relating to bank guarantee has been well settled by the Supreme Court in several judgments, we find no substance to quash the impugned order issued by the Board on 28.09.2015. In the circumstances, the appeal is dismissed. Needless to say that the interim relief qua replacement of encashed performance bank guarantee which is in operation stands vacated. The Appellant shall make good the encashed performance bond within three weeks from today. Consequently, the IA Nos. 25 and 425 of 2016 and IA No. 229 of 2017 do not survive and are disposed of, as such.

51. We recognize the fact that non-availability of policies with the State Government of Punjab for laying natural gas pipelines for CGD network, has been a hindrance to a great extent for the Appellant for making any progress on ground as per schedule. We also note that in absence of policy, the Appellant has taken a positive initiative in the interest of the public to create CNG facility in IOC's Retail Outlets at Jalandhar by carrying natural gas by cascades in absence of pipelines. The Appellant has also brought to the notice of this Court a show cause notice issued to the Appellant by the Board on 06.07.2016 under Regulation 16 of the CGD Authorization Regulations attracting action against second default for not meeting the targets in terms of domestic PNG connection and laying of steel pipeline infrastructure. This notice as per the Appellant is illegal. It is further submitted that the Board could not have proceeded to issue this second notice during the pendency of the appeal before the Tribunal.
52. While the Board will take its independent decision, it may consider the aspects of non-availability of policies with the

State Government of Punjab for CGD network and also the initiative taken by the Appellant in absence of policies prior to invoking further in future Regulation 16 of the Petroleum and Natural Gas Regulatory Board (Authorizing entities to lay, build, operate or expand city or local natural gas distribution network) Regulations, 2008 and also while pursuing the second show cause notice already issued to the Appellant.

53. Pronounced in the Open Court on this **26th day of May, 2017.**

B.N. Talukdar
[Technical Member (P&NG)]

Justice Ranjana P. Desai
[Chairperson]

✓ **REPORTABLE/~~NON-REPORTABLE~~**