



## J U D G M E N T

### PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON

1. The Appellant is a company incorporated under the Companies Act 1956. The Appellant was incorporated on 13/01/2006 to meet the city gas distribution needs of various districts of Maharashtra. The Appellant has got the PNGRB authorization for city gas distribution in Pune and Pimpri-Chinchwad city including adjoining areas of Hinjewadi, Chakan and Talegaon. The Appellant is a joint venture company of two Public Sector Undertakings (“**PSUs**”) namely Bharat Petroleum Corporation Limited (“**BPCL**”) and GAIL (India) Limited.

2. The Respondent is the Petroleum & Natural Gas Regulatory Board (“**the Board**”) constituted under the Petroleum and Natural Gas Regulatory Board Act, 2006 (“**the said Act**”).

3. In this appeal the Appellant has challenged order dated 01/12/2015 whereby the Board has encashed 25% of the Performance Bank Guarantee (“**bank guarantee**”) of the Appellant and directed the Appellant to make good the encashed

bank guarantee within two weeks of the receipt of the order dated 01/12/2015.

4. The gist of the facts narrated by the Appellant needs to be stated. On 01/06/2009 the Board accepted the authorization of the Central Government granted to the Appellant for the City Gas Distribution Network (“**CGD Network**”) in the geographical area (“**GA**”) of Pune City including Pimpri Chinchwad and along with adjoining contiguous areas of Hinjewadi, Chakan and Talegaon vide its letter dated 01/06/2009. In the said letter the Board had indicated the milestones which were to be met by the Appellant with regard to CGD project in the abovementioned GAs. Vide letter dated 25/06/2013 the Board asked the Appellant to provide reasons for non-achievement of the project milestones. The Appellant by its letter dated 05/08/2013 gave reasons for the same. The Board issued notice dated 20/12/2013 to the Appellant under Regulation 10 of the PNGRB (Exclusivity for City for Local Natural Gas Distribution Network) Regulations, 2008 (“**Exclusivity Regulations**”). By the said notice the Appellant was advised to attend the formal hearing before the Board on 08/01/2014 to explain the status of achievement of the project

milestones. According to the Appellant the Appellant appeared before the Board on 08/01/2014 and made its submissions with regard to the difficulties faced by it in achieving milestones.

5. The Board issued a notice on 01/07/2015 under Regulation 16 of the Petroleum and Natural Gas Regulatory Board (Authorising Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations 2008 (“**the Authorisation Regulations**”) asking the Appellant to appear for hearing before the Board on 31/07/2015 to explain the milestones. The Appellant appeared before the Board and again made submissions with regard to difficulties faced by it in achieving milestones.

6. The Appellant vide letter dated 05/08/2015 forwarded written submissions giving reasons for not achieving the milestones. According to the Appellant vide its letter dated 17/10/2015 the Appellant apprised the Board about the status of the milestones and requested the Board for separate hearing. However, the said hearing was not granted. It is the case of the Appellant that without even discussing the practical difficulties

faced by the Appellant in reaching the targets set out by the Board, the Board by the impugned order, encashed 25% of the bank guarantee of the Appellant i.e. Rs.1,50,00,000/- under Regulation 19(1)(c)(i) of the Authorisation Regulations.

7. We have heard Mr. Rai, Senior Advocate appearing for the Appellant. We have perused the written submissions filed by him. Gist of the submissions is as under:

- (a) The Board has not exercised its power to encash the bank guarantee judiciously as per the objective of the said Act.
- (b) The Board has not followed the pre-conditions prescribed under the Authorisation Regulations in resorting to encashing of bank guarantee under Regulation 16 of the Authorisation Regulations.
- (c) The Board has not acted like a regulator to promote the city gas distribution business for which it was constituted.
- (d) The Board vide letter dated 25/06/2013 sought Appellant's explanation for not achieving the target which was answered by the Appellant vide its letter dated 05/08/2013. Vide

letter dated 20/12/2013 the Appellant was called for hearing under Regulation 10 of the Exclusivity Regulations. The Board vide letter dated 17/01/2014 forwarded the minutes of the meeting dated 08/01/2014 held pursuant to the letter dated 20/12/2013. In the said minutes the difficulties faced by the Appellant were recorded.

- (e) The Board vide letter dated 01/07/2015 called the Appellant for hearing under Regulations 16 of the Authorisation Regulations to explain the status of achievement of project milestones and also to explain the cause of default. The Appellant appeared before the Board on 31/07/15 and explained the difficulties faced by it which were beyond its control. From the minutes dated 31/07/2015, it is clear that the Appellant had sought the Board's assistance in appointing Nodal Officer from the State, but the Appellant was asked to seek assistance of Ministry of Petroleum and Natural Gas. On 31/07/2015 the decision to encash bank guarantee was not taken.
- (f) Vide letter dated 05/08/2015 the Appellant gave details of the efforts made by it in achieving the targets. Vide letter dated 17/10/2015 the Appellant sought further hearing.

Vide the impugned order the Board encashed 25% of the bank guarantee of the Appellant for not fulfilling the targets for domestic connections.

- (g) Under Regulation 13(3) of the Authorisation Regulations, in case of any deviations or shortfalls in achieving targets, the Board has to advise remedial measures to the entity. The Board could have encashed the bank guarantee only if there was any deliberate defiance by the Appellant to following remedial measures. Without giving hearing to the Appellant the bank guarantee was encashed.
- (h) On 19/12/2015 a general hearing was given to the CEOs of the entities. No specific hearing was given to the Appellant.
- (i) The impugned order is passed without giving any reasons, which is contrary to the judgement of the Supreme Court in **Kranti Associates Pvt. Ltd & Anr. v. Masood Ahmad Khan & Ors.**<sup>1</sup>

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<sup>1</sup> (2010) 9 SCC 496

- (j) This is a case of arbitrary exercise of power by the Board. On exercise of power see **Indian Railway Construction Co. Ltd v. Ajay Kumar**<sup>2</sup>
- (k) The Regulator has to be pro-active so as to promote industry. It has not to act as a deterrent. (**Lafarge Umiam Mining Pvt. Ltd v. Union of India & Ors**)<sup>3</sup>
- (l) The Board has to apply same yardstick to all entities. It has not done so.
- (m) The power to encash bank guarantee is a discretionary power. It must be exercised judiciously. (**Clariant International Ltd. & Anr. v. Securities Exchange Board of India**)<sup>4</sup>.
- (n) The Board has amended the Authorisation Regulations wherein emphasis is laid on infrastructure and not on the number of gas connections. There is sufficient data to indicate that the Appellant has been consistently increasing its domestic connections. The Appellant is trying to meet the target of the old Authorisation Regulations. Non-

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<sup>2</sup> (2003) 4 SCC 579

<sup>3</sup> (2011) 7 SCC 338

<sup>4</sup> (2004) 8 SCC 524

achievement of targets was beyond the control of the Appellant which fact should have been taken into consideration by the Board.

- (o) Once the encashment is done a person is not remediless. He can sue for damages. **(U.P.Co-op. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.<sup>5</sup>**

8. We have heard Ms. Malhotra learned counsel appearing for the Board. We have perused the written submissions filed by her. Gist of the submissions is as under:

- (a) As per Regulation 13(3) of the Authorisation Regulations the Board evaluated the performance of the Appellant in June 2013 and found it to be unsatisfactory. The Appellant was asked to provide complete data vide letter dated 25/06/2013. After due examination of the Appellant's reply notice dated 20/12/2013 was issued to the Appellant calling the Appellant for a hearing to be held on 08/01/2014. During hearing the Appellant admitted the delay in achieving milestones.

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<sup>5</sup> (1998) 1 SCC 174(paragraph 21)

- (b) Ample opportunities were given to the Appellant to fulfil its obligations, but the Appellant failed to do so.
- (c) In June, 2015 the performance of the Appellant was again reviewed. The Appellant was called for a hearing on 31/07/2015 as per Regulation 16 of the Authorisation Regulations to explain the status of achievements which the Appellant failed to do.
- (d) The Appellant vide its communication dated 17/10/2015 admitted its failure.
- (e) From 2009 till 2014 the Appellant never submitted its objections to target set for the Appellant to achieve.
- (f) The Board has given sufficient time to the Appellant. The first hearing was in January 2014 and encashment of bank guarantee was done on 01/12/2015. Encashment of bank guarantee is in accordance with the provisions of Regulation 16 of the Authorisation Regulations. The Appellant was cautioned on a number of occasions of the proposed action but the Appellant failed to mend its ways.
- (g) The Appellant has violated terms and conditions of the Authorisation dated 30/06/2008 which was recognised by

the Board on 01/06/2009. The reasons given by the Appellant for non-achievements of the targets were found to be not satisfactory. The action taken against the Appellant is therefore justified.

- (h) On the encashment of bank guarantee reliance is placed on this Tribunal's judgment in **Kochi Salem Pipelines Pvt. Ltd. v. PNGRB** <sup>6</sup>.
- (i) The law relating to bank guarantee is settled by the Supreme Court. Unless there is fraud of the beneficiary or irretrievable harm or injury the courts are not to interfere with the encashment of bank guarantee (See: **Adani Agni Fresh Ltd. v. Mahboob Sharif & Ors.**<sup>7</sup>)
- (j) Considering the Appellant's dismal performance despite opportunities being given to it to take remedial measures, the appeal deserves to be dismissed.

9. It is necessary to first have a look at the facts. On 01/06/2009, the Board accepted the authorization granted to the Appellant vide letter dated 30/06/2008 for the CGD Network in

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<sup>6</sup> Appeal No.14 of 2016) decided on 02/09/2016.

<sup>7</sup> (2015) SCC Online SC 1302

the GA of Pune City including Pimpri-Chinchwad along with adjoining contiguous areas of Hinjewadi, Chakan and Talegaon. The Appellant was warned that violation of the said conditions shall be treated as default and shall be dealt with as per the provisions of the said Act. Annexed to the said letter were details of project milestones. The annexure contained the following note:

*“Non Achievement of any of the above project milestones shall lead to revocation of the Specific Performance Bond Bank Guarantee.*

*The period of exclusivity shall start from the date of issue of Specific Performance Bank Guarantee. The project milestones as mentioned above shall be on year to year basis from the date of issue of PBG.”*

10. As there was shortfall in achieving the various project milestones, the Board by its letter dated 25/06/2013 asked the Appellant to provide complete details of reasons for not achieving the project milestones. The Appellant responded by its letter dated 05/08/2013. In this letter, the Appellant stated that it fully intends to meet targets if conditions permit, but the present shortfall should not attract a negative view of the Appellant's performance. The Appellant cited the multiple challenges it was

facing due to prolonged delays in grant of permissions, rejections of requests for permission, reversals of permissions, question of ambiguous jurisdiction, railway, highway and river crossing, complex web of required permissions, stoppage of work by public and litigations involving private parties. The table indicating status of achievement of project milestones indicated that so far as Cumulative Domestic Connections are concerned, as on 31/03/2013, the cumulative target was 50000 and achievement of project milestones was only 12.61%. The Appellant requested that considering the efforts made by it and difficulties faced by it, the Board may take a considerate view of its project performance.

11. After perusing the Quarterly Progress Report ("**QPR**") submitted by the Appellant, the Board by its letter dated 20/12/2013 advised the Appellant to attend the formal hearing before the Board to be held on 08/01/2014 so as to explain the status of the achievement of the project milestones. This letter was sent as per Regulation 10 of the Exclusivity Regulations.

12. The hearing was accordingly held. The Board by its letter dated 17/01/2014 forwarded the Record Note of discussions held

during the hearing held on 08/01/2014 to the Appellant. The note indicates that the Board took note of the grievances of the Appellant and assured the Appellant that the matter will be taken up with the authority. Observing the gap between creation of infrastructure for domestic connections and the number of registered customers, the Appellant was advised to carry out promotional schemes and marketing activity more aggressively. The Appellant was advised to improve their liaison with local authorities and to submit QPRs on time, as its record of document submission and data consistency had been poor. The Appellant was assured that it would be called for a suitable hearing before finalizing any action under Regulation 10 of the Exclusivity Regulations.

13. By letter dated 01/07/2015, the Board called the Appellant for a hearing to be held on 31/07/2015 to explain the status of achievement of project milestones. Accordingly, a hearing was held on 31/07/2015. The Board by its letter dated 06/08/2015 forwarded the minutes of the said hearing to the Appellant. The minutes indicate that the Board noticed that no satisfactory progress had been made on domestic Piped Natural Gas (“**PNG**”)

connections. The minutes further indicate that the Appellant sought assistance of nodal officer from the Government of Maharashtra. The Appellant was advised to seek assistance from the Ministry of Petroleum and Natural Gas. The Board noted that the spread of infrastructure was uneven and a lot more had to be done in order to reach PNG domestic customer base in the GA. The Appellant was advised to put in more efforts for increasing the PNG domestic connections and spread its network evenly across the GA. The Appellant was warned that in view of the continuing highly unsatisfactory performance of the Appellant, the Board may consider taking action under Regulation 16 of the Authorisation Regulations.

14. By its letter dated 05/08/2015 addressed to the Board, the Appellant reiterated its difficulties and outlined the proposed steps to achieve milestones. This letter indicates that as on 30/06/2015, the Appellant was way behind in achieving target set for Cumulative Domestic Connections. Cumulative target as on 30/06/2015 was 72000 whereas the Appellants cumulative achievement was 18346. Thus the Appellant's achievement of project milestones in this behalf was only 25.48%.

15. By its letter dated 17/10/2015, the Appellant inter alia conveyed to the Board that it had made some progress. It was stated that despite monsoon, the Appellant had achieved about 30% of Cumulative Domestic Connections project milestones. The Appellant noted the immediate steps it had taken towards achieving the targets and requested that the Appellant may be given separate hearing. It appears from the impugned order that on 19/10/2015, a delegation CEOs from authorized CGD entities had visited the Board on the issue of encashment of bank guarantee. The Appellant was also represented in the said meeting. The Appellant requested that the bank guarantee should not be encashed and it may be given more time to prove that its performance had significantly improved. Not being satisfied with the Appellant's performance and various explanations offered by it, by the impugned order, the Board, in accordance with the terms and conditions of the authorization and provisions under Regulation 16(1)(c)(i) of the Authorisation Regulations, encashed 25% of the Appellant's bank guarantee and directed the Appellant to make good the encashed bank guarantee within two months.

16. Having taken into consideration the chronology of events and other relevant circumstances, we are satisfied that the Board's action is legal. In the impugned order, the Board has referred to the various letters sent by it to the Appellant, the replies of the Appellant, the details of the QPRs submitted by the Appellant and given reasons why it was compelled to encash 25% of the bank guarantee. As already noted, the Appellant was represented in a hearing given to the CEOs of all entities. Therefore, its request for separate hearing appears to have been made to just buy time. The Appellant was suggested remedial measures. Several opportunities were given to the Appellant to fulfill its obligation, but the Appellant failed to achieve target set up in respect of laying infrastructure and giving PNG Domestic Connections in Pune GA. The Board has rightly observed in the impugned order that even after six years and four months of acceptance of authorization by the Board for Pune GA, there was no concrete evidence of expected achievements and that the physical progress still remained highly unsatisfactory as per latest QPRs furnished by the Appellant.

17. It is true that the Board has to act like a regulator to promote the CGD business. It is also true that in case of shortfalls in achieving targets, the Board has to advise remedial measures to the entity. In this case, we find that the Board did call the Appellant for hearing more than once. The Board suggested remedial measures. The Board indicated the steps the Appellant should take to achieve targets, but the Appellant failed to achieve targets. The impugned order summarises the chain of events which persuades us to reject the submission that the Board was not proactive in its approach or that it has arbitrarily exercised its power. The Appellant was heard. The Appellant was given warning of the probable action that may be taken against it. Since no satisfactory progress was seen in the area of laying infrastructure and providing PNG Domestic Connections, the Board had to encash the bank guarantee. We also reject the submission that the impugned order is unreasoned, because the Board has assigned reasons for its actions.

18. In any case, the bank guarantee is already encashed and, therefore, even otherwise, it is not possible for us to interfere with the impugned order. The Supreme Court has in several cases

crystallized the law relating to encashment of bank guarantees. In **Himadri Chemicals Industries Limited**, after considering several judgments on the point, the Supreme Court has held that a bank guarantee is an independent and a separate contract and is absolute in nature. The existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of a bank guarantee. The Supreme Court cited two grounds on which alone encashment can be injected i.e. fraud of an egregious nature which would vitiate the very foundation of a bank guarantee or letter of credit and there is evidence to show that the beneficiary seeks to take advantage of the situation and cases where allowing encashment of a bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. None of these conditions are present in this case. Hence, it is not possible for us to interfere with the impugned order.

19. Relying on **U.P. Co-op. Federation Limited**, counsel for the Appellant urged that the Appellant can always file a suit being aggrieved by encashment of bank guarantee, but civil suit is barred by the said Act. As to what remedy 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 undoubtedly deal with it in accordance with law. We have not expressed any opinion on this aspect.

20. In the view that we have taken, the appeal is liable to be dismissed and is accordingly dismissed. If the Appellant has not made good the encashed bank guarantee as directed by the impugned order it shall make it good within three weeks from today. Needless to say that the interim application shall also stand dismissed.

21. Pronounced in the Open Court on this **07<sup>th</sup> day of April, 2017.**

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

**Justice Ranjana P. Desai**  
**[Chairperson]**

√ **REPORTABLE/~~NON-REPORTABLE~~**