

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

**APPEAL NO. 88 OF 2016 &
IA NO. 207 OF 2016**

Dated: 3rd November, 2017

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

IN THE MATTER OF:

GAIL GAS LIMITED)
Through Its)
Chief Operating Officer,)
Gail Gas Limited)
13th & 14th Floor,)
Jubilee Tower,)
B-35 & 36, Sector-1,)
Noida – 201301 (UP)) **...Appellant**

AND

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

2. **THE CHIEF MANAGER,**)
ICICI BANK LIMITED,)
Commercial Banking,)
9A, Phelps Building,)
1st Floor, Connaught Place,)
New Delhi – 110001) **...Respondents**

Counsel for the Appellant(s) : Mr. Ramji Srinivasan, Sr. Adv.
Mr. Ajit Pudussery
Mr. Ajeet S. Verma
Ms. Shruti Sharma Hazarika

Mr. Vivek Paul Oriel
Ms. Sunita Somdere (Rep.)
Mr. Tushar Bhardwaj
Mr. K Vijayan

Counsel for the Respondent(s) : Mr. Prashant Bezboruah
Ms. Sonali Malhotra
Mr. Sumit Kishore
Ms. Aparna Vohra for R-1

Mr. Mayank Pandey
Ms. Namrata Bhagmatula
Mr. Dhruv Sood for R-2

J U D G M E N T

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

1. In this Appeal, M/s Gail Gas Limited has challenged the Order dated 23.11.2015 passed by the Petroleum and Natural Gas Regulatory Board wherein it has invoked the bank guarantee submitted by the Appellant in respect of its authorization to lay, build, operate or expand city or local natural gas distribution network for the Firozabad geographical area under the Taj Trapezium Zone.
2. The Appellant, Gail Gas Ltd. (GAIL Gas) is a Limited Company under the Companies Act. It was incorporated by GAIL (India) Ltd. (GAIL) on 27.05.2008 for the purpose

of implementing the City Gas Distribution (CGD) projects in its authorized cities; distribution and marketing of Compressed Natural Gas (CNG) as fuel for intercity as well as intra city vehicles; creating infrastructure and distribution and marketing of piped natural gas for domestic/commercial/industrial purposes; allied retail businesses at CNG refueling station; formation of JVs with Gas producers/strategic partners for implementation of CGD projects; and as a promoter of all existing JVCs for CGD etc.

3. The Respondent No.1, the 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 Respondent No.2, ICICI Bank Ltd. is a commercial bank who issued the bank guarantee on behalf of the Appellant for an amount of Rs. 3,00,00,000/- (Rupees Three Crores) in favour of the Board.
5. The gist of the facts of the case as submitted by the Appellant is as under:
 - a. The Supreme Court had passed various orders in a Public Interest Litigation entitled M.C. Mehta Vs. UOI & Ors. pertaining to the effects of pollution on the Taj Mahal. The Supreme Court issued orders to stop using coke and coal which were causing pollution affecting the Taj Mahal and switch over to eco-friendly fuel viz gas and GAIL was given the task of supplying gas to this area. Thereafter, the Central

Pollution Control Board of Uttar Pradesh delineated the Taj Trapezium Zone (TTZ) spreading over 6 Districts of Agra, Mathura, Firozabad, Hathras, Etah and Bharatpur.

- b. Uttar Pradesh Pollution Control Board (UPPCB) vide letter dated 29.01.1997 directed 625 industries in TTZ to apply to GAIL for gas connection. All the industries were directed to approach/apply to GAIL within a period of one month for grant of industrial gas connections. The Supreme Court also directed that "the industries which were not in a position to obtain gas connection and also the industries which do not wish to obtain gas connection may approach/apply to Uttar Pradesh State Industrial Development Corporation (UPSIDC) within one month for allotment of alternative plot outside TTZ." Thus as far back as in the nineties, in the entire TTZ, GAIL was tasked with supply of gas to various industries etc. to reduce the pollution levels in the said zone so as to protect the Taj Mahal. In terms of

these orders passed by the Supreme Court, the Central Government, Ministry of Petroleum and Natural Gas (MoPNG) had vide its letter dated 27.07.1995 addressed to GAIL directed that the secondary distribution of gas in the Taj Trapezium area was to be taken up by it.

- c. Prior to the establishment of the Board, on behalf of the Central Government, the Ministry of Petroleum Natural Gas (MoPNG) had the power to authorize entities to supply natural gas for development of CGD network. After the establishment of the Board on September 01, 2007 (Appointed Day), the power got shifted to the Board. Accordingly, the Board under section 17 of PNGRB (Authorizing entities to lay, build, operate or expand city or local natural gas distribution networks) Regulations, 2008 accepted vide letter dated 26.09.2011 the authorization granted to GAIL by MoPNG earlier. The Board also granted exclusivity to the Appellant for the Firozabad geographical area for development of CGD network

which included charge areas like Firozabad, Fatehpur Sikri, Bharatpur, Govardhan and Vrindavan but excluded the geographical areas of Mathura and Agra.

- d. Initially, the total allocated Administrative Price Mechanism (APM) gas for the entire Agra-Firozabad region was only 0.60 MMSCMD. Later in the year 2000, an additional quantity of 0.5 MMSCMD of APM gas was allocated by MoPNG for the Agra-Firozabad region thus making a total allocation of 1.10 (0.60+0.50) MMSCMD. To increase supply of gas, GAIL laid the second gas pipeline from Agra to Firozabad and completed in September, 2003. Accordingly, pursuant to the submissions recorded by the Supreme Court, GAIL created two subsidiary companies namely, GAIL Gas Ltd. and Green Gas Ltd. to supply gas to various sectors in TTZ.
- e. As per the Supreme Court's order much prior to establishment of the Board, GAIL took lot of actions

with investment of substantial amount of money to supply gas in the entire TTZ area. In spite of this, the Board subdivided the TTZ and invited bids for certain areas in Mathura City and through bidding process the Board awarded the Mathura geographical area to an entity M/s Sanwariya Gas Ltd. on 12.06.2009. On 12.11.2009, the Board also granted authorization for the Agra geographical area to M/s Green Gas Ltd., a joint venture of GAIL and IOCL for CGD network in Agra. In the meantime, GAIL transferred its gas distribution project in Agra-Firozabad area to its subsidiary GAIL Gas Ltd. who is the Appellant in this case. MoPNG also based on GAIL's Board decision, allocation of the entire 1.10 MMSCMD APM gas to GAIL, transferred vide letter dated 29.09.2011 to the Appellant.

- f. Pursuant to acceptance of the authorization by the Board and after the business was transferred to the Appellant in 2011 by GAIL, the Appellant started work in a proactive manner for increasing the scope

of supply of natural gas to various customers. While doing so to achieve the milestones as per the authorization granted by the Board, the Appellant started facing lot of problems preventing the Appellant from achieving the targets. In the meantime, there was another development affecting the progress of the Appellant. M/s Sanwariya Gas after getting the authorization for the Mathura GA, wrote a letter dated 02.12.2011 to the Board requesting to cancel the authorization granted to the Appellant and to include the areas of Govardhan and Vrindawan which were contiguous to its authorized area and starting a fresh authorization process for the Firozabad GA.

- g. After a spree of unsuccessful Writ Petitions, LPAs and eventually after unsuccessfully approaching the Supreme Court, the Sanwariya Gas filed a complaint before the Board under Section 25 of the Act. The Board, though it refused the relief sought by Sanwariya, however, quashed the authorization

granted to the Appellant vide order dated 02.03.2015. The Appellant then filed Appeal No. 122 of 2015 before this Tribunal which after hearing the parties was pleased to entertain the appeal and to grant an order of status quo on 22.05.2015.

- h. On 26.10.2015, the Board issued a notice to the Appellant taking cognizance of media news that the Appellant was carrying out incremental activities in Firozabad area which was violative of the status quo order granted by the Tribunal. The Appellant vide its reply dated 02.11.2012 spelt out the action taken by the Board was contrary to the regulations in that as per the status quo order passed by the Tribunal the authorization which has been quashed by the Board continued to exist and the Appellant was entitled to carry on its activities in Firozabad GA.
- i. The Appellant vide its letters of various dated (viz 29.08.2013, 07.01.2014, 14.01.2014, 10.07.2015, 10.08.2015) pointed out as to how the external

factors which were beyond the control of the Appellant were preventing it from achieving the milestones and also submitted all information and future plans as requested by the Board. The fact that the issues mentioned in the letters of the Appellant are genuine is evident from the letters written by the then Chairman of the Bard to various authorities wherein these very points were raised by him and it was pointed out that this would prevent the entities from achieving the milestones set by the Board. As per the Appellant, some of these constraints fall within force majeure circumstances. Force Majeure circumstances have been defined in the bidding document issued by the Board in Clause 7 of the Application-cum-Bid document which inter alia provides also the restrictions imposed by the Central Government or other statutory authorities which prevents the execution of obligations under the regulations.

- j. In spite of being appraised of the various constraints and impossibility of achieving the modified target for specified number of PNG connections, the Board without considering any of the issues raised by the Appellant and without considering the request of extension upto September, 2016 submitted by the Appellant keeping in view the factors beyond the control of the Appellant, in utter violation of the procedure laid down under the regulations and also the principles of natural justice has invoked the performance bank guarantee submitted by the Appellant vide letter dated 23.11.2015 on the basis of the unilateral conclusion arrived at by it that the Appellant had failed to perform its obligations under the terms and conditions of the authorization.
- k. Against the said invocation of the bank guarantee, the Appellant approached the Delhi High Court by filing Writ Petition (C) No. 11015 of 2015 and the High Court after hearing the parties was pleased to interdict the encashment of the bank guarantee vide

order dated 30.11.2015. Parallely, in view of the issue regarding violation of status quo being raked up by the Board, the Appellant filed CM No. 7322 of 2016 before the Delhi High Court seeking directions to permit it to continue its activities in the GA and pointing out the contradictions in the stand taken by the Board. When the said application came up for hearing on 29.02.2016, the High Court after noticing that the Member (Technical) had been appointed to this Tribunal, while passing an interim order permitting the Appellant to continue with its activities in the GA and also permitted the Appellant to withdraw the writ petition and move before this Tribunal. It was also directed that the interim order dated 30.11.2015 will remain in force till this Tribunal takes up the matter or passes interim orders in the matter. Hence, the present appeal to this Tribunal by the Appellant.

6. We have heard the learned counsel appearing for the Appellant and perused his submissions made on behalf of the Appellant. The gist of the submissions is as under:

i. Supply of natural gas to the Taj Trapezium Zone originated from an order by the Supreme Court in a Public Interest Litigation entitled M.C. Mehta Vs. UOI & Ors. pertaining to the effects of pollution in the Taj Mahal because of use of coke and coal in and around the area of Taj Mahal. GAIL was tasked by the Court to supply gas to the area. Pursuant to this order of the Supreme Court, MoPNG vide its letter dated 27.07.1995 directed that the secondary distribution of natural gas in TTZ be taken by a joint venture company to be set up by GAIL.

ii. Vide order dated 10.04.1996 in (2012) 8 SCC 123 at page 125, the Supreme Court recorded as under:

“10. Pursuant to this Court’s order dated 14.03.1996
Mr. P.C. Gupta, General Manager (Civil), Gas

Authority of India Ltd. has filed an affidavit dated 02.04.1996. It is stated in the affidavit that the Ministry of Petroleum and Natural Gas has already allocated 0.60 MMSCMD for distribution to the industrial units in Agra and Firozabad. It is stated that as per the time schedule already filed in this Court, the two pipelines shall be complete by December, 1996. It is further stated that the quantity of gas as mentioned above is only for the purposes of supplying the same to the industries located within the Taj Trapezium.

11.

12.

13. Mr. Gupta has further stated that for the purposes of laying distribution network within the Taj Trapezium; GAIL is establishing a joint venture company. However, pending formation of the joint venture company, the required functions are being performed by GAIL. It is stated that GAIL had advertised comparative

prices and heat equivalent of various fuels in the newspapers circulated in Agra and Firozabad to enable the industries, who are prospective consumers of gas to evaluate the economics of conversation to gas. So far 214 parties from Agra and 364 parties from Firozabad have responded. According to the affidavit these responses are being processed."

- iii. The Supreme Court vide a subsequent judgment dated 30.12.1996 in (1997) 2 SCC 353 ordered various industries of Agra/Firozabad region to approach/apply to GAIL for grant of natural gas connections. Relevant portion of the said order is:

"35. We order and direct as under:

- (1) The industries (292 listed above) shall approach/apply to the GAIL before 15.02.1997 for grant of industrial gas connection.

- (2) The industries which are not in a position to obtain gas connections and also the industries which do not wish to obtain gas connections may approach/apply to the Corporation (UPSIDC)/Government before 28.02.1997 for allotment of alternative plots in the industrial estates outside TTZ.
- (3) The GAIL shall take final decision in respect of all the applications for grant of gas connections by 31.03.1997 and communicate for allotment letters to the individual industries.
- (4) Those industries which neither apply for gas connection nor for alternative industrial plot shall stop functioning with the aid of coke/coal in the TTZ with effect from 30.04.1997. Supply of coke/coal to these industries shall be stopped forthwith. The District Magistrate and the Superintendent of Police shall have this order complied with.

(5) The GAIL shall commence supply of gas to the industries by 30.06.1997. As soon as the gas supply to an industry commences, the supply of coke/coal to the said industry shall be stopped with immediate effect."

iv. Thus, much before the enactment of the PNGRB Act, 2006, GAIL had been tasked by the Supreme Court to supply gas to TTZ. The Board without considering the orders passed by the Supreme Court, subdivided the TTZ into three different areas and awarded the Mathura GA to M/s Sanwariya Gas Ltd. and Agra GA to M/s Green Gas Ltd. leaving only Firozabad GA to the Appellant.

v. The Board accepted the authorization granted to the Appellant by MoPNG as per Section 17 of the PNGRB Act, 2006, but this section does not provide any power to the Board to amend the authorization granted by the Central Government. The Board has no powers other than to note the information

supplied by the entity as per Section 'H' of the relevant Authorization Regulations. The relevant sections of the PNGRB Act, 2006 are as under: -

"Section 16. No entity shall –

- (a) Lay, build, operate or expand any pipeline as a common carrier or contract carrier;
- (b) Lay, build, operate or expand any city or local natural gas distribution network, without obtaining authorization under this Act:

Provided that an entity –

- (i) Laying, building, operating or expanding any pipeline as common carrier or contract carrier; or
- (ii) Laying, building, operating or expanding any city or local natural gas distribution network;

Immediately before the appointed day shall be deemed to have such authorization subject to the provisions of this chapter, but any change in

the purpose or usage shall require separate authorization granted by the Board.”

“Section 17 (2):

An entity which is laying, building, operating or expanding, or which purposes to lay, build, operate or expand, a city or local natural gas distribution network shall apply in writing for obtaining an authorization under this Act:

Provided that an entity laying, building, operating or expanding any city or local natural gas distribution network authorized by the Central Government at any time before the appointed day shall furnish the particulars of such activities to the Board within six months from the appointed day.”

Reliance is placed in the Supreme Court’s Judgment in M/s Motilal Padampat Sugar Mills Ltd. Vs. State of U.P. (1979) 2 SCC 409.

- vi. The conditions imposed by the Board acting under Section 17 of the PNGRB Act, 2006 are beyond the powers of the Board and hence the coercive action of ordering encashment of bank guarantee is wholly without jurisdiction and liable to be quashed and set aside.
- vii. Though Regulation 16 (1) (c) (iii) of the Authorization Regulations permits termination of an authorization granted by the Board, but Section 23 of the PNGRB Act shows that the Board has power only to terminate an authorization granted by it and not by the Central Government as in the present case.
- viii. The Board did not take into consideration the circumstances explained by the Appellant under which the progress of the project got hampered. The Board failed to take into account the huge amount of time taken by various government/local agencies/NHAI to grant permission for laying the

pipeline and the huge amount of money being charged for the same.

- ix. Force Majeure circumstances as defined in the bidding document issued by the Board in clause 7 of the Application-cum-Bid document has included inter alia the following factor:

“d) Restrictions imposed by Central Government or other statutory bodies which prevents or delays the execution of obligations under the Regulations.”

The Central Government’s notification dated 10.09.2009 advising a person obtaining PNG connection to surrender the LPG connection comes under the above force majeure factor. Price of PNG being higher than that of LPG because of non-supply of KG-D6 gas by the Central Government on account of sectoral allocation of gas also comes under the above force majeure factor. In addition, there is a matter pursuing adjudication before the National

Green Tribunal alleging that increased supply of gas in TTZ by the Appellant is adding to pollution affecting the Taj Mahal (Application No. 391 of 2015 – Social Action for Forest & Environment Vs. UOI & Ors.). TTZ authority directed that no further expansion activities are to be done in the TTZ area as there was an increase of the pollution load in the area. The Board did not consider all these factors while issuing the impugned order.

- x. The Board did not take into account the three letters written by the then Chairperson of the Board to different agencies including the Minister of MoPNG explaining factors including the above factors affecting the progress of the CGD projects being carried out by the entities.

- xi. The Board after considering the impossibility of the conditions originally laid down by it under the regulations has twice amended the criteria and revised it drastically downwards. Both the Board's

amendments of regulations vide dated 21.06.2013 and 07.04.2014 drastically reduced the number of domestic PNG connections. Since these amendments are clarificatory in nature, the same will have retrospective operation as laid down by the Supreme Court in the judgment reported in Zile Singh Vs. State of Haryana – (2004) 8 SCC 1.

- xii. On one hand, the Board has taken steps which prevents the Appellant from making any further investment in the project (notice against APTEL's status quo order) and on the other hand, the Board is seeking to take coercive steps of encashing bank guarantee against non-achievements of targets.
- xiii. Under Regulation 16, the Board was liable to inform the Appellant regarding the grounds on which it proposed to take action and the remedial measures it ought to take prior to invoking BG by issuing a specific show cause notice. However, the Board took the impugned action without providing a hearing and

opportunity to the Appellant as provided in the Act and the Regulations framed thereunder and without disclosing the grounds for the proposed action. The requirements of such a show cause notice has been set out by the Supreme Court in the judgment reported in (2014) 9 SSC 105. Thus the impugned action is also violative of the principles of natural justice.

- xiv. Encashment of bank guarantee in terms of Regulation 16 is more in the nature of penalty as the bank guarantee submitted is not a contractual one or submitted for facilitation of trade and commerce which is the basic reason why the Supreme Court had interdicted interference in the encashment of bank guarantee. Reliance is placed on the judgment of the Supreme Court in **Gangotri Enterprises Limited Vs. Union of India and Ors.** (2016) 11 SCC 720. The learned counsel appearing for the Appellant has referred to the following paragraph of this judgment.

“37. Their Lordships in Raman Iron Foundry case approved the view taken by Chagla C.J. in Iron and Hardware (India) Co. vs. Shamlal and Bros., by observing in para 11 as under: (Raman Iron Foundry case, SCC pp. 244-45, paras 11-12)

“11.The same view has also been taken consistently by different High Courts in India. We may mention only a few of the decisions, namely, *Jabed Sheikh v. Taher Mallik*, *S. Milkha Singh v. N.K. Gopala Krishna Mudaliar* and *Iron and Hardware (India) Co. v. Firm Shamlal and Bros.*, Chagla, C.J. in the last mentioned case, stated the law in these terms: (SCC OnLine Bom: AIR pp. 425-26)

‘...In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be

true to say that the other party to the contract who complains of the breach has any amount due to him from the other party. As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when

damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.'

7. The gist of the submissions made by the Respondent, the Board and the arguments made by its learned counsel is as under: -

- (i) The challenge of the Appellant to the jurisdiction of the Board to impose terms and consideration in the authorization is without any cogent basis. The Appellant has raised this issue after more than 4 years of the authorization only after the bank guarantee was sought to be encashed by the Board vide its impugned order dated 23.11.2015. The issue

of jurisdiction of the Board never troubled the Appellant earlier and the issue has been raised now only to frustrate the encashment of the bank guarantee. In none of the Appellant's letters written to the Board nor any hearing before the Board, this issue was raised by the Appellant earlier. In relation to delay and laches in raising the issue of jurisdiction of the Board, it has relied on the judgment of the Supreme Court in *Leelawati & Ors. Vs. State of Haryana & Ors.* (2012) 1 SCC.

- (ii) It is clear from the Central Government authorization that GAIL (India) Ltd., the parent company of the Appellant, had only been authorized for supply of natural gas to industrial units, which are only a part of a CGD Network as per the definition of CGD Network under Section 2 (i) and not the entire CGD Network. Further, even though GAIL (India) Ltd. was authorized by the Central Government, after the Act coming into force and Section 16 being notified, even in respect of industrial units, the acceptance of

Central Government authorization was required from the Board.

- (iii) The performance bank guarantee sought to be encashed is irrevocable and unconditional. The Respondent No.2, the ICICI Bank Ltd. has agreed in the bank guarantee provided by them that the decision of the Board as to whether the entity has failed to fulfill the terms and conditions of the authorization shall be final and binding on the bank.
- (iv) The position of law is well settled by a plethora of judgments of the Supreme Court of India that bank guarantee encashment can be interfered with by Courts only in the event of fraud of egregious nature or irretrievable injustice. In the present Appeal there is neither any fraud of egregious nature or otherwise on the part of the Board nor any irretrievable injustice to the Appellant if the PBG is encashed.

(v) It is also submitted that the position of law is also well settled that the contract between the Bank and the Board is an independent one and the PBG encashment must be honored by the Bank irrespective of the dispute between the beneficiary i.e. the Board and the Appellant. Reliance is placed on the following judgments.

“1. General Electric Technical Services Co. Inc Vs. Punj Sons (P) Ltd. (1991) 4 SCC 230.

2. Centex (India) Ltd. Vs. Vinmar Impex Inc., (1986) 4 SCC 136.

3. U.P. Coop. Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd. (1998) 1 SCC 174

4. Svenska Handelsbanken Vs. Indian Charge Chrome, (1994) 1 SCC 502.

5. U.P. State Sugar Corpn. Vs. Sumac International Ltd. (1997) 1 SCC 568

- 6. *Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Co., (2007) 8 SCC 110.***
- 7. *Vinitec Electronics Pvt. Ltd. Vs. HCL Infosystems Ltd. (2008) 1 SCC 544***
- 8. *National Highways Authority of India Vs. Ganga Enterprises, (2003) 7 SCC 410***
- 9. *Jagdish Mandal Vs. State of Orissa, (2007) 14 SCC 517.***
- 10. *Michigan Rubber (India) Ltd. Vs. State of Karnataka, (2012) 8 SCC 216: 2012 SCC OnLine SC 614***
- 11. *Maa Binda Express Carrier Vs. North-East Frontier Railway, (2014) 3 SCC 760: 2013 SCC OnLine SC 1060***

(vi) It is important to highlight that the reason why the PBG is sought to be encashed is that the Appellant has failed to achieve the targets, which it accepted and was supposed to achieve over a period of three (3) years. The Appellant has itself admitted this fact and there is no dispute on the issue of non-

achievement of targets. The Appellant has therefore clearly violated the terms and conditions of the Authorization dated 26.09.2011 by not completing its targets.

(vii) Under Regulation 16 (1) (c) of the Authorization Regulations, in case of failure to take remedial action, the Board may encash the performance bond of the entity equal to the percentage shortfall in meeting targets of inch-kms and/or domestic connections or failure to tie up natural gas. This fact is well known to the Appellant right from the date of notification of the Authorization Regulations on 19.03.2008 and the date of acceptance of Central Government Authorization on 26.09.2011 by the Board.

(viii) The purpose of the PBG is timely commissioning of the project and meeting performance undertakings, which has admittedly not been done till date by the Appellant. Further, if PNG connections are provided

to the public, then the LPG subsidy burden of the Government would also go down correspondingly, which would be in public interest too. It is also submitted that the amount of PBG that is encashed is kept in a specific account and is available for use by the Central Government for public purposes thereby furthering public interest.

- (ix) The Appellant's allegations of violation of principles of natural justice also have no merit as the Board has given repeated opportunities and hearings to the Appellant to fulfill its obligations. This would be clear from the impugned order itself. In any case, there can be no question of violation of natural justice while encashing bank guarantees, which are unconditional and irrevocable, as per the settled position of law. Trade and commerce would come to a shortfall if this were allowed.
- (x) It is also submitted that the Board has to balance both the interest of the entity and the consumers

and ensure uninterrupted and adequate supply of natural gas, petroleum and petroleum products in all parts of the country. This is a mandate of the PNGRB Act, 2006 itself. Therefore, not taking any action against defaulting entities would be against public interest, send out the wrong message with respect to an important sectoral Regulator and would harm the country in the long run. It would also send the wrong message to the entities that they can continue to default with impunity without any action being taken by the Board.

8. In the instant case, the Appellant, Gail Gas Ltd. has impugned the order dated 23.11.2015 passed by the Respondent No.1, Petroleum and Natural Gas Regulatory Board invoking the bank guarantee submitted by the Appellant in respect of its authorization to lay, build, operate or expand city or local natural gas distribution network for the Firozabad geographical area under the Taj Trapezium Zone. The relief sought in the appeal dated

28.03.2016 is quoted as under so as to focus our discussion to adjudicate the matter.

"a. That this Hon'ble Tribunal may be pleased to admit the present appeal on file and quash and set aside the order No. MI/CGD/Ferozabad (TTZ)/Monitoring/GAIL/2/dated 23.11.2015 (Annexure 'A-1') issued by Respondent No.1, PNGRB for the Ferozabad Geographical Areas and all consequential actions thereto;"

It is clear from above that the relief is sought only for invocation of bank guarantee.

9. The original authorization dated 27.07.1995 was granted by Ministry of Petroleum and Natural Gas to GAIL to supply natural gas to industrial units in the Taj Trapezium area through their joint venture company for which 0.60 MMSCMD of gas was allocated. After the establishment of the Board, this authorization was accepted by the Board on 26.09.2011 and granted exclusivity to M/s GAIL Gas to supply gas in the Ferozabad geographical area of the Taj Trapezium Zone for a period of 3 years from the date of issuance of performance bank guarantee by the Appellant. The bank guarantee was issued by ICICI Bank Ltd. on behalf of the Appellant favoring the Board on 26.08.2011.

In this authorization, all terms and conditions alongwith the physical targets to be achieved by the Appellant were mentioned. The Appellant duly accepted these terms and conditions of authorization. This authorization was for development of a CGD network including piped natural gas domestic connections in addition to supply of gas to industrial units.

10. The Appellant has raised an issue regarding jurisdiction of the Board in its submissions alongwith the issue of encashment of bank guarantee. The Board accepted the Central Government's authorization under Regulations 17 of PNGRB (Authorizing entities to lay, build, operate or expand city or local natural gas distribution networks) Regulations, 2008 entitled "Entity authorized by the Central Government for laying, building, operating or expanding CGD network before the appointed day. As per the Appellant, this Regulation 17 talks only of submission of information as per the Form it provided in Schedule 'H' of the regulation. Section 17 of the PNGRB Act, 2006 does not confer the Board with any authority either to impose

any conditions or to reject or even accept the information supplied. The Board also placed its counter arguments before us saying that the Appellant has raised this issue after more than 4 years of the authorization only after the bank guarantee was sought to be encashed by the impugned order. While accepting the authorization, the Appellant never raised the issue of jurisdictional power of the Board. In this respect, it is relied on the judgment of the Supreme Court in ***Leelawati & Ors. Vs. State of Haryana and Ors. (2012) 1 SCC.***

11. Before going into the issue of invocation of bank guarantee which is the crux of the appeal, we shall first discuss the jurisdictional issue raised by the Appellant in respect of the Board. Both the Supreme Court orders dated 10.04.1996 in (2012) 8 SCC 123 and dated 30.12.1996 in (1997) 2 SCC 353 quoted by the Appellant were primarily concerned with the safety of the Taj Mahal from the point of view of pollution because of use of coke and coal by the industries. The Supreme Court ordered the industries to switch over to eco-friendly fuel viz

natural gas. The Supreme Court did not deal with use of gas for domestic cooking i.e. use of PNG. The Supreme Court also recorded that it was told to the Supreme Court that the expertise to supply gas to the industrial units was available with GAIL. The Supreme Court accordingly entrusted the job to GAIL. The Supreme Court did not in any manner mention that GAIL would be outside any control of any regulatory authority or the Government of India in future for supply of gas in the Taj Trapezium area. There is also no indication in both the orders that in future, no regulatory authority would be authorized to impose any additional conditions on GAIL in respect of supply of gas to the industrial units in Taj Trapezium area. We reproduce below the said Supreme Court's orders which have been relied on by the Appellant. The order of the Supreme Court in (2012) 8 SCC 123 on 10.04.1996:

"10. Pursuant to this Court's order dated March 14, 1996 Mr. PC Gupta, General Manager (Civil), Gas Authority of India has filed affidavit dated April 2, 1996. It is stated in the affidavit that the Ministry of Petroleum and Natural Gas has already allocated 0.60 MMSCMD for distribution to the industrial units in Agra and Ferozabad. It is stated that as per the time schedule already filed in this Court, the two pipe

lines shall be completed by December, 1996. It is further stated that the quantity of gas as mentioned above is only for the purposes of supplying the same to the industries located within the Taj Trapezium.

11. We have no doubt that while laying down the supply line within the city of Agra, the safety of Taj and also the people living in the city of Agra shall have to be taken into consideration. We are told that expertise in this respect is available with the GAIL. If necessary, the opinion of NEERI, which has been associated by this Court in Taj Trapezium matters, can also be obtained by the GAIL.

12. We have already heard arguments regarding relocation of industries from Taj Trapezium. Some of the industries which are not in a position to get gas connections or which are otherwise polluting may have to be relocated outside Taj Trapezium. The GAIL may also examine whether in the event of availability of more quantity of gas, the same can be supplied to the industries outside the Taj Trapezium which are located in the vicinity from where the gas pipe is passing.

13. Mr. Gupta has further stated that for the purposes of laying distribution network within the Taj Trapezium, GAIL is establishing a joint venture Company. However, pending formation of the joint venture Company, the required functions are being performed by GAIL. It is stated that GAIL had advertised comparative prices and heat equivalent of various fuels in the newspapers circulated in Agra and Ferozabad to enable the industries, who are prospective consumers of gas evaluate to the economics of conversion to gas. So far 214 parties from Agra and 364 parties from Ferozabad have responded. According to the affidavit these responses are being processed."

The order of the Supreme Court in (1997) 2 SCC 353 on 30.12.1996:

"35. We order and direct as under: -

- (1) The industries (292 listed above) shall approach/apply to the GAIL before 15.02.1997 for grant of industrial gas connection.
- (2) The industries which are not in a position to obtain gas connections and also the industries which do not wish to obtain gas connections may approach/apply to the Corporation (UPSIDC)/Government before 28.02.1997 for allotment of alternative plots in the industrial estates outside TTZ.
- (3) The GAIL shall take final decision in respect of all the applications for grant of gas connections by 31.03.1997 and communicate for allotment letters to the individual industries.
- (4) Those industries which neither apply for gas connection nor for alternative industrial plot shall stop functioning with the aid of coke/coal in the TTZ with effect from 30.04.1997. Supply of coke/coal to these industries shall be stopped forthwith. The District Magistrate and the Superintendent of Police shall have this order complied with.
- (5) The GAIL shall commence supply of gas to the industries by 30.06.1997. As soon as the gas supply to an industry commences, the supply of coke/coal to the said industry shall be stopped with immediate effect."

These directions also do not indicate that the Supreme Court wanted to keep GAIL outside the regulatory control of the Board.

Let us also examine the jurisdictional issue from the point of view of the relevant sections of the PNGRB Act, 2006 and the CGD Authorization Regulations independent of the court's orders.

Chapter IV of the PNGRB Act, 2006 relates to Registration and Authorization. Section 14 provides for Register to be maintained by the Board containing details of entities and Section 15 relates to registration of entities.

Section 16 pertains to Authorisation. It says that no entity shall lay, build, operate or expand any pipeline as a common carrier or contract carrier and no entity shall build, operate or expand any City or local natural gas distribution network without obtaining authorisation under the PNGRB Act. Here, we also quote an order dated 21.10.2010 of a Division Bench of Delhi High Court in

W.P.(C) No. 8415 of 2009 and 9022 of 2009 which reads as under:

“39. We are of the opinion that Section 16 is the source of power as it gives statutory mandate to the Board to issue authorizations. Section 16 also confers monopoly on the Board to issue authorizations. Without notification of Section 16, Board does not have the power to issue authorizations, inasmuch as there would be no ban on other entities from laying, building, operating or expanding CGD Networks.”

The proviso to the Section 16 also says that an entity laying, building operating or expanding any pipeline as common carrier or contract carrier or an entity laying, building, operating or expanding any City or local natural gas distribution network, immediately before the appointed day shall be deemed to have such Authorisation subject to the provisions of Chapter IV, but any change in the purpose or usage shall require separate authorisation granted by the Board. Thus the proviso introduces a deeming fiction in respect of those entities who were in the field prior to the appointed date. They shall be deemed to have authorisation. There is no requirement for them to apply for Authorisation. This is however

subject to the provisions of Chapter IV. Such entities will have to however apply to the Board for separate Authorisation if there is any change in the purpose or usage.

Section 16 does not state that those entities who were operating prior to the appointed day and who shall be deemed to have such Authorisation are completely outside the Board's regulatory contract.

Section 17 relates to application for Authorisation. So far as an entity laying, building, operating or expanding any pipeline as common carrier or contract carrier authorised by the Central Government at any time before the appointed day or an entity laying, building, operating or expanding any City or natural gas distribution network authorised by the Central Government at any time before the appointed day are concerned they have to only furnish particulars of such activities to the Board within six months from the appointed day. This is a corollary to the deeming fiction contained in proviso to Section 16. Since such entities are deemed to have authorisation there is no

question of their applying for it. Section 17 nowhere states that such entities are excluded from the regulatory control of the Board. It merely does away with the requirement of making application.

Regulation 17 of the PNGRB (Authorising Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulation 2008 reads thus:

"17. Entity authorized by the Central Government for laying, building, operating or expanding CGD network before the appointed day.

(1) The entity shall submit relevant information along with supporting documents in the form as in Schedule H within a period of one hundred and eighty days from the appointed day.

(2) The entity shall abide by the terms and conditions of the authorization by the Central Government including obligations, if any, imposed by the Central Government.

(3) The entity shall abide by the relevant regulations for technical standards and specifications, including safety standards and the quality of service standards as specified under regulation 15.

(4) The Board may consider grant of exclusivity on such terms and conditions as per the provisions in the Petroleum and Natural Gas Regulatory Board (Exclusivity for City or Local Natural Gas Distribution Networks) Regulations, 2008.

(5) The network tariff and the compression charge for CNG shall be as determined under the Petroleum and Natural Gas Regulatory Board (Determination of Network tariff for City or Local Natural Gas Distribution Networks and Compression Charge for CNG), Regulations 2008.

(6) The activities of the entity may be subject to such other regulations as may be applicable as per the provisions of the Act."

Regulation 17 also does not indicate that the entities who are in the field prior to the appointed date are not within the regulatory control of the Board. It requires such entities to submit relevant information in tune with proviso to Section 16. It makes it obligatory on such entities to abide by the terms and conditions of the Authorisation issued by the Central Government including obligations if any imposed by the Central Government. Under this Regulation such entities have to abide by the relevant

Regulations as specified under Regulation 15. It clarifies that the Board may consider grant of exclusivity to such entities in terms of the Exclusivity Regulations. It says that such activities may be subject to such other Regulations as may be applicable as per the provisions of the PNGRB Act. This Regulation does not in any manner indicate such entities are outside regulatory control of the Board. On the contrary it indicates that the Board retains hold over such entities.

The preamble to PNGRB Act reads as under:

“An Act to provide for the establishment of Petroleum and Natural Gas Regulatory Board 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.”

Functions of the Board are specified in Section 11 of the PNGRB Act. If we read Preamble along with Section 11

which lays down the Board's functions it is not possible to conclude that such entities can function independently without being subjected to regulatory oversight. It is not possible to come to a conclusion that in the interest of the sector particularly the consumer the Board cannot impose any additional conditions on the authorised entities. Such a view will defeat the object of the PNGRB Act and will be not in the interest of the sector particularly the consumers.

12. Now, to examine the main issue of invocation of bank guarantee, let us study the relevant Sections of the PNGRB Act, 2006 and the relevant regulations of the PNGRB (Authorizing entities to lay, build, operate or expand city or local natural gas distribution network) Regulations, 2008 in this perspective.

Relevant Sections of PNGRB Act, 2006

"Section 16. No entity shall –

- (c) Lay, build, operate or expand any pipeline as a common carrier or contract carrier;

(d) Lay, build, operate or expand any city or local natural gas distribution network, without obtaining authorization under this Act:

Provided that an entity –

(iii) Laying, building, operating or expanding any pipeline as common carrier or contract carrier; or

(iv) Laying, building, operating or expanding any city or local natural gas distribution network;

Immediately before the appointed day shall be deemed to have such authorization subject to the provisions of this chapter, but any change in the purpose or usage shall require separate authorization granted by the Board.”

Last paragraph of the above Section in respect of subsection (d) (iv) is relevant in the instant case.

“17. Application for authorization. –

(1) An entity which is laying, building, operating or expanding, or which proposes to lay, build, operate or expand, a pipeline as a common

carrier or contract carrier shall apply in writing to the Board for obtaining an authorization under this Act:

Provided that an entity laying, building, operating or expanding any pipeline as common carrier or contract carrier authorized by the Central Government at any time before the appointed day shall furnish the particulars of such activities to the board within six months from the appointed day.

- (2) An entity which is laying, building, operating or expanding, or which proposes to lay, build, operate or expand, a city or local natural gas distribution network shall apply in writing for obtaining an authorization under this Act:

Provided that an entity laying, building, operating or expanding any city or local natural gas distribution network authorized by the Central Government at any time before the appointed day shall furnish the particulars of such activities to the Board within six months from the appointed day.

- (3) Every application under sub-section (1) or sub-section (2) shall be made in such form and in such manner and shall be accompanied with such fee as the Board may, by regulations, specify.
- (4) Subject to the provisions of this Act and consistent with the norms and policy guidelines laid down by the Central Government, the Board

may either reject or accept an application made to it, subject to such amendments or conditions, if any, as it may think fit.

- (5) In the case of refusal or conditional acceptance of an application, the Board shall record in writing the ground for such rejection or conditional acceptance, as the case may be."

Sub-section (2) above has relevance in the present case.

PNGRB Regulations:

"9. Performance bond

¹⁷(1) Grant of authorization shall be issued to the selected entity after it furnishes the performance bond in the form of demand draft or pay order or bank guarantee from any scheduled bank for the amount equal to four times the amount of bid bond and the bank guarantee shall be valid initially for the period of five years and thereafter for the period of grant of authorization by the Board.

¹⁸(2) The amount of the bid bond and performance bond shall be rounded off to the nearest multiple of lakh rupees and for the purpose any part of a rupee consisting of paise shall be ignored and thereafter if such amount is not a multiple of lakh, then, if the last figure in that amount is fifty thousand or more, the amount shall be increased to the next higher amount which is a multiple of lakh and if the last figure in that amount is less than fifty thousand, the amount shall be reduced to the next lower amount which is a multiple of lakh.

¹⁸(3) The performance bond has been prescribed for guaranteeing the timely commissioning of the proposed CGD network as per the prescribed targets and also for meeting the service obligations by the selected entity during the operating phase of the project.

In the above regulation, sub-regulation (3) is material. In the instant case, performance bond was meant for commissioning of the project in three years of exclusivity period.

"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.

Thus under sub-section (3) post authorization, the Board has to monitor the progress of the entity in achieving targets with respect to the CGD network project, and advise remedial action to the entity in case any shortfall is noticed.

"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) ²⁸in 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) ²⁸25% of the amount of the performance bond for the first default ; and

(ii) ²⁸50% of the amount of the performance bond for the second default:

²⁸Provided 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) ²⁸100% 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 the above regulation is material because encashment of performance bank guarantee is done under this provision.

"17. Entity authorized by the Central Government for laying, building, operating or expanding CGD network before the appointed day.

- (1) The entity shall submit relevant information along with supporting documents in the form as in Schedule H within a period of one hundred and eighty days from the appointed day.
- (2) The entity shall abide by the terms and conditions of the authorization by the Central Government including obligations, if any, imposed by the Central Government.
- (3) The entity shall abide by the relevant regulations for technical standards and specifications, including safety standards and the quality of service standards as specified under regulation 15.
- (4) The Board may consider grant of exclusivity on such terms and conditions as per the provisions in the Petroleum and Natural Gas Regulatory Board (Exclusivity for City or Local Natural Gas Distribution Networks) Regulations, 2008.
- (5) The network tariff and the compression charge for CNG shall be as determined under the Petroleum and Natural Gas Regulatory Board (Determination of Network Tariff for City or Local Natural Gas Distribution Networks and Compression Charge for CNG), Regulations 2008.
- (6) The activities of the entity may be subject to such other regulations as may be applicable as per the provisions of the Act.

Above Regulation 17 is very much relevant in the instant case since the Appellant was authorized by the Central Government prior to the appointed day i.e. October 1, 2007 when the Central Government notified the establishment of the Board.

13. We shall now discuss the relevance of the performance bond vis-à-vis the commissioning of the CGD network project in respect of the instant matter. As per Regulation 9 (3) of the CGD Authorization Regulations, the Appellant submitted the performance bank guarantee for Rs.3.0 Crores against any breach with respect to compliance of project milestones of the Firozabad CGD network and the bank guarantee was issued by the ICICI Bank Ltd. The project completion time was 3 (three) years from the issue of the bank guarantee i.e. till 26.08.2014 which was the exclusivity period granted to the Appellant.

14. The year wise physical targets (commitments) during the exclusivity period were as under:-

Year Wise Commitments During The Exclusivity Period				
	Existing just prior to issuance of PBG	1st year from the date of issue of BG	2nd year from the date of issue of BG	3rd year from the date of issue of BG
Cumulative Domestic Connections (No.)	Nil	3000	12000	24000
Cumulative Steel pipeline length (Inch Km)	488	528	848	1010
Cumulative CNG Compression Capacity (Kgs/Day)	Nil	18460	55360	92260

15. Under the provision of Regulation 13 (3) of CGD Authorization Regulations, the Board has the authority to monitor the progress of the project and the Board accordingly did so. The first review was done in June, 2013 taking into account the Quarterly Progress Report (QPR) submitted by the Appellant for the quarter, January-March, 2013. The progress of the project was found to be as under:

	Targets till 3rd year	Achievement (Jan-Mar'13)
Cumulative Domestic Connections (No.)	24000	160
Cumulative Steel pipeline length (Inch Km)	1010	526.57
Cumulative CNG Compression Capacity (Kgs/Day)	92260	18460

It is clear from the above tabulation that the progress in respect of all the three parameters was not proportionate to the targets till March, 2013. On advice from the Board, the Appellant vide letter dated 01.07.2013 made various submissions/arguments with regard to non-achievement of project milestones such as delays in receipt of statutory clearances, MoPNG's directive regarding surrender of LPG connection by PNG consumers, non-availability of domestic gas and under-utilization of CNG station etc.

16. A formal hearing was held on 07.01.2014 and the Appellant was asked to explain the status of the project before the Board and the Appellant was advised to renew its efforts to achieve the targets and the Board intended to provide an opportunity to the Appellant for hearing at a suitable time before finalizing any action under Regulation 10 of CGD Exclusivity Regulation. The Board thereafter reviewed the QPR submitted by the Appellant for the quarter, January-March, 2015 which is as under:

	Targets till 3rd year	Achievement (Jan-Mar'15)
Cumulative Domestic Connections (No.)	24000	200
Cumulative Steel	1010	960.369

pipeline length (Inch Km)		
Cumulative CNG Compression Capacity (Kgs/Day)	92260	36920

We note from above that the above quarter was already beyond the exclusivity period of three years and still, the progress was much lower in respect of cumulative domestic connections and cumulative CNG Compression Capacity till March, 2015.

17. As per the Board, a notice was issued to the Appellant for a formal hearing on 02.07.2015 under the provisions of Regulation 16 of CGD Authorization Regulation to explain the status of achievements of the project milestones and to also explain the cause of default, if any, in achievements of the targets. After the hearing on 02.07.2015, the Board observed that since the exclusivity period was already over, it would be a fit case for encashment of PBG. The Board accordingly issued the impugned order to the Appellant on 23.11.2015 in accordance with provisions of Regulation 16 (1) (c) (i) of CGD Authorization Regulations, to encash 25% of the PBG

amount i.e. Rs.75,00,000/- (Rupees Seventy Five Lakhs only) for breach of authorization with respect to laying infrastructure and providing PNG domestic connections.

18. While challenging this impugned order, the learned counsel for the Appellant has argued that no formal notice was issued to the Appellant by the Board as per Regulation 16 (1) (a). The learned counsel appearing for the Board counter-argued that the Appellant was given ample opportunities to be heard and reasonable time was granted to the Appellant to fulfill its obligations through various communications issued from time to time. The counsel has produced a copy of the final notice issued by the Board to the Appellant on 25.06.2015 as per provision of Sub-Regulation 16 of CGD Authorization Regulations which reads as under:

“Subject: Notice for hearing w.r.t. status of achievement of project milestones for the CGD Network in the Geographical Area of Firozabad

Sir,

In accordance to the provision of Sub-regulation 16 of PNGRB (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008 you are required to appear for a hearing before PNGRB on 02.07.2015 at 1600 Hrs to explain the status of achievement of the project milestones and also to explain the cause of default, in any, in achievement of the targets.

This issues with the approval of Chairperson, PNGRB.”

19. The Appellant has highly contested that the Board did not take into account the reasons for delay of commissioning of the project which were beyond the control of the Appellant. On this issue, the learned counsel appearing for the Appellant quoted three letters written by the then Chairman of the Board viz two to MoPNG and one to the Chief Secretaries of the States where the Chairman highlighted the problems being faced by the CGD entities while carrying out the CGD network activities in their geographical areas. We notice that these letters were

written by the Chairman on 31.08.2010, 11.07.2011 and 18.08.2011 whereas the exclusivity to the Appellant was granted by the Board on 26.09.2011. These letters were not written by the Chairman in respect of the Appellant's geographical area and the Appellant was well aware of any action before accepting the authorization. We have also noted terms and conditions of authorization dated 26.09.2011 specifically the following condition: -

"1). M/s GAIL Gas Ltd. shall abide by the provisions of the PNGRB Act, 2006 and relevant regulations including amendments thereof and regulations, if any, framed from time to time."

20. We have also examined the Appellant's contention that the Board after considering the impossibility of the conditions originally laid down by it under the regulatory provision has twice amended the criteria of PNG domestic connections and drastically reduced the number of domestic PNG connections. In the amendments dated 21.06.2013 and 07.04.2014, the Board did not mention that the reduced number of PNG domestic connections

would be effective retrospectively. We note that in both the amendments, under short title and commencement, it is respectively mentioned as under:-

“1. Short title and commencement.

(1) These regulations may be called the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Amendment Regulations, 2013.

(2) They shall come into force on the date of their publication in the Official Gazette.”

“1. Short title and commencement.

(1) These regulations may be called the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Amendment Regulations, 2014.

(2) They shall come into force on the date of their publication in the Official Gazette."

Above notifications clearly show that the amendments are prospective.

21. Let us now examine the PBG submitted by the Appellant in respect of its Firozabad geographical area. We find that the bank guarantee issued by the ICICI Bank Ltd. is absolutely irrevocable and unconditional. The relevant provisions of the PBG is reproduced as under: -

"We ICICI Bank Ltd., a banking company within the meaning of the Banking Regulation Act, 1949 and a company incorporated under the Companies Act, 1956 having its Registered Office at Landmark, Race Course Circle, Vadodara-390007 and among other place a Branch at 9A, Pheleps Building, Connaught Place, New Delhi-110001 (hereinafter referred to as 'the Bank') at the request of the Authorized Entity hereby irrevocably and unconditionally guarantee to PNGRB that the Authorized Entity shall render all necessary and efficient services which may be required to be rendered by the Authorized Entity in connection with and/or for the performance of the said Authorized Entity and further guarantees that the service which shall be provided by the Authorized Entity under the said acceptance letter of exclusivity, shall be actually performed in accordance with the terms and conditions of the Exclusivity to the satisfaction of PNGRB.

2. We, the bank, hereby undertake to pay PNGRB an amount not exceeding Rs.3,00,00,000.00 (Rupees Three Crores only) against any breach with respect to compliance of project milestones of the "Firozabad GA (TTZ area) CGD Network" as per prescribed targets and also meeting service obligations by the authorized entity during the operating phase of the project, including failure to extend the validity of this guarantee or to give a fresh guarantee in lieu of the existing one.

3. We, the bank hereby, in pursuance of the terms of the said exclusivity, absolutely, irrevocably and unconditionally guarantee as primary obligor and not merely as surety the payment of an amount of Rs.3,00,00,000.00 (Rupees Three Crores only) by the authorized entity of all his/their obligations under the said acceptance letter of exclusivity. This performance bond can be encashed by PNGRB to make good the amount of the performance bond.

4. We, the bank, hereby agree that the decision of PNGRB as to whether the authorized Entity has failed to or neglected to perform or discharge his duties and obligations under the said acceptance letter of exclusivity or whether the service is free from deficiencies and defects and is in accordance with or not of the terms & conditions of the said acceptance letter of exclusivity and as to the amount payable to PNGRB by the bank hereunder shall be final and binding on the bank."

It is very clear from the text of the above performance bond that if there is any breach of commitment by the Appellant, the Board's decision is binding on the bank. In such a situation, if the Board takes strict action, it cannot

be faulted for it. Considering all the discussions as above, it is our considered opinion that the submissions of the Appellant must fail.

22. Lastly, we must now revisit the law on invocation of bank guarantees. Several judgments have been cited by both sides. We shall refer to only a few of them because all the judgments state the same principles.

23. In **U.P. State Sugar Corporation**, the Supreme Court held as under:

12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the

encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases. In the case of U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.¹ which was the case of a works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank*² (All ER at p. 352): (at SCC p. 197)

“The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank’s knowledge. It

would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged."

This Court set aside an injunction granted by the High Court to restrain the realization of the bank guarantee."

24. In **Vinitec Electronic Private Limited v. HCL Infosystem Ltd.**, the Supreme Court held as under:

"11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an unconditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. In *U.P. State Sugar Corpn. v. Sumac International Ltd.*¹ this Court observed that: (SCC p. 574, para 12)

"12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in

granting an injunction to restrain the realisation of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases."

12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In *BSES Ltd. v. Fenner India Ltd.*² this Court held: (SCC pp. 733-34, para 10)

"10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are 'special

equities' in favour of injunction, such as when 'irretrievable injury' or 'irretrievable injustice' would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court³, that in *U.P. State Sugar Corpn. v. Sumac International Ltd.*¹ (hereinafter 'U.P. State Sugar Corpn.¹') this Court, correctly declared that the law was 'settled'."

25. In **Himadri Chemicals Industries Ltd. V. Coal Tar Refining Company (2007) S SCC 110**, the Supreme

Court held as under:

14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or letter of credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a letter of credit.

(iv) Since a Bank Guarantee or a letter of credit 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 bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned.

26. After considering relevant judgments on the question of invocation of bank guarantee, this Tribunal in its judgment dated 29.05.2017 in IA No. 384 of 2017 in Appeal No. 161 of 2017 titled as Shapoorji Pallonji Energy (Gujarat) Private Limited Vs. Gujarat Electricity Regulatory Commission & Anr. and IA No. 383 of 2017 in Appeal No. 162 of 2017 titled as Essar Power Gujarat Limited Vs. Gujarat Electricity Regulatory Commission & Anr. has observed as under: -

“30. In the recent judgment in **Gujarat Maritime Board**, the Supreme Court has reiterated the same principles and stated that the moment there is a written demand for invoking the Bank Guarantee pursuant to breach of the covenants between the parties, the Bank is bound to honour the payment under the guarantee. It is not necessary to multiply the judgments as the

law is crystallized in the above judgments and has been followed in all the later judgments.

31. The principles laid down by the Supreme Court can be summarized as follows: The Bank Guarantee is an independent contract between the bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable Bank Guarantee. The dispute between the beneficiary and party, at whose instance the bank has given the guarantee is immaterial and is of no consequence. The liability of the bank is absolute and unequivocal. The bank has to only verify whether the amount claimed is within the terms of the Bank Guarantee or Letter of Credit. Any payment by the bank would obviously be subject to the final decision of the court or the tribunal. At the stage of invocation of Bank Guarantee, there is no need for final adjudication and decision on the amount due and payable by the person giving the Bank Guarantee. The Courts should not interfere with invocation and encashment of Bank Guarantee unless there is fraud of egregious nature of which the beneficiary seeks to take advantage and which vitiates the entire underlying transaction or a case where irretrievable injustice is likely to be caused to either of the parties. That is to say, there must be special equities in favour of injunction such as when irretrievable injury or irretrievable injustice would occur if injunction were not granted. Since in most cases payment of money under a Bank Guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on

commercial dealings in the country. There is no question of making out any prima facie case much less strong evidence or special equity for interference by way of injunction by the court in preventing encashment of Bank Guarantee. The bank must honour bank guarantees free from interference by the courts, otherwise trust in commerce, internal and international would be damaged irreparably. There has to be glaring circumstances of deception or fraud warranting interference. Final adjudication is not a pre-condition to invoke the Bank Guarantee and that is not a ground to issue injunction restraining the beneficiary from enforcing the Bank Guarantee. The mere fact that the Bank Guarantee refers to the principle agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one. The present case can be examined in the light of these principles."

27. If we examine the present case in the light of above principles, it becomes clear that no interference is warranted with the impugned order invoking bank guarantee.

28. So far as judgment of the Supreme Court in Gangotri is concerned, this Tribunal has distinguished it in the same judgment i.e. IA No. 384 of 2017 in Appeal No. 161 of 2017 titled as Shapoorji Pallonji Energy (Gujarat) Private

Limited Vs. Gujarat Electricity Regulatory Commission & Anr. and IA No. 383 of 2017 in Appeal No. 162 of 2017 titled as Essar Power Gujarat Limited Vs. Gujarat Electricity Regulatory Commission & Anr. Following are the relevant paragraphs:

"42. Heavy reliance was placed on behalf of the Applicants on the judgment of the Supreme Court in **Gangotri**. We are of the opinion that the said judgment is not applicable to this case. We do not think that in that case, the Supreme Court took a different view from the law settled by it in a catena of judgments crystallising principles underlying invocation and encashment of Bank Guarantees. In fact, after referring to number of leading cases, which include **U.P. State Sugar Corporation**, the Supreme Court has in **Gangotri** said that, these judgments lay down general principles relating to Bank Guarantees and there can be no quarrel over the propositions laid down in those cases. The Supreme Court then reiterated that every case has to be decided with reference to the facts of the case involved therein and then discussed the peculiar facts of the case before it. Reliance was placed by the Applicants on the observations of the Supreme Court in this case that the sum claimed was neither an admitted sum, nor a sum which was adjudicated upon in any judicial proceedings. It is submitted that even in this case, the sum is not adjudicated upon. But it must be noted that this is not the only circumstance that weighed with the Supreme Court. The Supreme Court observed that the sum claimed by the Respondents from the Appellants therein did not relate to the contract for which the Bank Guarantee had been furnished but it related to

another contract dated 22/08/2005 for which no Bank Guarantee had been furnished. Perhaps the most important fact which distinguishes it from other cases and which was noted by the Supreme Court was that the Bank Guarantee was in the nature of a Performance Guarantee furnished for execution work of contract dated 14/07/2006, which was completed and the work having been completed to the satisfaction of the Respondents, they had no right to encash the Bank Guarantee. Thus, this case turns on its own peculiar facts. It does not take a view contrary to the view taken by the Supreme Court in earlier judgments to which we have made a reference that adjudication of claim is not a precondition to invocation and encashment of a Bank Guarantee. Facts of **Gangotri** can never be equated with the facts of the present case. We may advantageously refer to the Delhi High Court's judgment in **TRF Limited v. ENERGO Engineering Projects Limited**, where the Delhi High Court has distinguished **Gangotri**.

The above observations cover the present case also.

Gangotri will have no application to this case.

29. Based on our discussions above and also considering the relevant Sections of the PNGRB Act, 2006, relevant CGD Authorization Regulations and Exclusivity Regulations alongwith the above cited judgments and the text of the performance bank guarantee submitted by the Appellant, we find no substance in the instant appeal. The appeal is

dismissed. Consequently, the IA No. 207 of 2016 does not survive and is disposed of, as such.

30. Pronounced in the Open Court on this **3rd day of November, 2017.**

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

Justice Ranjana P. Desai
[Chairperson]

√ REPORTABLE/~~NON-REPORTABLE~~