

**Tribunal for Electricity**  
**(Appellate Jurisdiction)**

**APPEAL No.86 OF 2011**  
**AND**  
**APPEAL NO. 87 OF 2011**

**Dated: 09<sup>th</sup> March, 2012**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson**  
**Hon'ble Mr.M B Lal, Technical Member (P& NG)**

**APPEAL No.86 OF 2011**

**In the Matter Of**

Gail India Limited  
16, Bhikaji Cama Place  
R.K. Puram, New Delhi

Appellant(s)

Versus

1. Shyam Industires  
402/403, Phase-IV,  
GTDC, Naroda,  
Ahmedabad-382 330,  
Gujarat
2. Petroleum & Natural Gas Regulatory Board  
1<sup>st</sup> Floor, World Trade Centre,  
Babar Road, New Delhi-110 001

Respondent(s)

Counsel for the Appellant : Mr. Abhinav Vashisth, Sr. Adv  
Ms. Leena Tuteja  
Mr. Archit Vasudeva

Mr. Raman Kumar  
Mr. Niraj Kumar  
Mr. Rahul Arora

Counsel for the Respondent : Mr. Anand K Ganesan for R-1  
Ms. Swapna Seshadri for R-1  
Mr. Rishabh Bhutani for R-2  
Mr. I.S. Alag for R-2  
Mr. Rakesh Dewan for R-2  
Mr. Sunil Kumar Rai for R-2  
Mr. J. S Lamba for R-2  
Mr. R. K Bisht for R-2

**APPEAL No.87 OF 2011**

**In the Matter Of**

Gail India Limited  
16, Bhikaji Cama Place  
R.K. Puram, New Delhi

Appellant(s)

Versus

1. Haldyn Glass Gujarat Limited  
Village Gavasad, TalukPadra,  
District Vadodara, Gujarat
2. Bharat Glass Tube Ltd  
189, GIDC, Industrial Estate,  
Ankleshwar, District-Bharuch,  
Gujarat
3. Schott Glass India Pvt Ltd  
Second Floor, Sidcup Tower,  
Race Course, Vadodara

4. Shyam Industries  
404/403, Phase-IV  
GTDC, Naroda,  
Ahmedabad-382 330, Gujarat
5. Punjab Steel Rolling Mills (Baroda)  
Pvt Ltd  
Station road,  
Vadodara-390 002
6. Petroleum & Natural Gas Regulatory Board  
1<sup>st</sup> Floor, World Trade Centre,  
Babar Road, New Delhi-110 001

Respondent(s)

- |                            |  |
|----------------------------|--|
| Counsel for the Appellant  | :Mr. AbhinavVashisth,SrAdv<br>Ms. LeenaTuteja<br>Mr. ArchitVasudeva<br>Ms. Amrita Jayas<br>Mr. Raman Kumar<br>Mr. Niraj Kumar,<br>Mr. Rahul Arora  |
| Counsel for the Respondent | : Mr. Anand K Ganesan for R-1 to R-5<br>Ms. Swapna Seshadri for R-1 to R-5<br>Mr. Rishabh Bhutani for R-2<br>Mr. Sunil Kumar Rai for R-2<br>Mr. R K Bisht for R-2<br>Mr. I.S. Alag for R-6<br>Mr. Rakesh Dewan for R-6 |

## **JUDGMENT**

### **PER HON'BLE MR. JUSTICE M. KARPAGAVINAYAGAM, CHAIRPERSON**

1. GAIL India Limited is the Appellant herein. Five Consumers who use to receive the supply of Gas from the Appellant, namely (1) M/s. Haldyn Glass Gujarat Limited (2) Bharat Glass Tube Limited (3) SchottGlass Industries India Limited (4) Shyam Industries Limited and (5) Punjab SteelRolling Mills (Baroda) Pvt Limited are the Respondents. The Petroleum Board is the other Respondent.
2. One of the Respondent Consumers M/s. Shyam Industries filed a complaint on 15.6.2010 before the Petroleum Board complaining against GAIL, the Appellant with regard to excess Gas Transportation Charges levied on them and praying for the refund of the said excess charges.
3. Similarly, on 9.12.2010, all the five Respondent consumers jointly filed a similar complaint praying for the same relief.
4. Since the issues raised in both the complaints were same, both the complaints were heard together by the Petroleum Board which in turn, passed the final order on 25.5.2011 holding that the collection of transportation charges levied by GAIL was excess and arbitrary and directing the GAIL to re-compute the

applicable transportation charges and refund the excess charges levied with interest w.e.f 1.10.2007 to the Respondent Consumers.

5. Aggrieved by this order, the GAIL India Limited has filed these Appeals in Appeal No.86 and 87 of 2011.
6. The Appellant has challenged the impugned order on the following grounds:
  - (i) The Petroleum Board lacks the jurisdiction to adjudicate the issue in question in view of the arbitration clause in the agreement.
  - (ii) The line in question is not a dedicated line but it is just a spur line.
  - (iii) The complaints filed by the Respondent consumers was barred by limitation.
7. As regards, **the 1<sup>st</sup> point**, regarding the complaint dt. 15.6.2010, the Learned Senior Counsel for the Appellant submits that in view of Section 12 (1) (a) of the Act, the dispute raised by the Consumer, is covered by the Arbitration Clause under the Agreement entered into between the Appellant and Shyam Industries , the concerned complainant and therefore, the jurisdiction of the Board gets ousted.

8. On the other hand, the Learned Counsel for the Respondent Shyam Industries Limited has submitted that the contention of the Appellant is misconceived in view of the fact that for a dispute to be covered for the arbitration clause under the Agreement is to be the dispute which is ought to be arbitrable but in this case, since the dispute raised by the consumers to the effect that the transportation charges levied by the Appellant is arbitrary, excessive and contrary to the provisions of the Act, the same is not an arbitrable dispute and that therefore, the Petroleum Board alone has got the jurisdiction to adjudicate this dispute.
9. As pointed out by the Learned Counsel for the Respondent, it is a well settled principle of law that an Arbitrator is bound only by the Agreement between the parties and he can merely decide whether the transportation charges levied by the Appellant is as per the Agreement or not and it will not have any jurisdiction to decide whether the transportation charges are reasonable, arbitrary or excessive or not and whether they are against the provisions of the Act or not.
10. In other words, the issue raised with reference to the alleged arbitrary transportation charges cannot be decided by the

Arbitrator as the dispute in question is not arbitral. Only the Board has the requisite jurisdiction to decide the dispute raised by the consumer. In this respect, the Petroleum Board has given a clear finding to the effect that the Arbitration clause found in the agreement would not automatically restrict the jurisdiction of the Board to decide the dispute particularly when the said dispute is not arbitral dispute. The said findings are as under:

*“31. Another objection raised by the Respondent is that the agreement for transportation and supply of gas with the Petitioner Shyam Industries Limited was entered into in 2006 which was subsequently amended to include an arbitration clause. It is their contention that since Section 12 providing for power of the Board with regard to complaints and resolution of disputes cannot be invoked where the parties have agreed for arbitration, the Board cannot entertain these complaints. The undisputed facts on record indicate that of the five complaints, only in one case i.e. Shyam Industries, the parties have entered into a supplemental agreement well after the appointed day which contains an arbitration clause to settle disputes with regard to the agreement. It is also the contention of the complainants who have entered into subsequent agreement on 30.12.2010 that they were forced to sign this agreement in spite of their protests which has been done by the Respondent with the objective of preventing the regulatory Board to intervene in the matter. The parties have also contended, in support of which they have cited various case laws, that the mere inclusion of an arbitration clause in the agreement by itself does not necessarily exclude the jurisdiction of a regulatory body to intervene in the matter. Their contention is that the scope*

*of the arbitration clause included in the agreement is limited to the substantiate clauses in the agreement and that complainants such as these relating to fair trade and competition was beyond the scope of any arbitration. We tend to agree with the contention of the complainant as the Board is obliged to carry out the mandate under Section 11(a) of the Act which is very broad in its scope. Moreover, any agreement entered into by the parties has to be in conformity with the specific provisions of the said Act and as well as provisions under other statutes as may be applicable. In other words, an agreement by itself cannot justify any act of omission or commission which is in violation of the provision of Section 11(a) of the Act or, for that matter, any other provisions of the said Act. We have, therefore, no hesitation in holding that the provision of arbitration in the supplemental/subsequent agreements does not in any way restrict the jurisdiction of the Board in ensuring fair trade and competition amongst the entities for protecting the interest of consumers”.*

11. The Learned Counsel for the Respondent in support of the finding given by the Board on this issue has cited the following authorities:

- (a) *Haryana Telecom Ltd v SterliteIndustires (India) Ltd (1999) 5 SCC 688*
- (b) *“Sukanya Holding Pvt. Ltd v. Jayesh H. Pandya and Anr (2003) 5 SCC 531*
- (c) *Natraj Studios (P) Ltd v. Navrang Studios AIR 1981 SC 537*
- (d) *ChiranjilalShrilalGoenka through LRs V. Jagjeet Singh and Others., (1993) 2 SCC 507*



- (e) *Punjab State Electricity Board V. Bassi Cold Storage, Kharar and Another., 1994 Supp (2) SCC 124*
- (f) *M/s. Fair Air Engineers Pvt. Ltd.,v N.K Modi.,AIR 1997 SC 533*
- (g) *UP State Electricity Board v. Banaras Electric Light and Company Ltd., (2001) 7 SCC 637*

12. On the other hand, the Learned Counsel for the Appellant on the issue of Arbitration Agreement and Lack of Jurisdiction, has cited the following judgments:

- (a) *P AnandGajapathiRaju&Ors Versus P.V.G Raju (Died) &Ors, AIR 2000 SC 1886*
- (b) *Hindustan Petroleum Corpn Ltd Versus Pinkcity Midways Petroleum, AIR 2003 SC 2881*
- (c) *Order dated 01.09.2009 passed by Hon'ble Supreme Court of India in the matter of General Manager Telecom Versus M. Krishnan &Anr in Civil Appeal No.7687 of 2004*
- (d) *Booz Allen and Hamilton Inc. Versus SBI Home Finance Limited & Ors (2011) 5 SCC 532*
- (e) *Shin Satellite Public Co. Ltd Vs Jain Studios Ltd. (2006) 2 SCC 628*

13. The crux of the principles laid down by the various judgments referred above are as follows:

- (a) The Legislature intended to provide a remedy in addition to the consentient arbitration which could be enforced under the Arbitration Act but it does not confer an automatic right nor create an automatic

Judgment in Appeal No.86 of 2011 & Appeal No. 87 of 2011  
embargo on the exercise of power by the judicial  
authority under the Act.

- (b) Considered from this perspective, we hold that the State Commission and National Commission are judicial authorities for the purposes of the Act, in view of the object of the Act and we are of the considered view that it would be appropriate that these forums created under the Act are at liberty to proceed with the matter in accordance with the provisions of the Act rather than relegating the parties to an arbitration proceeding.
- (c) Though the present dispute would have been referable to arbitration, it cannot be done, in view of the provisions of the Act which would override the stipulation contained in the aforesaid condition and the Act would prevail over the general law of arbitration.

14. In the light of the principles laid down by the various Courts in the above judgments and also in the light of the finding correctly given by the Board holding that the dispute does not involve the arbitral dispute, there is no merit in the contention of the Learned Senior Counsel for the Appellant. Accordingly, the 1<sup>st</sup> contention urged by the Learned Counsel for Appellant would fail.

15. The **2<sup>nd</sup> Issue** is relating to the question as to whether the line, in question, is a dedicated line or a spur line. According to the Appellant, the line, in question, is not a dedicated line but it is a

spur line. According to the Respondent Consumer, the line, in question, is a dedicated pipeline and is not a part of the common carrier network as the definition of a common carrier would not satisfy the ingredients of the term dedicated line. In this context let us look to the definition section of common carrier under Section 2(j) of the Act which reads as under:

*“2(j) “Common carrier” means such pipelines for transportation of petroleum, petroleum products and natural gas by more than one entity as the Board may declare or authorise from time to time on a non-discriminatory open access basis under sub-section (3) of section 20, but does not include pipelines laid to supply-*

*(i) petroleum productions or natural **gas to a specific consumer**; or*

*(ii) Crude oil;”*

16. In case, the lines are treated as dedicated pipelines, the tariff determination methodology has to be based on the guidelines dt. 2.12.2010 issued by the Petroleum Board.

17. In case, the system is considered as common carrier, the tariff determination has to be based in terms of the regulation of the Board for tariff determination of common carrier system.

18. In respect of the gas supply to Respondent consumers, the contracts (GSA) between the Appellant and the consumers were entered into in the 90's, much before the concept of common carrier was introduced in the country and much before any such Regulation on common carrier system came into existence. The pipelines were laid essentially to supply gas from the producing fields of ONGC in the region to the Respondent consumers.

19. In the very first Agreement entered into between the Appellant and M/s. Haldyn Glass Limited on 26.05.1993, there was a specified formula for determination of transportation charges - a specific formula which is as follows:-

*“10.01(a). The price of 1000 (One Thousand) standard cubic metres of GAS, shall be as per Government pricing order No.L-12015/2/88 GP dated 31.12.1991. and is give under:*

<u>Period</u>	<u>Price/1000 Standard cubic metres</u>
	(Rs)
1.1.1994 to 31.12.1994	1750
1.1.1995 to 31.12.1995	1850

*Provided further the SELLER shall have the right to revise the price of GAS as per directive, instruction, order etc of Government of India from time to time and the BUYER shall pay to the SELLER such revised price of GAS.”*

.....

*10.04 The price of GAS in Article 10.10(a) and 10.01 (b) and 10.02 above is exclusive of Transportation Charges,*

*Royalty, Taxes, Duties and all other statutory levies as applicable at present or to be levied in future by the Central or State Government or municipality or any other local body or bodies payable on sale of GAS from ONGC to SELLER or on sale of GAS from SELLER to the BUYER which shall be borne by the BUYER over and above the aforesaid price.”*

.....

*Formula for working out the Transportation Cost*

*(Annexure II to Agreement dated May 26, 1993 for 20000 SCMD)*

*Monthly Transportation charges in Rs.lakhs  $\frac{(3n+0.4037c)}{12}$*

*Where*

*n=Number of employees*

*As intimated by Seller to Buyer one month before commencement of supply*

*c= Capital cost (to be intimated by Seller)*

*The above formula is applicable subject to the following stipulations:*

*Corporate Income tax rate assumed at 51.75% and the formula is subject to change as and when the Income tax rate is changed.*

*Rate of Return taken as 12% after tax but shall not be less than 24% pre-tax.*

*The Monthly Transportation Charges are subject to escalation by 3% per annum on annual rest basis with effect from 01.04.1995.”*

20. In any regulatory tariff determination process, the capital cost is not recovered through tariff, but only the servicing of the capital cost is to be recovered through tariff, such as Return on Equity and Interest on Loan, etc. Equity and Loan as such are not recovered through tariff. However, as per the above formula specified in agreement dated 26.03.1993, the capital cost itself was to be recovered within 30 months. Upon realization by the Appellant, that there would be no justification for transportation charges under the formula after the expiry of 30 months when the entire capital cost itself would be recovered, the formula was replaced by the Appellant with a fixed monthly charges on an arbitrary basis and a new supplemental agreement dated 02.09.1995 was entered into between the Appellant and M/s. Hayldn Glass Limited. Thereafter, all the Agreements entered into by the Appellant only provided for a fixed transportation cost without any co-relation to the actual cost and the expenses incurred by the Appellant.
21. In all these cases, it is clear that the transportation charges seem to be fixed arbitrarily and the basis has not been elaborated in transparent manner in the Agreement with the Respondent's consumer.

22. The GSA also does not clearly seem to indicate the section of the pipeline for which the tariff / transmission charges are being levied. For instance, the gas transportation being charged to Shyam Industries for 1.278 km gas pipeline is Rs.3,60,000/- per month for a contracted capacity of 2000 SCMD working out to Rs.1,80,000 per 1000 SCMD and for Reliance Industry is only Rs.309/- per 1000 SCMD having contracted capacity of about 2,30,000 SCMD and for a distance of 2.5 km. As against this specific contention of the Respondent consumers as against the Appellant before the Board, the Appellant did not deny/dispute this aspect. Even in the Appeals, the Appellant has merely stated that the two cases are different. Only, during the course of the hearing, the Appellant handed over a chart giving some calculations and reasons as to why the gas transportation charges of Reliance is lesser, mainly being that Reliance gets gas from three sources. However, the same has no co-relation to the gas transportation charges. The price of gas may vary with the source of gas. However, Shyam Industries had only compared the gas transportation charges of its 1.278 Km line with the 2.5 Km to Reliance. Shyam Industries has not included/considered the other lines and no material has been placed by the Appellant to prove that two additional lines exist or that a common bill for the gas transportation from all three sources is sent to Reliance.

23. Over the years, the gas distribution system of the Appellant in Gujarat has evolved and now includes gas supply sources from the LNG terminals from Dahej and Hazira. A part or whole of the system may now be amenable for consideration as common carrier, However, unless the PNGRB(Petroleum Board), which is authorised to consider this aspect under the Act, declares the same as a common carrier, the tariff determination would not be possible on a common carrier basis.
24. The contention of the Appellant that line is not a dedicated line but it is only a spur line will not justify the levy of charges by the Appellant. In case of spur line, the Appellant would be required to charge tariff in terms of the Regulation of the Board. In case of a dedicated line also, the Appellant would be required to charge tariff to recover its reasonable cost expenses. The differentiation sought to be made by the Appellant between the dedicated line and spur line does not provide any justification for the charges levied by the Appellant.
25. This aspect has been considered and decided by the Petroleum Board in the impugned order. The same is as follows:

*“35. For deciding this issue, it would be important to understand how the natural gas pipeline transportation dynamics work in the sector. A natural gas pipeline system would normally have two constituents (i) the main transmission pipeline which transports natural gas meant for multiple consumers in bulk and (ii) a spur line originating from the main transmission line and terminating at delivery point at*



*the premises of specific consumers. The dedicated portion of any pipeline system would constitute the item in (ii) which is clearly identifiable with a specific consumer whereas item (i) would constitute a “common or contract carrier” since natural gas is being transported in bulk in the system intended for multiple consumers or “more than one entity”. This intent is visible more clearly in the Policy of the Central Government dated 20.12.2006 which as per the provisions of section 17(4) of the Act the Board is mandated to follow in deciding applications for grant of authorization, subject of course to the provisions of the said Act and the Regulations. Para 2.1 covering applicability of the Policy states thus which is quoted below:*

*This policy will apply to natural gas pipelines and city or natural gas distribution networks except for dedicated pipelines laid to supply gas to specific consumers originating from regulated pipelines provided the same are for their own use and not for resale.*

*36. The regulations framed by the Board have reflected the intent of the Policy of the Central Government which is also evident in the Act which defines a common or contract carrier pipeline as under:*

*(j) “common carrier” means such pipelines for transportation of petroleum, petroleum products and natural gas by more than one entity as the Board may declare or authorise from time to time on a non-discriminatory open access basis under sub-section (3) of section 20 but does not include pipelines laid to supply.*

*(i) Petroleum products or natural gas to a specific consumer; (emphasis added) or*

*(ii) Crude oil;*

*Explanation:- For the purposes of this clause, a contract carrier shall be treated as a common carrier, if- (i) such contract carrier has surplus capacity over and above the firm contracts entered into; or (ii) the firm contract period has expired.*

*Further Sub Clause (m) of Section 2 provides for definition of the word “contract carrier” which reads as under:*

*(m) “contract carrier” means such pipelines for transportation of petroleum, petroleum products and natural gas by more than one entity pursuant to firm contracts for at least one year as may be declared or authorized by the Board from time to time under subsection (3) of section 20;*

*37. In the represent batch of the complaints, the undisputed facts are that the pipelines have been laid over short distances for supplying to specific consumers mainly from isolated/marginal wells. As such, the pipelines fall within the definition of dedicated pipelines since these are used to service only single consumers for their own consumption and not for resale. Apart from this, the GSTA entered into between GAIL & Shyam Industries dated 30.03.06 (para 6 refers) provides for the payment by the consumer of a fixed monthly transmission charge plus additional charge for supply of gas over and above the quantity mentioned in the agreement. It further provides that the monthly plus unit rate transmission charges is exclusive of replacements/modifications of the existing pipeline and associated facilities (excluding compression facility) wholly/partly for supply of gas to the consumer at the delivery point. This is being taken as the standard clause in the agreements with all the complainants which is the admitted position. Since these pipelines have been laid to supply gas to single consumers and from the wordings of the clause in the agreement providing for transmission charges, it is quite evident that the single consumer was required to pay the capital cost of the pipeline in addition to O&M cost, it is quite clear that these are dedicated pipelines and operated as such by the respondent. In any case,*

*only the Board can declare a dedicated pipeline to be a common or contract carrier pipeline in exercise of powers vested in it under Section 20 of the said Act in the public interest after following the procedure laid down in the Act and the relevant regulations. It is not open to any entity to assume the conversion of a dedicated pipeline to a common/contract carrier pipeline and include in it a common carrier network for the purpose of determination of network tariff. We are again constrained to observe here that from the date of the submission of the proposal for determination of tariff by the Board for this network i.e., 20.07.2010, this appears to be a part of the deliberate strategy of the respondent to continue to deny any reasonable relief to the consumers through the redressal of their complaints.*

*38. Even assuming for the sake of argument that these pipelines are considered as part of a common carrier network, the Board has to be guided by the criteria laid down in Section 22(2) of the Act in determination of transportation tariff which includes factors such as competition, efficiency and safeguard of consumer interest. In accordance with these provisions, the Board has notified that PNGRB (Determination of Natural Gas Pipelines Tariff) Regulation, 2008 as per which transmission tariff for the pipelines under implementation or in operation on the appointed day have to be fixed on the basis of 12% post tax return on the historical value of capital employed and opex calculated on a normative basis. In view of this, since the facts as brought out by the complainants are not disputed by the respondent indicate that the capex of the pipelines have already been recovered many times over by the respondent, the transporter would in any case be entitled only to payment of Opex on a normative basis as transmission charges. If we accept the contention of the respondents that these are part of common carrier pipeline network and that the tariff determined by the Board would be payable by these complainants, it would amount to making consumers who have already paid the capex of the pipelines laid to supply them gas many times over,*

*subsidize all other consumers being serviced by the network. This cannot be accepted as this is neither fair nor reasonable.”*

26. In view of the details enumerated above, the submissions made by the Learned counsel for Appellant on this point can not be accepted.

27. The Petroleum Board has framed the Petroleum and Natural Gas Regulatory Board (Access Code for Common Carrier or Contract Carrier Natural Gas Pipelines Regulations,2008) under which a natural gas pipeline is defined as under:

*“(n) “natural gas pipeline” means any pipeline including spur lines for transport of natural gas and includes all connected equipments and facilities, such as, compressors, storage facilities, metering units, etc. but excludes-*

*(i) Dedicated pipeline laid to transport natural gas to a specific customer to meet his requirement and not for resale;*

*(ii) pipelines in a city or local natural gas distribution network which are regulated by the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008”*

28. The lines, in question, falls squarely in the above provision i.e. dedicated pipelines allowed to transport natural gas to specific consumer to meet his requirements and not for resale. For a

particular line to be declared as a common carrier line, the Board has exclusive jurisdiction to make such declaration. Unless there is a specific declaration by the Board, the Appellant cannot make any unilateral claim. The Appellant has strangely stated that the Appellant understood these lines to be common carrier pipelines and in those circumstances lines should be taken as a common carrier line. The Appellant cannot merely rely upon its files to establish that these lines to be common carrier pipelines. Virtually, the Appellant is seeking for a direction to treat these lines as a common carrier contrary to the provisions of the Act and regulations framed.

29. As per the above formula as indicated above, the entire cost of gas pipelines was already recovered by the Appellant within 30 months. Hence, it cannot be stated that the entire cost of the network was to be recovered only from one consumer by taking the entire capital cost of the network. If that be the case, there would be no transportation charges recovered, from any or the other consumers, as the entire capital cost of the total network was to be recovered only from one consumer. This itself clearly establishes that the line in question is only a dedicated pipeline to the consumer premises and not the entire network cost.

30. A line is a spur line only when the same connects or re-intended to connect to more than one consumer. The definition of the spur line cannot render the provision of dedicated line in Section 2(j) of the Act or Regulations meaningless.
  
31. If the contention of the Appellant that the entire network cost has to be recovered from the consumers is accepted, then no network cost can be recovered by the Appellant without the approval of the Board. In that event, the entire levy would be illegal as no authorisation whatsoever has been taken by the Appellant from the Board for the recovery of the network cost by the Appellant.
  
32. The determination of the network tariff is the exclusive jurisdiction of the Board under the provisions of the Act. The Appellant has no jurisdiction to impose or levy any such tariff on the consumers without approval of the Board. In view of our above findings, the submissions made by the Appellant on the 2<sup>nd</sup> point would fail. Accordingly, this is answered in favour of the Respondents.
  
33. Let us now take up the **3<sup>rd</sup> Issue**. According to the Appellant, the complaints filed by the Respondent consumers, were barred by time.

34. According to the Respondents, the Appellant levied excess transportation charges over and above the capital cost of the line and the consumers had raised the question for the continuing cause of action before the Board and as such the consumers are entitled to maintain their claim for refund at any time as the cause of action of the consumers is continuous in nature.
35. Let us see the finding with reference to this point given by the Board:

*“42. It is quite clear, therefore, that the Respondents have to be fair and reasonable in charging transmission tariff even in case of dedicated pipelines for which the Board is not required to determine tariff. Since in the present case, as brought out by the complainants and not disputed by the Respondent, the capital cost of the pipelines has long been recovered, the Respondent is entitled to charge only opex on a normative basis and nothing more. The question that arises as to from which date this would become operative.*

*The Respondent have, in fact raised the issue that the complainants have failed to indicate as to from which date the tariff modification was to become operative. This again appears to be a deliberate dilatory tactics adopted by the Respondent which does not behave a public Sector undertaking. In the case of tariff determination by the Board under the said regulations, the transporters are obliged to calculate and charge tariff as per the formula in the said regulation which is subject to adjustments as and when the Board determines the tariff. The tariff as determined by the Board is operative from the date of the notification of the said regulations or from date of*

*commencement of commercial operation, whichever is later.*

*In this case, the date of commencement of these pipelines is prior to the appointed day i.e. 01.10.2007. The guidelines for dedicated pipelines have been issued on 02.12.2010. The question arises as to from which of these two dates the tariff as directed in this order is to be charged by the Respondent. It is relevant to bear in mind in this regard that the complaints have been made on the ground of contravention of Section 11 (a) of the Act which mandates the Board for ensuring fair trade and competition amongst the entities to protect the interest of consumers. In these cases, as our findings indicate, the respondent has been levying transmission charges which have remained unchanged even after the capex employed had been paid by the consumer many times over. There is also the complaint of obvious discrimination as per the petition of M/s. Shyam Industries which alleges that it is being charged far more for transmission of natural gas over a shorter distance as compared to supply of gas from the same source over a longer distance to Reliance Industries. These facts have not been denied by the Respondent except to justify the obvious discrimination against the complainant although we have not gone in to the issue of discrimination as it is not germane to the matter under consideration. Taking all these factors in to account, we are of the opinion it is just, fair and reasonable that the Respondent shall be entitled to charge only the Opex on a normative basis after it had recovered the Capex on the pipeline. The dates in these cases pre-date the coming into force of the provisions of the Act and constitution of the Board.*

*In view of this, the Board is legally not in a position to extend its jurisdiction prior to the appointed day even though it is conscious of the fact that as per the*



*established case law, the respondent as a public sector entity should act in a reasonable and fair manner and not indulge in unfair trade practice in abuse of the monopoly power given to it by the Government irrespective of whether there was a specific statutory provision to regulate this or not.*

*The guidelines in this regard reproduced at para 39 of this order were issued on 2.12.2010. However, these guidelines did not give effect to the provision of Section 11 (a) of the Act which had come into force on 01.10.2007. The guidelines had to be issued, as indicated earlier, as large number of complaints had been made to the Board and these were intended to facilitate compliance with the provision. It cannot, therefore, be construed that the fair and reasonable conduct has to commence only from the date of the guidelines as this would condone a specific provision of the Act which was already in force.*

*In view of this, we hold that even though the Respondent should charge Open on a normative basis after it has recovered the capital employed in the Pipeline, our direction would become effective from the appointed day. i.e. 01.10.2007”.*

36. The above finding would make it clear that the Board has given the relief with effect from 1.10.2007, the date on which the Act came into force, instead of giving effect from 2.12.2010 i.e. the date of the issuance of the guidelines.
37. It is not disputed as mentioned above that the entire capital cost of the pipeline has already been recovered and the Appellant is entitled to charge only operational expenditure on a normative basis and nothing more. So, when the excess transportation charges are levied even after the capital cost of pipelines was

recovered, the natural cause of action for the consumers would accrue continuously. Therefore, the question of limitation would not arise in this case.

38. Strangely, the Learned Senior Counsel for the Appellant has questioned the legality of the guidelines which were issued on 2.12.2010 by the Board. However, at the same breath, the Learned Counsel for the Appellant has contended that since the guidelines have been issued on 2.12.2010, the Appellant is liable to refund the charges only from that date i.e. 2.12.2010 and not from 1.10.2007 as laid down by the Board. This is nothing but blowing hot and cold.
39. Both the parties have filed their written submissions making allegations against both the parties in respect of various issues. We are not referring to the same as they are not germane to the issue raised in this matter. However, we have to record that the Board could have avoided from making some adverse remarks as against the GAIL as in our view, those remarks have been made by the Board without referring to the basis on which those remarks were called for.
40. It is noticed that in the complaints filed by the consumers, the consumers have alleged that the GAIL has been charging from them heavy gas transportation charges since the year 2000. However, the Board thought it fit to direct for the refund the excess charges levied only w.e.f. 1.10.2007 namely the date on which the Board assumes jurisdiction. Therefore, it cannot be

said that the Board has wrongly exercised its jurisdiction. However, it is noticed that the finding which have been given by the Board with reference to the collection of excess charges was on the basis of the guidelines which have been issued by the Board on 2.12.2010. It is noticed that though the Board has assumed jurisdiction on 1.10.2007, the complaints have been filed by the consumers only on 15.6.2010 by the Shyam Industries and on 9.12.2010 by other consumers. Therefore, it would be appropriate to modify the impugned order to the effect that the Appellant is liable to refund the excess charges levied with interest w.e.f. 2.12.2010, the date of issuance of guidelines. Accordingly, the order is liable to be modified.

41. Therefore, we modify the order to the effect that the impugned order shall take effect only from 2.12.2010, the date of issuance of guidelines, instead of 1.10.2007 as mentioned in the impugned order. Thus, the impugned order is modified. Appeal is partly allowed.

42. However, there is no order as to costs.

**(M.B. Lal)**  
**Technical Member (P&NG)**

**(Justice M. KarpagaVinayagam)**  
**Chairperson**

Dated: 09<sup>th</sup> Mar, 2012

✓ Reportable/Not Reportable