

APPELLANT TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)

APPEAL NO. 14 OF 2014 &
IA-19, IA-34, IA-58 OF 2014

DATED : 28th November, 2014

PRESENT:-

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. NAYAN MANI BORAH, TECHNICAL MEMBER

IN THE MATTER OF:-

BHARAT PETROLEUM CORPORATION LIMITED
BHARAT BHAVAN,
4 & 6, CURRIMBHOY ROAD,
BALLARD ESTATE, P.B. NO. 688,
MUMBAI -400001

...APPELLANT(S)

VERSUS

1. SABARMATI GAS LIMITED
PLOT NO.907, SECTOR-21,
GANDHI NAGAR-382021
GUJARAT

2. GAIL (INDIA) LIMITED
16, BHIKAJI CAMA PLACE,
NEW DELHI -110066

3. PETROLEUM & NATURAL GAS REGULATORY BOARD
1ST FLOOR, WORLD TRADE CENTER,
BABAR ROAD,
NEW DELHI -110001
THROUGH ITS SECRETARY

...RESPONDENT(S)

Counsel for the Appellant(s) : Mr. Rajat Navet
Ms. Sanya Talwar

Counsel for the Respondent(s) : Mr. Piyush Joshi, SGL
Ms. Sumiti Yadava
Ms. Meghna Chandra for SGL
Mr. Prashant Bezboruah for PNGRB
Ms. Sonali Malhotra for R-3

JUDGMENT

Per Hon'ble Mr. Nayan Mani Borah, Technical Member, (Petroleum and Natural Gas)

1. Bharat Petroleum Corporation Limited (BPCL) is the Appellant herein.
2. Sabarmati Gas Limited (Sabarmati-R-1), Gail India Ltd. (GAIL-R-2) and the Petroleum & Natural Gas Regulatory Board (PNGRB, referred hereafter as Petroleum Board-R3) are the Respondents.
3. The present Appeal is against the Impugned Order dated 14.11.2013 passed by the Petroleum Board (R-3) in Complaint Case No.8 of 2013 filed by Sabarmati (R-1) accusing GAIL (R-2 herein) and BPCL (Appellant herein) of resorting to restrictive trade practices.
4. The Petroleum Board (R-3), while passing the Impugned Order, has held the Appellant alone to be guilty of restrictive trade practice.
5. Aggrieved over the Impugned Order, the Appellant has filed the present Appeal.

6. The short facts are as follows: -

- (a) The Appellant is engaged in the business of refining, marketing of petroleum products including Liquefied Natural Gas (LNG) in India, import of crude and petroleum products.
- (b) Sabarmati (R-1) is a joint venture between Gujarat State Petroleum Corporation Ltd. (GSPCL) and the Appellant in City Gas Distribution (CGD) business.
- (c) Petronet LNG Ltd. (PLL), a joint venture between GAIL, Indian Oil Corporation Ltd. (IOCL) and BPCL owns, operates and manages the Dahej LNG Terminal.
- (d) BPCL, GAIL and IOCL have entered into separate Gas Sales and Purchase Agreement (GSPA) with PLL and have, subsequently, entered into Gas Sales Agreement (GSA) with other entities for supply of regassified LNG in terms of the said Agreements.
- (e) As per the terms of GSA dated 29.06.2009 between the Appellant and R-1, the Delivery Point at which gas is delivered to R-1, is 500m away from the Dahej LNG Terminal. The pipeline

connecting the Dahej Terminal and the Delivery Point is owned by GAIL (R-2).

- (f) GAIL (R-2) bills transmission charges to the Appellant (Seller) for transportation of gas to the Delivery Point.
- (g) Appellant has entered into a Gas Transmission Agreement (GTA) dated 07.10.2005 with GAIL (R-2) for transportation of gas from the Dahej Terminal to the Delivery Point. This GTA, inter alia, has a Ship or Pay Quantity (SOPQ) clause.
- (h) In March, 2012, R-1 filed a petition before the Petroleum Board against the Appellant and R-2 for purported restrictive trade practices in not allowing it to take gas directly from the point of direct connectivity between GSPL pipeline and Dahej LNG Terminal instead of the Delivery Point hitherto used.
- (i) On 14.11.2013, the Impugned Order was passed by the Respondent Petroleum Board, holding that Appellant alone was found guilty.

7. The Appellant has made the following submissions in the present Appeal assailing the Impugned Order passed by the Respondent Petroleum Board: -

- (a) The GSA between Appellant and Sabarmati (R-1) has, inter alia, an Arbitration Clause, and as such, the Petroleum Board has no jurisdiction to adjudicate upon the issues raised in the Petition by Sabarmati.

- (b) The Impugned Order is violative of the principles of natural justice, in as much as, the proceedings had taken place before two members only, whereas the Impugned Order has been passed by four members of the Petroleum Board.

- (c) The petition sought a relief in terms of change of gas handing over location from the hitherto Delivery Point to the point of direct connectivity between GSPL pipeline and the Dahej LNG Terminal.

- (d) A change in Delivery Point, however, would actually tantamount to re-writing a contract by a court which is not permissible in law.

- (e) The GTA (Gas Transmission Agreement) dated 07.10.2005 between Appellant and GAIL (R-2) is on a Ship or Pay Quantity (SOPQ) basis which implied that the Appellant is bound to pay for transmission charges of a minimum specified quantity to R-2,

irrespective of the actual quantum of gas transmitted. The Impugned Order fails to address specific concerns raised by the Appellant with regard to the impact of change of Delivery Point with respect to the SOPQ charges of the GTA.

- (f) The connectivity/transportation charges collected from R-1 by Appellant is wholly passed on to GAIL (R-2).
- (g) The Appellant and R-1 had also entered into a Price Side Letter dated 29.06.2009 which specified contract price for gas under the GSA signed by them.
- (h) The terms and conditions of the GSA and the Price Side Letter make it abundantly clear that Transmission Charges, charged by the Appellant are essentially fixed by GAIL (R-2). The Appellant, accordingly, has charged Transmission/Connectivity charges from R-1 as per prices fixed by R-2 from time to time.
- (i) The Appellant had a back-to-back arrangement with GAIL (R-2) for transmission of gas from Dahej LNG Terminal to the Delivery Point, and accordingly, declined to concur with the request of R-1 to allow R-1 to offtake gas from GSPL's direct connectivity.

- (j) Prior to signing a Supplementary GSA dated 30.09.2009, R-1 again requested Appellant to agree to switch over the gas handing over point from the Delivery Point to the point of GSPL Direct Connectivity. Appellant reiterated that due to the said back-to-back contractual arrangement with GAIL (R-2), the request for changing gas delivery location could not be agreed to.
- (k) Pursuant to Petroleum Board's Tariff Order dated 09.06.2010, GAIL (R-2) informed Appellant and Sabarmati (R-1) that the revised Zone-1 tariff would now be applicable as Transmission/connectivity charge for R-1.
- (l) As per the Price Side Letter, the interconnectivity charges had been fixed at Rs.8.74 per MMBTU. As per the Zone-1 tariff, GAIL (R-2) intimated that the interconnectivity charges would be revised upwards to Rs.19.83 per MMBTU with a retrospective effect from 20.11.2008.
- (m) R-1 vide its letter dated 22.09.2010 informed the Appellant about its disagreement to the said Zone-1 tariff's applicability to interconnectivity charges at the Delivery Point located at a mere 500m distance from the Dahej Terminal. R-1, however, also

stated that it would make payments for the invoices "Under Protest and without prejudice to remedies available to it under law."

- (n) In March 2012, R-1 filed a petition before the Petroleum Board against Appellant and R-2 alleging that they have resorted to restrictive trade practices in not allowing R-1 to offtake gas directly from the GSPL pipeline and, instead compelling it to offtake gas only at the Delivery Point on the GAIL's pipeline.
- (o) In its submission, the Appellant, inter alia, urged that if any change in Delivery Point were to be directed by the Petroleum Board, the directions passed by the Tribunal (APTEL) in Orders dated 23.01.2012 and 24.02.2012 in Appeal Nos. 1,2,5 & 7 of 2012 should be considered and the Appellant be relieved of its SOPQ obligations under the GTA with GAIL (R-2) for the quantities of gas that would be delivered to the PLL-GSPCL Delivery Point, if the Delivery Point is changed by the Petroleum Board.
- (p) Although two members heard the matter, the Impugned Order was passed on 14.11.2013 by four members of the Petroleum Board (R-3).

- (q) The Appellant's submissions with regard to consequential change/amendments in the GTA with GAIL have not been considered in the majority decision, though, in the minority decision, appropriate directions with regard thereto have been passed.
8. In reply to the Appellant's above submissions, Respondents have put forward the following arguments: -
- (a) Contrary to the submission made by the Appellant, the facts and circumstances of the present Appeal (No.14 of 2014) and Appeal No.1,2, and 5 of 2012 (APTEL judgment dated 18.12.2013 refers) are materially different.
- (b) Sabarmati (R-1) wanted gas delivery point at the then existing GSPL pipeline directly from Dahej Terminal to avoid transmission charges.
- (c) Despite the fact that an alternative pipeline was available, the Appellant insisted that it would delivery gas only at a Delivery Point outside Dahej Terminal at a distance of 500m using a GAIL (R-2) pipeline.

- (d) Appellant insisted on above delivery arrangements since as it stated in its letter dated 15.06.2009; "BPCL has back-to-back arrangements with GAIL for Transmission of gas from PLL facilities to Delivery Point. As a result of the same, BPCL cannot agree to allow SGL to offtake gas from GSPL's direct connectivity."
- (e) Faced with no other option for supply of gas, R-1 had to enter into GSA dated 29.06.2009 and, later, a Supplementary Agreement dated 30.09.2009 for additional volume of gas with the Appellant.
- (f) Both of the above Agreements had to be entered into by R-1 since the Appellant, on the strength of its dominant position, unfairly imposed its clauses in the Agreements with respect to the Delivery Point.
- (g) The only reason for denying R-1 direct connectivity to GSPL pipeline at the Dahej terminal, and instead, insist on a Delivery Point at the GAIL pipeline a mere 500m downstream is to extract "Transmission Costs" as part of the gas price. Should an arrangement of direct connectivity were to have been allowed as requested by R-1, Transmission costs could have been avoided.

- (h) The Appellant exercised its dominant position to bundle a transmission service with the sale of gas, ---- a transmission service that was not at all required by R-1.

- (i) Evidently, it is a restrictive trade practice to bind R-1 to utilize GAIL's pipeline till the Delivery Point despite there being an alternative direct pipeline of GSPL that was sought to be utilized by R-1.

- (j) R-1 is not a party to the GTA between Appellant and GAIL (R-2). But it is R-1's understanding that the said GTA is not linked to the delivery of gas under the GSA between R-1 and the Appellant.

- (k) The Petroleum Board's Tariff Order dated 09.06.2010 relates to the DVL Pipeline or HVJ-DVPL GREP pipeline. Since R-1 is not a customer of either of these pipelines, tariff fixed for them is not to be imposed on R-1 for receiving gas at the Delivery Point.

- (l) The transmission charges being sought to be imposed on R-1 are not linked in any manner to the transmission of gas to the Delivery Point located at 500m distance, and imposition of

charges in a retrospective manner falls outside the GSA between R-1 and the Appellant.

- (m) If Petroleum Board's Impugned Order is implemented, R-1 would be allowed to utilize GSPL direct connectivity. Consequently, the gas transportation tariff payable by R-1 would get reduced substantially. This, in turn, would result in benefit of the general public in the Geographical Areas served by R-1 as the city gas distributor.
- (n) There has been no breach of natural justice principles in the Impugned Order contrary to the claims made by the Appellant. The submissions of the parties were perused and considered by all members of the Petroleum Board. The Appellant never earlier raised any objection to the fact that only two members were present during the hearing on 12.09.2013.
- (o) As is evident from the foregoing, the Appellant and GAIL (R-2) took undue advantage of their dominant positions to bundle the transmission service with sale of gas/Regassified LNG (RLNG) and this tying in was done solely to benefit R-2.
- (p) Time and again, including prior to signing of GSA, R-1 has consistently conveyed its request to Appellant to allow delivery

of gas through direct connectivity to the GSPL pipeline at the Dahej Terminal. Further, R-1 has also sent a number of communications to the Appellant disputing imposition of inapplicable zonal tariff to connectivity charges at the Delivery Point.

- (q) This case is clearly distinct on facts from the matter of Appeal Nos. 1,2 and 5 of 2012 before the Tribunal (APTEL) which were disposed vide judgment dated 18.12.2013, since, inter alia, in the instant case, there was an alternate pipeline (GSPL) at the location existing at the time of denial of access to the same for R-1 by the Appellant.
9. It may be noted that while hearing of the matter was in progress before this Tribunal, the Appellant (BPCL) approached the Hon'ble High Court of Delhi by filing WP(C) No.2977 of 2014 against Order dated 25.04.2014 of this Tribunal. The Hon'ble High Court of Delhi passed an Interim Order dated 12.05.2014 in this connection.
10. This Tribunal, consequently, vide Order dated 22.05.2014 stated that the present Appeal No.14 of 2014 would be posted for further hearing only after the disposal of the WP(C) No.2977 of 2014 by the Hon'ble High Court.

11. Pursuant to the Order of this Tribunal dated 22.05.2014, R-1 filed an application with the Hon'ble Delhi High Court for dismissal of the WP(C) No.2977 of 2014 and, accordingly, the same was dismissed by the Hon'ble High Court vide its Order dated 04.07.2014.
12. Pursuant to above development, the part-heard matter of Appeal No.14 of 2014 was resumed in this Tribunal.
13. In the light of the aforesaid rival pleadings, arguments and response to our queries thereon, in our opinion, the following questions would arise for consideration:

(A) Whether in the facts and circumstances of the case, the Impugned Order is violative of principles of natural justice and liable to be set aside on that ground itself in view of the admitted fact that the proceedings had taken place before a two member bench, whereas the judgment has been rendered by four members?

(B) Whether the Petroleum Board erred in holding that the Appellant had adopted a restrictive trade practice and that it alone would have to bear the consequences without appreciating that in no circumstance could the

Appellant have been held guilty of a restrictive trade practice and that too on its own inasmuch as the Appellant does not earn a single penny for the Transportation Charges charged by it, and therefore, under no circumstance could the Appellant alone have been held to have adopted a restrictive trade practice.

- (C) Whether the PNGRB was correct in law in directing the change in "Delivery Point" as agreed upon by the parties in terms of the Gas Sales Agreement entered into between the parties as the same amounts to rewriting a contract between the parties?
- (D) Whether the Impugned Order should have considered ordering to change the Delivery Point with regard to Regassified LNG only after considering to pass appropriate amendments/changes in the GTA dated 07.10.2005 between the Appellant and GAIL, since otherwise, the same would have potentially significant monetary consequences to the Appellant.

14. We will now address the above key questions ad seriatim.

Question (A)

15. R-1 has claimed that the Appellant did not object to the fact when the proceedings took place before two members of the Petroleum Board and, in fact, consented to the same orally.

16. The fact that while the Petroleum Board took up the matter on 12.09.2013, two members were present and the other members including the Chairperson were on an official tour on that date was recorded in the Petroleum Board's Order dated 12.09.2013 in Case No.08 of 2012.

17. We note from the written submissions that the above fact was informed to the parties by the members present, and neither Appellant nor R-2 objected to the same. Apparently, only after receiving oral consent from the Appellant for proceeding with the hearing in the presence of two members, the hearing continued.

18. On the subsequent hearing of the matter on 18.10.2013, all the four members of the Petroleum Board, including the Chairperson, were present. The Petroleum Board's Order dated 18.10.2013 records that written submission filed by all the parties were perused and considered by all the members of the Board including Chairperson.

19. Based on the perusal of the foregoing we are of the opinion that no breach of principles of natural justice has taken place as regards Question (A).

Question (B), (C) & (D)

20. As far as Questions B,C & D are concerned, this Tribunal analysed in detail similar issues in judgment dated 18.12.2013 in Appeal Nos. 1,2, & 5 of 2012 in the matter of ***Indian Oil Corporation Limited vs. Gujarat State Petroleum Corporation Ltd. & Ors.; Bharat Petroleum Corporation Ltd. Vs. Gujarat State Petroleum Corporation Ltd. & Ors. Gail (India) Limited vs. Gujarat State Petroleum Corporation Ltd. & Ors.*** The Appellant has argued that the present Appeal i.e. Appeal No.14 of 2014, in scope and matter involved, is analogous to matter involved in Appeal Nos. 1,2 & 5 of 2012. In his written submission, the Appellant has brought out the similarities and contended that the judgment dated 18.12.2013 passed by this Tribunal in Appeal Nos. 1,2 & 5 of 2012 is squarely applicable to the present Appeal also.
21. The basic issue/allegation is same in both the matters i.e. BPCL and GAIL have indulged in restrictive trade practice by "tying in", the requirement of taking delivery of Regassified LNG (RLNG) only by

using GAIL's pipeline to Delivery Point located at a distance of 500 meters from the Dahej LNG Terminal. The submissions of BPCL defending its position in both the matters are identical.

22. The GSA dated 16.02.04 entered into between the BPCL and GSPCL which was a subject matter of Appeal No.2 of 2012 is identical and it contains similar clauses and provisions as those of GSA dated 12.06.2009 entered into between BPCL (Appellant) and Sabarmati (R-1) which is the subject matter of the instant Appeal.
23. The complaint filed by GSPCL against BPCL in Appeal No. 2 of 2012 is, in its essence, identical to the complaint filed by Sabarmati (R-1) against BPCL (Appellant) in the present Appeal.
24. In the present case (as in the case of GSPCL), no complaint was filed by Sabarmati till the tariff was increased from Rs.8.74 per MMBTU to Rs.19.83 per MMBTU by the Petroleum Board.
25. Sabarmati (R-1) strongly opposes the above stand and states that there are important differences in the two matters and, therefore, the judgment of 18.12.2013 in Appeal Nos.1,2 & 5 of 2012 cannot be applied to the present Appeal.

26. The main point of factual difference between the two matters is that while there was only one pipeline from which gas could be delivered from the Dahej LNG Plant, i.e. GAIL's DVPL Pipeline in case of matter related to Appeal Nos.1,2 & 5 of 2012, there were already two pipelines connected directly with the Dahej LNG Terminal in the matter related to the present Appeal. These two pipelines are (i) GAIL DVPL Pipeline; (ii) GSPL's Gas Pipeline. In the present Appeal, Sabarmati wanted to utilize direct connectivity at the GSPL pipeline but BPCL stated that it would deliver gas only at GAIL's DVPL pipeline Delivery Point.
27. As a part of their written submissions, the Appellant and R-1 have listed a few more claims and counter claims as to the similarity/difference and applicability of the judgment of 18.12.2013 in Appeal Nos.1,2, & 5 of 2012 to the present Appeal No.14 of 2014.

SUMMARY OF OUR FINDINGS:-

- 28. In the light of the foregoing, we hold that the best course of action would be to remand the matter back to the Petroleum Board so that the Petroleum Board may examine the matter from the standpoint of whether this Tribunal's judgment dated 18.12.2013 in Appeal Nos. 1,2, & 5 of 2012 would be squarely applicable to the present Appeal i.e. Appeal No.14 of 2014 or**

not in the light of the rival contentions held out by the parties.

We are not expressing any opinion on this aspect.

29. We also notice that Sabarmati (R-1) has a vested right to be heard by the Petroleum Board in the process of the determination of provisional initial tariff in the light of this Tribunal's judgment passed on 06.01.2014 in the matter of Reliance Industries vs. PNGRB and GSPL (Appeal No.222 of 2012). Consequently, the tariff order to be reworked by the Petroleum Board as suggested above will have to be passed after providing the R-1 an opportunity to be heard and taking into account its submissions in respect thereto.
30. In view of our above findings, the Order impugned is set aside and remanded for consideration of the aspect which we have indicated above. The Board will hear the parties concerned and decide the issue in accordance with law. With these observations, the Appeal is disposed of.

(Nayan Mani Borah)
Technical Member (P&NG)
Dated: 28th November, 2014

(Justice M. Karpaga Vinayagam)
(Chairperson)

√REPORTABLE/NON-REPORTABLE