

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL NO.222 of 2012

Dated: 06th Jan.2014

Present:

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

In the Matter of:

Reliance Industries Limited,
4th Floor, Maker Chambers IV,
Nariman Point,
Mumbai-400 021

..... Appellant

Versus

1. Petroleum & Natural Gas Regulatory Board
1st Floor, World Trade Centre
Babar Road,
New Delhi-110 001

2. Gujarat State Petronet Limited (GSPL),
3rd Floor, G S P C Bhavan,
Behind Udyog Bhavan,
Sector-11, Gandhi Nagar,
Gujarat-382 011

..... Respondent(s)

Counsel for the Appellant : Dr. Abhishek Manu Singhvi, Sr Adv
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Mr. K R Sasi Prabhu
Mr. Amit Bhandari
Mr. Gaurav Mitra
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Mr. Vipul Sharda
Mr. Saurav Aggarwal for R-1

Mr. C S Vaidyanathan, Sr Adv
Mr. Aspi Kapadia
Mr. Piyush Joshi
Ms. Sumiti Yadava
Ms. Nimisha Singh Dutta for R-2

J U D G M E N T

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. The Reliance Industries Limited (Reliance) is the Appellant herein. Petroleum & Natural Gas Regulatory Board (Petroleum Board) is the 1st Respondent. M/s. Gujarat State Petronet Limited (Gujarat Petronet) is the 2nd Respondent.
2. Aggrieved over the Impugned Order dated 11.9.2012 passed by the Petroleum Board (R-1) fixing the provisional Natural Gas Pipeline Tariff at the rate of Rs.23.99/MMBTU applying retrospectively from 20.11.2008, instead of from the date of authorisation i.e. 27.7.2012, the Appellant has filed this Appeal.
3. The short facts are as follows:

(a) Reliance, the Appellant, is carrying on the business of petroleum refining, petrochemical production and marketing of refinery products/petrochemicals.

(b) M/s. Gujarat State Petronet Limited (Gujarat Petronet, R-2) is carrying on the business of laying, building, operating and expanding natural gas pipelines for transportation of natural gas.

(c) In terms of the Petroleum and Natural Gas Regulatory Board Act, 2006 (Petroleum Board Act), the Petroleum Board (R-1) is entrusted with the responsibility of authorising entities to lay, build, operate or expand natural gas pipelines and regulating and fixing the transportation rates for common carrier or contract carrier pipelines.

(d) The Petroleum Board notified the Authorising Regulations, 2008 (Authorising entities to lay, build, operate or expand natural gas pipelines) on 6.5.2008.

(e) The Petroleum Board also notified the Tariff Regulations for determining the Tariff for Natural Gas pipelines on 20.11.2008.

(f) Under the provisions of the Tariff Regulations, the Petroleum Board (R-1) is required to determine the Natural Gas Pipeline's tariff on a provisional basis first

and subsequently to finalise the same considering the actual cost and data at the end of the Financial Year, on the basis of audited annual accounts. Thus as per Tariff Regulations, the overall Tariff fixation comprises of the following three steps:

- i) Existing tariff charged by the entity on authorization by the Board becomes “on account”*
- ii) On determination of provisional tariff by the Board the entity will carry out adjustment with retrospective effect relating back to the date from which tariffs were charged “on account” basis. Stakeholders/customers are entitled to submit comments/objections to this provisional tariff.*
- iii) The final step provided in Schedule A: Regulation 9 is that after considering the response of stakeholders, the provisional tariff shall become final.*

(g) The Gujarat Petronet (R-2) applied to the Petroleum Board (R-1) for authorisation on 6.12.2008 under the Authorising Regulations for grant of authorisation for laying, building, operating or expanding its Grid under the Regulation 18 of the Authorising Regulations, 2008.

(h) The Reliance, the Appellant in May, 2009 made an arrangement by entering into a Gas Transportation Agreement with Gujarat Petronet (R-2) for transportation of Gas from Bhadbut for the price of Rs.12.45/MMBTU and Hazira/Dahej for the price of Rs.21.63/MMBTU to the Appellant's refinery in Jamnagar, Gujarat.

(i) The Petroleum Board (R-1) after considering the Application dated 6.12.2008, filed by the Gujarat Petronet (R-2) seeking for authorisation, granted the said authorisation to the Gujarat Petronet for its High Pressure Gujarat Gas Grid by the order dated 27.7.2012.

(j) As indicated above, under the above Regulations, the Petroleum Board (R-1) is required to determine the initial unit natural gas pipelines tariff on provisional basis first before authorising the tariff after considering the actual cost and data at the end of the Financial Year on the basis of audited accounts.

(k) Accordingly, the Petroleum Board (R-1) passed the impugned order dated 11.9.2012. In this order, the Petroleum Board decided that the provisional initial unit natural gas pipelines tariff on a levelised basis for the Gujarat Petroleum High Pressure Gas Grid network

shall be Rs.23.99/MMBTU with retrospective effect i.e. from 20.11.2008 being the date of the Notification of the Tariff Regulations.

(l) Aggrieved over the retrospectivity aspect of fixing the tariff from the date of Tariff Regulation i.e. 20.11.2008 instead of the date of authorisation i.e. 27.7.2012, the Appellant has filed this Appeal challenging the impugned order dated 11.9.2012.

4. The submissions of the Appellant in this Appeal are as follows:

(a) The Petroleum Board notified the Authorising Regulations, 2008 on 6.5.2008. Under these Regulations, the Gujarat Petronet (R-2) applied to the Petroleum Board for authorisation on 6.12.2008.

(b) In the meantime, the Petroleum Board notified the Tariff Regulations for determining the tariff for natural gas pipelines on 20.11.2008. The Petroleum Board granted authorisation to the Gujarat Petronet (R-2) for its High Pressure Gujarat Gas Grid under Regulation 18 of the Authorising Regulations by the order dated 27.07.2012.

(c) Under the Tariff Regulations, 2008, the Petroleum Board is required to determine the tariff for every Financial Year. Accordingly, by the impugned

order dated 11.9.2012, the Petroleum Board passed the order fixing the tariff as Rs.23.99/MMBTU giving retrospective effect from 20.11.2008 being the date of Notification of the Tariff Regulations instead of giving effect from the date of the authorisation namely 27.07.2012. The Tariff Regulations by which the tariff has been fixed would apply to the entity which has been authorised under the Authorising Regulations. In the instant case, the Gujarat Petronet has been authorised only on 27.7.2012. Thus, the tariff Regulations would be applicable to Gujarat Petronet from the very same date namely 27.7.2012. So, the impugned order giving retrospective effect to applicability of tariff is wrong.

(d) The Petroleum Board Regulations clearly provide that the retrospective adjustments can only be made from the date of authorisation. The impugned order has wrongly been applied in the tariff retrospectively from the date of the Tariff Regulations which have come into force namely on 20.11.2008 instead of the date on which pipeline of the Gujarat Petronet was authorised by the Petroleum Board i.e. on 27.07.2012.

(e) The Petroleum Board has erred in holding that the tariff would be applicable from the date of the Tariff Regulations Notification i.e. 20.11.2008. The action of

the Petroleum Board is contrary to the Tariff Regulations and as such it cannot act in contravention of its own Regulations as settled by various judgments of Hon'ble Supreme Court and the Appellate Tribunal for Electricity.

(f) It is a settled position of law that no statute shall have retrospective effect unless it is specifically provided. In the present case, Tariff Regulations do not provide expressly the retrospective effect.

(g) In the present case, the Act and relevant Regulations do not provide empowering the Petroleum Board to retrospectively apply the tariff order beyond the date of authorisation. Such retrospective application cannot be read into the Act under the garb of consumer's interests as mandated by the preamble to the Petroleum Act.

(h) The Petroleum Board is attempting to read Regulations 18 (1) of the authorising Regulations so as to include the obligation of an entity to operate as a common carrier pipeline to be eligible for an authorisation under the Regulations 18 (1). Thus, the Petroleum Board is seeking to interpret its own Regulations to include such obligations when it is not provided for. This is against the settled principle of

interpretation when a statute is clear and unambiguous nothing should be added or read into the statute.

(i) Gujarat Petronet's pipeline network gets classified as a common carrier network only on the authorisation of the Board on 27.07.2012. Hence, it is not to be treated as a common carrier at the time of application for authorisation filed on 06.05.2008.

(j) In the present case of Gujarat Petronet being authorised under the Authorising Regulations, the regulated tariff would be applicable only from the date of authorisation by the Board and not prior to that.

(k) Before getting authorisation from the Petroleum Board, the tariff applicable would be the contractual tariff i.e. the tariff negotiated between Gujarat Petronet and individual customer depending on various contractual parameters. Since the Tariff Regulations expressly provide that the tariff fixed by the Petroleum Board can be applied only after authorisation, it is a necessary corollary that prior to date of authorisation, the tariff fixed by the Petroleum Board cannot apply.

(l) The present statute does not confer any power to the Petroleum Board to apply the tariffs retrospectively. It is a well-established principle of law that the Petroleum Board is a creature of statute and it can only

exercise such powers as are vested in it by the statute. If there are no express powers conferred to a statutory authority, then no such powers can be inferred.

(m) The Appellant is a person aggrieved. Merely because it did not participate in the proceedings before the Petroleum Board, its locus-standi, cannot be questioned.

(n) The impugned order is wrong also on the ground that the Appellant being aggrieved has not been heard before passing the impugned order thereby the Petroleum Board has violated the principles of natural justice.

(o) A fundamental fallacy of the Petroleum Board's submission is to equate non-discriminate access (to a common carrier pipeline) to an obligation to charge uniform tariff from all its consumers. A regulated tariff is not a uniform tariff as mistakenly claimed by the Petroleum Board.

5. In reply to the above submissions, the Petroleum Board (R-1) as well as the Gujarat Petronet (R-2) have advanced the following arguments:

(a) The Act mandates the Petroleum Board to protect the interests of the consumers by fostering fair trade and competition amongst the entities. Based on

this mandate, the Petroleum Board can neither discriminate amongst the customers nor can it allow the entities to do so.

(b) Once that Gujarat Petronet had applied for an authorisation as a common carrier under the Authorising Regulations, the said entity must adhere to the fundamental requirement to operate on a non-discriminatory manner even during the pendency of the authorisation application before the Petroleum Board.

(c) The Appellant does not have a right under the provisions of the Act to file an Appeal against the determination of the provisional tariff as the Appellant is not an aggrieved person as per Section 33 of the Act.

(d) The Petroleum Board Act is an economic legislation which provides power to the Petroleum Board to determine the tariff under Tariff Regulations. The Tariff Regulations provide for the manner in which it is to be done. It is an established law that economic Regulations must be read and interpreted strictly. It cannot be interpreted liberally to include substantial right where none is substantially listed.

(e) The Appellant is virtually challenging the framework for determination of tariff established u/s 22

of the Act read with the Tariff Regulations. The same is outside the jurisdiction of this Tribunal.

(f) The Gujarat Petronet applied for authorisation in 2008 on the basis that they are operating as a common carrier network. As a common carrier network, the Gujarat Petronet is under an obligation to charge uniform tariff from its customers. Hence, the Gujarat Petronet must charge a uniform tariff for all its customers including the Appellant from 2008. Hence, the question of retrospective date would not arise.

(g) Since the Gujarat Petronet applied for authorisation as a common carrier, the Gujarat Petronet ought to have charged uniform tariff from all its customers. On the other hand, the Gujarat Petronet was charging a varying tariff of Rs.2 - Rs.48/MMBTU. Therefore, the Petroleum Board, in the process of rectifying this lacuna has fixed a uniform tariff of Rs.24/MMBTU from the date of Tariff Regulations so as to achieve the objective of the Petroleum Board Act.

(h) The Appellant has only challenged the retrospective application of tariff and not the tariff rates. Thus, the Appeal is not maintainable for the reasons that the Appellant is not an aggrieved person u/s 33 of

the Act and hence it has no locus-standi to maintain the present appeal.

(i) The consumers of the common carrier or contract carrier have not been given substantive right to participate in the tariff determination proceedings. The same cannot be read into the Act or Regulations. The Appellant has not satisfied the requirement of an aggrieved person as per Section 33 of the Act. Therefore, the impugned order does not suffer from any infirmity. This order is only a provisional order and not final and as such the point regarding the violation of the principles of natural justice is misconceived especially when the consumer of the pipeline does not make any investment in development, construction and maintenance of the natural gas pipeline.

(j) Definition of “common carrier” does not require uniform tariff but only mandates “non-discriminatory open access”. Thus Gujarat Petronet was under no obligation whatsoever to charge uniform tariff from its customers from the moment it applied for authorisation under Regulation 18 of the Authorisation Regulations.

(k) Prior to the date of authorisation, the tariff fixed and agreed contractually between the parties is the

tariff chargeable and payable and is incapable of alteration.

6. In the light of the above rival contentions urged by the parties, the following questions would arise for consideration:

(a) **Whether the Tariff Regulations can be made applicable to Gujarat Petronet (R-2) prior to the grant of authorisation to lay, build, operate or expand its High Pressure Gujarat Gas Grid under the provisions of the Regulations 18 of the Authorising Regulations?**

(b) **Whether the Petroleum Board was empowered in law, to make “the provisional initial unit Natural Gas pipeline tariff” for the High Pressure Gas Grid by the Gujarat Petronet retrospectively applicable from the date of the invocation of the Tariff Regulations i.e. on 20.11.2008, prior to the date of authorisation?**

(c) **Whether the Appellant can be considered as an aggrieved person and if so, whether the Petroleum Board was right in passing the impugned order without following the principles of natural justice, being violative of Section 13 (3) of**

the Act read with Regulation 14 and Regulation 22 (11) of the Conduct of Business Regulations?

7. Before dealing with the questions (a) and (b) above, it would be better to deal with the question (c) with regard to the locus-standi of the Appellant and maintainability of the Appeal.
8. According to the Appellant, the Appellant is an aggrieved person and the impugned order has been passed without hearing the Appellant which is gross violation of the principles of natural justice that vitiates the impugned order.
9. On the other hand, the Respondents submitted the following:

The Appellant does not have a right under the provisions of the Act to file an Appeal against the determination of provisional tariff for High Pressure Gujarat Gas Grid. In view of the fact that the consumers of the common/contract carriers have not been given a substantive right to participate in the tariff determination proceedings, the Appellant cannot be said to be a person aggrieved u/s 33 of the Act who is bound to satisfy the requirement of an aggrieved person. Therefore, the Appeal which has been filed by the person who has no locus-standi, is not maintainable.

10. We have carefully considered the submissions made by both the parties on this issue.
11. It is a settled law that when there is nothing in the statute to actually prohibit from giving an opportunity to be heard, it is clear that the nature of the statutory duty imposed itself would be implied an obligation to hear before deciding the issue.
12. It is held by the Hon'ble Supreme Court in the Gajendra Haldia vs GRIDCO (2008) 13 SCC 414 that a "person aggrieved" must be a person who suffered legal grievance or legal injury or one who has been unjustly deprived and denied of something which he would have been entitled to obtain in usual course.
13. This principle is reiterated in Chhattisgarh State Electricity Board Vs Chhatisgarh State Commission and Hira Ferro Alloys Ltd reported in 2007 ELR (APTEL) 746 and GRIDCO Limited Vs Jindal Stainless Limited (2009) ELR (APTEL) 0459.
14. The scope and ambit of the word "person aggrieved" would include any person whose interest may be prejudicially affected by what is taking place. In other words, it includes any person who has a genuine grievance against something which has been done which affects him, determines or

threatens with injury of his rights and obligation which has been created under a statute.

15. The following are the other decisions:

- (a) Northern Plastics Ltd., Vs Hindustan Photo Films Mfg. Co Ltd., (1997) 4 SCC 452;
- (b) United India Insurance Company Ltd V. Shila Datta (2011) 10 SCC 509;
- (c) Bar Council of Maharashtra Vs M. BV Dabholkar (1975) 2 SCC 702;
- (d) Jasbhai Motibhai Desai Vs Roshan Kumar, Haji Bashir Ahmed (1976) 1 SCC 671;
- (e) Thammanna Vs K Veera Reddy reported in (1980) 4 SCC 62;
- (f) S P Gupta vs Union of India, 1981 Supp SCC 87;
- (g) Infosys Technologies Limited Vs Jupiter Inforsys Limited, (2011) 1 SCC 125;
- (h) Kanwar Singh Saini Vs High Court of Delhi (2012) 4 SCC 307;

16. The principles regarding the aspects of the person aggrieved and his locus-standi have been laid down by the Hon'ble Supreme Court as referred to above are as follows:

- (a) The meaning of the term "person aggrieved" will have to be ascertained with reference to the purpose and the provisions of the statute.
- (b) A person will be held to be aggrieved by a decision if the decision is materially adverse to him.

(c) The term “person aggrieved” are of wide import. It should not be subject to a restricted interpretation of possession or denial of legal rights. The test is whether the words “person aggrieved” includes “a person who has a genuine grievance because an order has been passed which prejudicially affects his interests”.

(d) In order to have locus-standi to invoke the extraordinary jurisdiction under the Article 226, an applicant should ordinarily be one who has a personal or individual right in the subject matter of the application. In other words, infringement of some legal right or prejudice to some legal interest inhering in the applicant is necessary to give him locus-standi in the matter.

(e) In exceptional cases even a stranger or a person who was not a party to the proceedings before the authority but has a substantial and genuine interest in the subject matter of the proceedings will be covered by this Rule.

(f) Normally, a person aggrieved, must be a man who has suffered legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something.

(g) To be an aggrieved person, he must be one whose interest is affected in some possible way. It must not be a fanciful suggestion of grievance but a likelihood of some injury or damage to the Applicant may make a test of locus standi.

(h) In order to earn a locus standi as a “person aggrieved”, other than the arraigned party before the adjudicating authority, it must be shown that such a person aggrieved being third party has a direct legal interest in the goods involved in the adjudication process.

(i) The expression “any person aggrieved” will have to be interpreted in the context in which it appears, having due regard to the provisions of the act and scheme. Any person aggrieved, is a person whose legal rights have been affected, injured or damaged in a legal sense or who has suffered a legal grievance. The person is entitled to file an Appeal.

(j) It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the statute. If there is power to decide and determine to the prejudice of a person, the duty to act judicially is implicit in the exercise of such powers. In those cases, the rule

of natural justice operates. This warrants the hearing of the party who is likely to get prejudiced of the order passed by the adjudicating authority.

17. In the light of the above well laid down principles, we shall now analyse this issue as to whether the Appellant is an aggrieved person or not.
18. From the perusal of the records available, it is clear that the Appellant is a customer of the Gujarat Petronet and it utilises the pipelines of Gujarat Petronet for transportation of natural gas to its power plants carried out as per the Gas Transmission Agreement. The Appellant being the customer/beneficiary of the pipeline of the Gujarat Petronet bears the transportation charges levied by the Gujarat Petronet for usage of the natural gas pipeline. Thus, the Appellant becomes the necessary party in the proceedings relating to determination of transportation tariff which will be recovered from the Appellant. Therefore, the Appellant would become an aggrieved person if the Appellant is prejudiced by the order determining the transportation tariff by the parties.
19. In the present case, the impugned tariff order clearly states that the difference between the tariff charged and that approved by the Petroleum Board shall be adjusted with the customer from 20th November, 2008. Thus, the obligation of

the Gujarat Petronet under the authorised Regulations is to recover this tariff amount from the consumers including the Appellant. It is the case of the Appellant that the Petroleum Board has unlawfully authorised or directed the Gujarat Petronet to recover the large sums of money from the consumers like the Appellant. When the entire monetary liability of the tariff order has to be borne by the customers like the Appellant, then it is only the Appellant who is practically and legally aggrieved by the impugned order and therefore, it has got the locus-standi to file the present Appeal.

20. As indicated above, The Appellant admittedly, is a customer of the Gujarat Petronet. It is being charged with the transportation charges for usage of pipelines for transportation of gas. Hence, it has vested right to hearing and transparency in the proceedings of the tariff determination. Admittedly, the right for hearing the customer like the Appellant had been denied in the present case. This entitles the Appellant as an “aggrieved person” to file the present Appeal u/s 33 of the Act.

21. Further, Section 13 (3) of the Act, read with the definition of “Petition”, “Proceedings” in Regulation 2 and Regulation 14 and Regulation 22 (11) of the Conduct of Business Regulations would clearly reflect that the Petroleum Board is

mandated to adhere to the principle of natural justice in the course of conducting any proceeding.

- 22.** The principles of natural justice include the right to hearing in this case. Admittedly, there is no notice and no hearing.
- 23.** Thus, the contention regarding absence of locus-standi of the Appellant does not merit consideration especially when the Gujarat Petronet would generate the revenue by charging the tariff from the customers including the Appellant on its network. Accordingly, the Appellant being a major customer of the Gujarat Petronet is to be considered as an aggrieved person.
- 24.** Had the Petroleum Board issued public notice inviting suggestions from public who were likely to be affected for participating in the tariff determination process, then such entities or the members of the public including the customers like the Appellant would have assisted the Petroleum Board by objecting with the reasonings to the proposal made by the Petroleum Board. Admittedly, this was not done. Therefore, the Appellant who is affected and aggrieved by the order, has the right to approach this Tribunal by filing an Appeal, as the Appellant has got the locus standi. In that view of the matter we hold that the Appeal is maintainable. Thus, 3rd question (para 6 (c) above refers) is answered accordingly.

25. Let us now go into the other questions (a) and (b) as referred to in Para-6. As both these questions are interconnected, these issues are being taken-up together for discussion and decision.
26. Before analysing these issues, it would be proper to refer to the impugned findings rendered by the Petroleum Board with reference to the applicability of the tariff under the Tariff Regulations. The same is quoted as below:

“9.4 IMPUGNED FINDING:

“3.2.3 Tariff Effectiveness:

(i) GSPL has mentioned that tariff determination cannot precede authorisation of the entity and consequently tariff should be made effective only on a prospective basis as there is no provision in the PNGRB Act, 2006 for retrospective fixation of tariff. GSPL has further mentioned that provisions of the relevant tariff Regulations do not cover GSPL in light of the fact that at that point in time, GSPL was not an entity falling under any of the categories specified in Regulation 3 of the PNGRB (Determination of Natural Gas Pipeline Tariff), Regulations, 2008.

(ii) The substance of the argument made by GSPL is that absence of grant of authorization to them by the Board would keep them completely outside regulatory oversight in respect of items like transportation tariff and it is in that context that the applicability of tariff has been proposed by them to be on a prospective basis i.e from the date of grant of authorization and Board cannot seek to implement tariffs from

20.11.2008 onwards as during that period GSPL had not been authorised by the Board.

(iii) The reasoning given by GSPL has been examined and it is not considered tenable due to the following factors:-

(a) It is a misnomer that the Board is seeking to impose retrospective application of tariff; rather what is being sought by the Board is implementation of tariffs from the date when the tariff regulations titled PNGRB (Determination of Natural Gas Pipelines Tariff) Regulations, 2008 were notified and brought into force from 20.11.2008 onwards in respect of all entities who were laying, building, operating or expanding natural gas pipelines before the appointed day.

(b) From a plain reading of the PNGRB Act, 2006, it is unambiguously evident that the said Act contains separate and distinct provisions for authorization and tariff i.e. Section 16 and Section 22 respectively. Section 22 which contains specific provisions on transportation tariffs has been in force since 01.10.2007 which is the appointed day. Undoubtedly, since all provisions of the Act are inter-woven, regulations notified by the Board have an applicability clause which states that it would be applicable to entities authorized by the Central Government or by the Board. However, GSPL by either own admission as given in their annual report of 2008-09 have stated thus:-

The company owns and operates one of the largest natural gas transmission networks in India. The Company is the first pure natural gas transmission Company in India for transmission of natural gas on an “open access” basis, which means that the

Company makes gas transmission capacity available to any shipper on non discriminatory basis. The unique business model of “Pure Transmission Services and Open Access” adopted by the Company are in line with the spirit of new regulatory regime.

(c) It is not GSPLs case that they were not operating a natural gas pipeline before the appointed day as by virtue of their own statement mentioned above they have confirmed operating such an “open access” pipeline network. Even the authorization granted by the Board to GSPL is for their pipeline network which the entity was operating before the appointed day. Under these circumstances, there would appear to be no option for an in-operation “open access” or common carrier natural gas pipeline before the appointed day but to fall within the purview of said regulatory framework specifically created for the purpose of transportation tariff determination drawing powers from the provisions of Section 61 (2) (t) of the PNGRB Act, 2006 i.e., the PNGRB (Determination of Natural Gas Pipeline Tariff) Regulations, 2008 which have come into force from the date of their Notification on 20.11.2008. Any arguments to the contrary citing absence of authorisation would be legally unsustainable as no entity can claim to have operated in violation of the legislative and regulatory framework which was already in force.

(d) If GSPLs stand is allowed to prevail that the tariff to be determined by the Board would be applicable to them only prospectively from the date of grant of authorisation to them, it would amount to discriminatory application of the relevant tariff regulations notified by the Board for

entities laying, building, operating or expanding common or contract carrier natural gas pipelines before the appointed day either authorized by the Central Government (which authorisation has been formally accepted by the Board later) or authorized by the Board.

(iv) In view of the above, there can be no doubt that transportation tariff to be determined by the Board in respect of GSPLs network should also be equally made applicable to them from the date of Notification of the relevant tariff Regulations i.e. 20.11.2008”.

27. The above findings in the impugned order would make it clear that the Petroleum Board fixed the tariff which would be applicable from the date of the Notification of the Tariff Regulation i.e. 20.11.2008.

28. In this Appeal, the Appellant has not challenged the tariff rate. The claim of the Appellant is that the pipeline tariff of the Gujarat Petronet as approved by the Petroleum Board ought to have been made applicable only from the date of the authorisation namely 27.07.2012 and not from 20.11.2008 i.e. the date of Tariff Regulations.

29. The following aspects have been brought to our notice by the Appellant in order to substantiate its plea that retrospective effect should not have been given to the tariff:

(a) Regulation 3(2) of the Tariff Regulations states that the Tariff Regulations will apply to an entity laying, building, operating or expanding a natural gas pipeline

before the appointed day (01.10.2007) and authorised by the Respondent No.1 for such activities under Regulation 18 of the Authorising Regulations.

(b) At the time of filing, Gujarat Petronet was not covered under Regulation 3 of the Tariff Regulations; therefore, the Tariff Regulations have no applicability prior to the date of authorisation.

(c) Subsequently, during the course of Tariff Determination, authorisation was granted to Gujarat Petronet by the Petroleum Board on 27.07.2012.

(d) However, the Petroleum Board failed to take note of the fact that Tariff Regulation shall apply from the date of authorisation but instead it held that the tariff would be applicable from the date of Notification of the Tariff Regulations.

(e) The action of Petroleum Board is contrary to the Tariff Regulations. The Petroleum Board cannot act in contravention to its own Regulations as settled by various judgments of the Supreme Court and Appellate Tribunal.

30. In the light of the above aspects, the issues are to be analysed. The following facts are not disputed:

(a) On 6.5.2008, the Petroleum & Natural Gas (Authorising Entities to lay, build, operate or expand Natural Gas Pipelines) Regulations 2008 (Authorising Regulations) came into force.

(b) The Tariff Regulations came into force on 20.11.2008. The Gujarat Petronet applied for authorisation before the Petroleum Board on 6.12.2008. The said authorisation was granted by the Petroleum Board to the Gujarat Petronet under the Authorising Regulations on 27.07.2012. However, the Petroleum Board passed the impugned order on 11.09.2012 fixing the tariff w.e.f from 20.11.2008 i.e. the date of the Notification of the Tariff Regulations. In this context, it would be appropriate to refer to the applicable provisions of the Act as well as the provisions of the Tariff Regulations. Section 2 (j) would define the term 'common carrier'. The same is as follows:

“2. Definitions:

(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.

.....

Explanation-for 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,”

- (c) The functions of the Petroleum Board has been provided in Section 11 (e) which is as under:

Section 11 (e)

“11. Functions of the Board- The Board shall-

.....

(e) regulate, by regulations-

(i) access to common carrier or contract carrier so as to ensure fair trade and competition amongst entities for that purpose specify pipelines access code;

(ii) Transportation rates for common carrier or contract carrier,”

- (d) Section 20(3) would refer to the procedure for giving authorisation which reads as under:

Section 20 (3)

“20. Declaring, laying, building, etc., of common carrier or contract carrier and city or local natural gas distribution network.

.....

(3) The Board may, after following the procedure as specified by regulations under Section 19 and sub-section (1) and (2), by notification-

(a) declare a pipeline or city or local natural gas distribution network as a common carrier or contract carrier; or

(b) authorise an entity to lay, build, operate or expand a pipeline as a common carrier or contract carrier; or

(c) Allow access to common carrier or contract carrier or city or local natural gas distribution network,

(d) Authorise an entity to lay, build, operated or expand a city or local natural gas distribution network,”

(e) The applicability of the Regulations to an entity has been given in the Regulations 3 (2) of the Tariff Regulations which is as under:

“Regulation 3(2) of the Tariff Regulations

“3. Application: These Regulations shall apply to an entity:-:

(2) Laying, building, operating or expanding a natural gas pipeline before the appointed day and authorised by the Board for such activities under Regulation 18 of the Petroleum and Natural Gas Regulatory Board (Authorizing

Entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations, 2008”.

(f) In regard to the data to be submitted by the Entity for determination of the tariff is given in Section 5 (2) of the Tariff Regulations which is as under:

Regulation 5(2) of the Tariff Regulations:

“5. Form for data submission by entity for determination of natural gas pipeline tariff-

Every entity shall submit to the Board the financial costs and other data in the form at Attachment 1 of Schedule A, if as on the day of the notification of these Regulations, the natural gas pipeline-

(2) Is already in operation, then, in relation to an entity referred to in-

(a) Clause (1) of Regulation 3, within ninety days of the notification of these Regulations;

(b) Clause (2) of Regulation 3 within ninety days of the grant of authorisation by the Board or;

(c) Clause (3), within ninety days of the date of authorisation by the Board;

Provided that the entity shall charge initial unit natural gas pipeline tariff “on account basis” based on these regulations from the date of commission of natural gas pipeline referred to in clause (1) of Regulation 3 or the date of authorisation by the Board of natural gas pipeline referred to in clause (2) or clause (3) of Regulation 3, as the case may be, till the

date the Board provisionally fixes the initial unit natural gas pipeline tariff;

Provided further that the entity shall carry out adjustments, with a retrospective effect with the customers for the difference between the initial unit natural gas pipeline tariff that the entity had so charged and that provisionally fixed by the Board.”

(g) The Regulations 9 (2) of the Tariff Regulations would provide for the determination of the initial unit natural gas pipeline tariff as under:

Regulation 9 (2) of Schedule A of the Tariff Regulations:

“9. Determination of initial unit natural gas pipeline tariff and review of unit natural gas pipeline tariff

.....

(2) The initial unit natural gas pipeline tariff including its apportioning over all tariff zones shall be determined based on provisional computations.”

(h) Regulations 18 (9) (a) (d) provide for the determination of the tariff for the entity not authorised by the Central Government which reads as under:

Regulation 18 (9) (a) and (d):

“18. Entity not authorised by the Central Government for laying, building, operating or expanding natural gas pipeline before the appointed day.

.....

(9) In case the entity is selected for grant of authorisation for laying, building, operating or expanding natural gas pipeline,

(a) the natural gas pipeline tariff shall be determined under the Petroleum and Natural Gas Regulatory Board (Determination of Natural Gas Pipeline Tariff for Natural Gas Pipelines) Regulations, 2008:

.....

(d) the entity shall abide by the provisions under the relevant regulations on access code and declaring natural gas pipelines as common carrier or contract carrier.”

31. The above provisions would make it evident that Regulation 3(2) of the Tariff Regulations, 2008 mandates that the Tariff Regulations are applicable only to those entities which have already been granted authorisation under the Authorising Regulations. These provisions do not refer to anything with reference to retrospective effect.

32. It is settled law that an Act or Regulation has to provide expressly for retrospective application for such Act or provisions to be enforced in a retrospective manner. The Act and the relevant Regulations do not contain any provision which empower the Petroleum Board to retrospectively apply the tariff order. Such retrospective application cannot be read into the Act under the garb of consumer's interests. The Petroleum Board has invoked

Regulations 18 of the Authorising Regulations. Regulations 18 of the Authorising Regulations are reproduced below:

“18. Entity not authorised by the Central Government for laying, building, operating or expanding CGD network before the appointed day.”

- 33.** The reading of the above Regulation would reveal that it does not provide for a pre-requisite condition that an entity must operate as a common carrier to seek authorisation under this Regulation. The relevant Regulation for applicability of tariff determined by the Petroleum Board is only Regulations 3 (2) of the Tariff Regulations.
- 34.** The Petroleum Board has invoked Regulation 18 (1) of the Authorisation Regulations in order to include the obligation of an entity to operate as a common carrier to be eligible for Regulations into Regulations 18 (1). The interpretation of the Regulations to include such obligation is not correct. Admittedly, the Authorisation Regulations could not provide to include the requirement of an entity to operate as a common carrier to apply for authorisation under the said Regulations. There is no mandatory obligation for an entity to operate as a common carrier under the said Regulations. Therefore, such obligation cannot be read into Regulations which are plain and unambiguous by the very same authority that has drafted the Regulations.

- 35.** Regulations 18 of the Authorising Regulations provide that if an entity is authorised, its tariff shall be determined under the Tariff Regulations. Regulation 2 (1) (e) (ii) of the Tariff Regulations provides that Provisional Initial Unit Natural Gas Pipelines Tariff is the tariff which will be applicable for a period commencing from the date of commissioning of natural gas pipeline within the purview of the Tariff Regulations and ending on the last date of the Financial Year.
- 36.** Regulation 3(2) of the Tariff Regulations makes it clear that the tariff regulations will apply to an entity that has been authorised under Regulations 18 of the Authorising Regulations. Thus, it is clear that no tariff fixed by the Petroleum Board can be made applicable for any period prior to the authorisation for pipeline coming within the purview of the Tariff Regulations.
- 37.** In the instant case, as mentioned above, the Gujarat Petronet has been authorised only on 27.07.2012.
- 38.** In view of the above, the Tariff Regulations would be applicable to the Gujarat Petronet only from the date of authorisation. This date, being the date on which the pipeline network of Gujarat Petronet came under the purview of the Tariff Regulations, it should also be the date

as per the Regulations 2 (1) (e) (ii) of the Tariff Regulations from which the tariff can be fixed by the Petroleum Board.

- 39.** In addition to this, Regulation 5(2) (b) of the Tariff Regulations provides for the entities to provide financial cost and other data to the Petroleum Board within 90 days of the grant of authorisation by the Board. Thus, the relevant date by all counts is the date when the pipeline became authorised.
- 40.** In fact, the first proviso to Regulation 5 (2) of the Tariff Regulations provides that the entity shall charge initial unit natural gas pipeline tariff “on account basis” from the date of authorisation by the Board of the pipeline referred to in Regulation 3(2) of Tariff Regulations till the date the Petroleum Board provisionally fixed the initial unit natural gas pipeline tariff.
- 41.** The second proviso to Regulation 5(2) of the Tariff Regulations also provides that adjustments will be carried out with retrospective effect with the customers for the difference that the entity so charged and that provisionally fixed by the Petroleum Board.
- 42.** This would make it clear that on determination of the provisional tariff by the Petroleum Board, the entity will carry out adjustments with retrospective effect relating back to the date from which the tariff were charged on account basis. In

other words, the Regulations clearly provide that the retrospective adjustments can be only from the date of authorisation and not from the date of Tariff Regulations. Thus, the impugned order has wrongly applied the Tariff Regulations from the date of the Tariff Regulations namely 20.11.2008 in respect of the date on which the pipelines were fixed by the Board i.e. on 27.07.2012.

43. If the draftsman wanted the tariff to apply retrospectively beyond the date of authorisation, he would have framed those Regulations in such a way that it expressly provided for this. For the entities which are covered by Regulation 17 i.e. entities authorised by the Central Government, the Regulations expressly provided that the tariff shall be retrospectively applied from the date of commissioning of natural gas pipe lines. But, such a provision has not been made in the Regulations relating to the Gujarat Petronet Limited (R-2).

44. As such, the differential treatment is evident from the reading of the Regulations 2 (1) (e) (ii), Regulation 3(ii), Regulation 5(ii) of the Tariff Regulations as well as the Regulations 17 and 18 of the Authorisation Regulations. Thus, the differential treatment between the entities approved by the Central Government as compared to the entities authorised by the Petroleum Board is not only permissible but actively contemplated and provided for.

- 45.** As stated earlier, if the intent had been that the tariff to be applied retrospectively for all cases, the same would have been so stated. If that is so, it must have been provided in the Regulations that tariff would apply retrospectively from the date of the application for authorisation or the date of commencing of the pipelines as in the case of pipelines authorised under Regulation 17 or the date of Notification of the Tariff Regulations. But, that is not the case here.
- 46.** Being cognizant that procedure under Regulation 18 contemplates a time gap between application and authorisation, the tariff regulations specifically provide that Tariff Regulations shall apply to pipelines authorised under Authorization Regulation 18 only from the date of authorization and not from any other date.
- 47.** Further, Section 11, Clause (e) of the Act states “regulate by Regulations”. It implies that there can be no determination of Tariff in any other manner. Section 62 of the Act also provides that Rules and Regulations have to be laid before the Parliament and it would come into effect only thereafter with such a modification as may be approved.
- 48.** From the careful perusal of these provisions, it is clear that the Petroleum Board cannot regulate prior to the date of the Regulations. In other words, the scheme of the Act does not permit one to go beyond the statute and to pass the orders.

In other words, once, the Regulations had been framed with respect to determination of tariff and authorisation of entities, then the order of the Petroleum Board necessarily has to conform to such Regulations.

- 49.** In this context, two other provisions of the Act have to be taken note of. They are Section 20(3) and Section 63 of the Act.
- 50.** Section 20(3) of the Act provides that the power exercised by the Petroleum Board is prospective. The provision of Section 20(3) uses the language “the Board may after following the procedure as specified by regulations...”. This indicates that the procedure is provided in the Regulations. Therefore, the power to impose tariff can only be prospective in accordance with the Act read with Regulations.
- 51.** Section 63 of the Act is a provision relating to transitional arrangements. This provides that the Petroleum Board may monitor the contracts entered into between the parties before coming into force of the Act and approved by the Central Government. The scope of Section 63 of the Act is also limited to certain type of contracts only and it does not relate to all types of contracts. Therefore, it is amply clear that if the Act does not provide for such transitional arrangements before the coming into force of the Regulatory

regime, then the transactions between the parties shall be covered by the contractual arrangement under the law of contract.

- 52.** According to the learned Counsel for the Petroleum Board, the Gujarat Petronet applied for authorisation in the year 2008 on the basis that they are operating as a common carrier network and as a common carrier network, the Gujarat Petronet was under an obligation to charge uniform tariff from all customers and under those circumstances, the tariff shall be fixed retrospectively.
- 53.** This submission, in our view, is misconceived.
- 54.** The Gujarat Petronet got classified as a common carrier network only on authorisation by the Board in 2012. Till then, the Gujarat Petronet cannot be treated as a common carrier merely because the application for authorisation was filed in 2008.
- 55.** In this context, the following Sections are to be quoted for understanding this concept. These provisions emphasise the factum of the Petroleum Board's authorisation or declaration as a common carrier which is to be a condition precedent for conferring that status. They are as follows:
- 56.** Section 2 (j) of the PNGRB Act is as follows:

“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...”.

57.Section 11 of the PNGRB Act lays down the functions of the Board. The relevant provisions are as follows:

Section 11 (e)

“The Board shall-

(a) protect the interest of consumers by fostering fair trade and competition amongst the entities;

(b).....

(c) authorize entities to-

(i) lay, build, operate or expand a common carrier or contract carrier

(d) declare pipelines as common carrier or contract carrier;

(e) Regulate, by regulations:-

(i) Access to common carrier or contract carrier so as to ensure fair trade and competition among entities and for that purpose specify pipeline access code;

(ii) Transportation rates for common carrier or contract carrier.”

58.Section 16 (a) of the PNGRB Act provides as follows:

“No entity shall lay, build, operate or expand any pipeline as a common carrier or contract carrier without obtaining authorization under this Act....”.

59.Section 17 (1) of the PNGRB Act provides as follows:

“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 authorisation under this Act...”.

60.Section 19 of the PNGRB Act provides for grant of authorisation:

“19 (1) When either on the basis of an application for authorisation for laying, building, operating or expanding a common carrier or contract carrier or for laying, building, operating or expanding a city or local natural gas distribution network is received or on suo motu basis the Board forms an opinion that it is necessary or expedient to lay, build, operate or expand a common carrier or contract carrier between two specified points, or to lay, build, operate or expand a city or local natural gas distribution network in a specified geographic area, the Board may give wide publicity of its intention to do so and may invite applications from interested parties to lay, build, operate or expand such pipelines or city or local natural gas distribution network.

(2) The Board may select an entity in an objective and transparent manner as specified by Regulations for such activities.”

61.Section 20 of the PNGRB Act lays down the process for declaration of a pipeline as a common carrier pipeline:

“20(1) If the Board is of the opinion that it is necessary or expedient to declare an existing pipeline for transportation of petroleum, petroleum products and natural gas or an existing city or local natural gas distribution network as a common carrier or contract carrier or to regulate or allow access to such pipeline or network, it may give wide publicity of its intention to do so and invite objections and suggestions within a specified time from all persons and entities likely to be affected by such decision.

(2) For the purposes of sub section (1), the Board shall provide the entity owning, the pipeline or network an opportunity of being heard and fix the terms and conditions subject to which the pipeline or network may be declared as common carrier or contract carrier and pass such orders as it deems fit having regard to the public interest, competitive transportation rates and right of first use.

(3) The Board may, after following the procedure as specified by regulations under Section 19 and sub-section (1) and (2), by notification:-

(a) declare a pipeline or city or local natural gas distribution network as a common carrier or contract carrier; or

(b) authorise an entity to lay, build, operate or expand a pipeline as a common carrier or contract carrier; or

(c) Allow access to common carrier or contract carrier or city or local natural gas distribution network,

(d) Authorise an entity to lay, build, operated or expand a city or local natural gas distribution network,”

- 62.** The conjoint reading of the above provisions of the Act would make it evident that the declaration of authorisation by the Board is required for the pipeline to become a common carrier pipeline. In other words, the concept of common carrier was introduced by the Act which provides for natural gas pipeline to become classified as a common carrier pipeline on authorisation by the Petroleum Board.
- 63.** Gujarat Petronet has been operating on an existing natural gas pipeline even prior to the Act coming into force. The Gujarat Petronet applied for grant of authorisation under Regulation 18 of the Authorising Regulations on 6.12.2008. As mentioned earlier, this authorisation was ultimately granted by the Petroleum Board on 27.07.2012. Hence, the condition precedent for the authorisation issued by the Board, only stood fulfilled on 27.07.2012 and as such, the Gujarat Petronet gets classified as a common carrier network only on this date, namely, 27.07.2012.
- 64.** The learned Counsel for the Petroleum Board has stated that since the Gujarat Petronet applied for authorisation as a common carrier, the Gujarat Petronet as per the definition of the common carrier ought to have charged and collected uniform tariff from all its customers whereas, in fact, it was charging varying tariff from various customers and, therefore, the Petroleum Board in order to rectify this, fixed the uniform tariff of Rs.24/MMBTU from the date of the Tariff

Regulations so as to achieve the objectives of the Petroleum Board Act.

65. We have carefully considered this submission made by the learned Counsel for the Petroleum Board on this issue, but we find no substance in this.

66. Once a pipeline is classified as a common carrier network on authorisation, there is an obligation to allow non-discriminatory access but, as far as tariff is concerned, there is no requirement to charge uniform tariff. So, the Petroleum Board cannot equate non-discriminatory access with uniform tariff for the following reasons:

(a) The issue of discrimination can arise only after the date of authorisation;

(b) Even in the post-authorisation/declaration, the discrimination focused on by the scheme of the Act is access or lack of access. That means the right of all shippers to get access to the pipeline network without any discrimination.

(c) As far as the tariff after authorisation is concerned, it would be the statutory tariff as per the Tariff Regulations. This means the regulated tariff.

(d) Crucially, the regulated tariff is not a uniform tariff as claimed by the Petroleum Board. This means that

different zones will have invariably non-uniform tariffs, depending on various parameters.

- 67.** Section 2(j) of the Petroleum Act only refers to non-discriminatory open access basis. There is no provision requiring uniform tariff from all customers.
- 68.** Section 11(e) of the Act also draws a distinction between access and tariff. Section 11 (e) (i) of the Act provides that the Petroleum Board shall regulate access to common carrier network through the Regulations to ensure fair trade and competition. Thus, the reason for non-discriminatory access is to foster a competitive market environment. This is distinct from Section 11 (e)(ii). This Section provides that the Petroleum Board shall provide for the transportation tariff for common carrier networks through Regulations. Thus, there is no requirement for charging uniform tariff which can be read into this Section.
- 69.** Under the Tariff Regulations itself, the transporter is entitled to charge different tariffs depending upon parameters like the length of the pipeline used by the customer etc.. It is noticed that for the Gujarat Petonet's network itself, the Petroleum Board approved tariff ranging from Rs.18/MMBTU to Rs.37/MMBTU depending on the zone in the network.

70. Various provisions of the Act and Regulations provide for the regulated tariff. Section 21(1) of the Petroleum Board Act provides as under:

“Subject to the provisions of this Act, the Board shall lay down, by regulations, the transportation tariffs for common carriers and contract carriers or city or local natural gas distribution network and the manner of determining such tariffs.”

71. Similarly, Regulation 18 and sub-Regulation 9 of the Authorising Regulations clearly provide that in case, the entity is selected for authorisation, the tariff shall be determined under the Tariff Regulations. Therefore, the condition precedent of the authorisation has to be fulfilled before a regulated tariff is applied. This is natural because Regulation 18 provides extensive scrutiny by the Petroleum Board which includes assessment of the progress of the network, verification of supporting documentation, public consultation etc., to finalize the facilities in the network which would be considered for granting authorisation. Only upon grant of authorisation, the entity comes to know which assets are regulated and the value of that will be used for tariff determination in line with the relevant regulations.

72. In fact, the Tariff Regulations stipulate the manner and extent to which such regulated tariff would be applied to various entities. In the present case, the regulated tariff for the Gujarat Petronet being authorised under Regulation 18

of the Authorising Regulations would be applicable from the date of the authorisation by the Petroleum Board.

73. It is argued by the learned Counsel for the Petroleum Board that till the time Gujarat Petronet is authorised, the Petronet cannot operate in a vacuum.

74. This submission also does not deserve acceptance.

75. The statutory regime for the Gujarat Petronet pipeline network only came into existence on 27.07.2012. Till then, neither law nor commercial reality can operate in a vacuum. This means prior to authorisation, it is the contractual rate, which would apply. Admittedly, the Gujarat Petronet has been operating a gas pipeline network from 2001 onwards. Therefore, the contractual arrangements must be given full play for the period prior to the statutory regime kicking in.

76. In other words, before getting authorisation from the Petroleum Board, the tariff applicable would be the contractual tariff i.e. the tariff negotiated between the Gujarat Petronet and each customer depending upon the volumes that are committed, length of the network that is being used to deliver gas and time period of agreement etc.

77. Since the Tariff Regulations expressly provide that the tariff fixed by the Petroleum Board can be applied only after authorisation, it is a necessary corollary that before the date

of authorisation the tariff fixed by the Petroleum Board cannot apply.

78. It is a well established principle of law that in the absence of expressed provision, a statute or regulation cannot apply retrospectively. When the law is silent on this point, then that statute/regulation will only apply prospectively. These are the decisions in this regard:

- (a) Shakti Tubes Limited Vs State of Bihar : (2009) 7 SCC 673 paras 24-25;
- (b) Binani Zinc Limited Vs Kerala State Electricity Board (2009) 11 SCC 244 para 36;
- (c) Kusumam Hotels Private Ltd Vs Kerala State Electricity Board & Ors: (2008) 13 SCC 213 paras 23,24, 36;
- (d) Meghalaya SEB vs Meghalaya SERC & Byrnihat Industries Association: 2010 ELR (APTEL) 0940, paras 14,35-38;
- (e) Nani Sha vs State of Arunachal Pradesh (2007) 15 SCC 406, at page 413 (Para 13);
- (f) Union of India vs Kartick Chandra Mondal (2010) 2 SCC 422, at page 426 (para 15);
- (g) Anil Chandra v Radha Krishna Gaur (2009) 9 SCC 454, at page 461 (para 19);
- (h) Keshavan Madhava Menon v. State of Bombay, 1951 SCR 228;
- (i) Dayawati v Inderjit (1966) 3 SCR 275 (para 9);
- (j) Subodh S Salaskar v Jayaprakash M Shah (2008) 13 SCC 689 at page 700;

(k) Workmen v Firestone Tyre & Rubber Co. of India (P) Limited., (1973) 1 SCC 813, at page 839;

(l) Ahmedabad Mfg. and Calico Printing Co Ltd., v S G Mehta, ITO, 1963 Supp (2) SCR 92;

(m) LIC v Escorts Ltd., (1986) 1 SCC 264, at page 317;

(n) Zile Singh v State of Haryana (2004) 8 SCC 1, at page 9 (Paras 13, 14 and 15);

79. The guidelines and principles with the ratio laid down in these cases with reference to retrospectivity is as follows:

(a) In order to make a provision applicable with retrospective effect, it has to be specifically expressed in the provision.

(b) It is a well settled principle of law that the court cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is the determinative factor of the legislative intent. If the language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent not found in the statute.

(c) If a rule/notification/circular claims to be retrospective in nature, it has to expressly specify as per the rules of interpretation of statutes.

(d) Every statute is prima facie prospective unless it is expressly or by necessary implications made to have retrospective operation.

(e) A substantive law, as it is well settled, in absence of an express provision, cannot be given a retrospective effect or retroactive operation.

(f) All laws that affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations unless the legislative effect may be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective operation is intended.

(g) The question whether a statutory provision has retrospective effect or not depends primarily on the language in which it is couched. If the language is clear and unambiguous, effect will have to be given to the provision in question in accordance with its tenor. If the language is not clear then the court has to decide whether in the light of the surrounding circumstances, retrospective effect should be given to it or not.

(h) The general rule is that all statute other than those which are merely declaratory or which relate only

to matters of procedure or of evidence are prima facie prospective; and retrospective effect is not to be given to them unless by express words or necessary implication, it appears that this was the intention of the legislature.

(i) It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation.

80. If we apply these principles and guidelines to the present case, it is clear that there is no indication or provision conferring powers to the Petroleum Board to give a retrospective effect. When such being the case, the effect of retrospectivity, cannot be given.

81. Consequently, we hold that the conclusion arrived at by the Petroleum Board in the impugned order with reference to the retrospectivity, is totally wrong. Therefore, the same is liable to be set aside.

82. Consequently, we hold that the tariff fixed in the present case, would be applicable only from the date of authorisation i.e. on 27.07.2012 and not from the date of tariff Regulations i.e. on 20.11.2008.

83. Summary of Our Findings

(a) The Appellant, admittedly, is a consumer of the Gujarat Petronet. It utilises the pipeline of Gujarat Petronet for transportation of Natural Gas to its Power Plants carried out as per the Gas Transmission Agreement. The Appellant, being the customer/ beneficiary of the pipeline of the Gujarat Petronet, has to bear the transportation charges levied by the Gujarat Petronet for usage of the natural gas pipeline. Thus, the Appellant becomes a necessary party in the proceedings relating to the determination of the transportation charges. This tariff will be recovered from the customers like the Appellant. Therefore, it is the case of the Appellant that the Petroleum Board has unlawfully directed the Gujarat Petronet to recover the large sums of money from the consumers like the Appellant. When this being the case, the Appellant becomes the Aggrieved party. Therefore, the Appellant has vested right for hearing and transparency in the tariff determination process. Had the Petroleum Board issued public notice inviting suggestions from the public like the customers who are likely to be affected, then such members of the public would have assisted the

Petroleum Board by objecting with the reasonings to the proposal made by the Petroleum Board. This was not done in this case. Hence, the Appeal is maintainable.

(b) On 6.5.2008, the Petroleum and Natural Gas (Authorising Entities to lay, build, operate or expand Natural Gas Pipelines) Regulations, 2008 came into force. The Tariff Regulations came into force on 20.11.2008. The Gujarat Petronet applied for the authorisation before the Petroleum Board on 6.12.2008 under Regulation 18 of the Authorising Regulations. The said authorisation was granted by the Petroleum Board to the Gujarat Petronet under the Authorising Regulations on 27.07.2012. The Tariff Regulations, 2008 provides that the Tariff Regulations are applicable only to those entities which have been granted authorisation under the Authorising Regulations, 2008. These provisions do not refer to anything with respect to the retrospective effect. In other words, the Act and the relevant Regulations do not contain any provision which empower the Petroleum Board to apply the tariff order retrospectively. In the present case, the Gujarat Petronet has been authorised only on 27.07.2012.

In view of the above, the above Regulations will be applicable to the Gujarat Petronet only from the date of the authorisation, i.e. 27.07.2012 and not prior to that. Section 20 (3) of the Act provides that the power to be exercised by the Petroleum Board is prospective. This section uses the language “the Board may after following the procedure as specified by the Regulations....”. This indicates that the procedure is provided in the Regulations. As per the Regulations and the Act, the power to impose tariff can only be prospective and not retrospective.

(c) Gujarat Petronet has been operating an existing natural gas pipeline even prior to the Act came into force. The Gujarat Petronet applied for grant of authorisation under Authorising Regulations on 6.12.2008. This authorisation was ultimately granted by the Petroleum Board on 27.07.2012. Hence the condition precedent for the authorisation issued by the Petroleum Board only stood fulfilled on 27.07.2012. As such, the Gujarat Petronet gets classified as a common carrier network on this date i.e. 27.07.2012. Hence, finding by the Tribunal in regard to the retrospectivity is patently wrong.

84. In view of our above findings, the Appeal is allowed. The impugned order on this issue is set aside. The Petroleum Board will pass consequential orders in terms of the findings given in this judgment. Hence, there is no order as to costs.

85. Before parting with this case, we deem it appropriate to issue some directions with regard to necessity to allow in future the Customers/Consumers of common carrier or contract carrier to participate in the tariff determination proceedings.

a) In the present case, we have held that the Appellant the customer, who is likely to be the affected party, should have been heard before determining the Tariff so that opportunity could be given to the Customers to put forth their views and this was not done in this case.

b) While defending the same, the learned counsel for the Petroleum Board contended that the Customers have not been given substantive right under the Regulation to participate in the Provisional Initial Tariff determination proceedings and therefore the opportunity was not given to them.

c) We recognize that to allow consumers like the Appellant to participate in the Provisional Initial

Tariff determination proceedings by the Petroleum Board is not a procedural requirement under the existing Tariff Regulations. Hence, our judgment in the current case is not pivoted on the fact that the Appellant was not given an opportunity to participate in the Provisional Initial Tariff determination proceedings by the Petroleum Board.

d) But, we are of the considered opinion that since the consumers would ultimately become real aggrieved parties, they must be heard before deciding the Provisional Initial Tariff. In view of our above conclusion, we direct the Petroleum Board to frame necessary Regulation providing a fair opportunity for the Consumers and the public to participate in the Provisional Initial Tariff determination proceedings by way of issuing public notice etc. in the future, so that tariff determination would be made in accordance with law.

(Nayan Mani Borah)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: Jan.2014.

✓ ~~REPORTABLE/NON-REPORTABLE~~