

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)**

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**APPEAL NO. 213 OF 2014
&
I.A. NO. 333 OF 2014 & IA NO. 177 OF 2016**

Dated: 4th November, 2016

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

IN THE MATTER OF:

**GSPC GAS COMPANY LIMITED (later renamed as Gujarat Gas Ltd.)
2ND FLOOR, BLOCK -15, UDYOG BHAVAN,
SECTOR 11- GANDHINAGAR – 382010**APPELLANT****

VERSUS

- 1. GAIL (INDIA) LIMITED
16 BHIKAJI CAMA PLACE,
NEW DELHI – 110066
AND**
- 2. PETROLEUM AND NATURAL GAS REGULATORY
BOARD
1ST FLOOR, WORLD TRADE CENTRE,
BABAR ROAD
NEW DELHI- 110 001 ...**RESPONDENTS****

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Mr. Piyush Joshi
Ms. Meghna Chandra
Mr. Arjun Masters
Ms. Sumiti Yadava

Counsel for Respondent(s) : Mr. Ramji Srinivasan, Sr. Adv.
Ms. Mayuri Raghuvanshi
Ms. Sara Sundaram
Mr. Rishabh Kapoor for R-1
Ms. Sonali Malhotra
Mr. Sumit Kishore
Ms. Arpana Vohra for
PNGRB

J U D G M E N T

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

1. In the present Appeal, the Appellant, GSPC Gas Company Ltd. has challenged the Judgment/Order dated 21st July 2014 passed by the Petroleum and Natural Gas Regulatory Board ("PNGRB") in Case 89/2014 filed by the Appellant. The case was filed by the Appellant under Section 25 read with Section 11(a) read with Section 11(f)(vi) read with Section 12(b)(v) read with Section 13(1)(g) of the Petroleum & Natural Gas Regulatory Board Act, 2006. The

complaint to PNGRB was against the conduct of the Respondent No. 1/GAIL of unilaterally imposing a non-applicable transmission tariff of Rs. 42.46/MMBTU on the volumes of APM gas and PMT Gas being supplied by the Respondent No. 1/GAIL to the Appellant amounting to restrictive trade practices. The PNGRB dismissed the complaint and a cost of Rs.5,00,000/- (Rupees Five Lakh only) was imposed on the complainant payable to the Respondent No.1/GAIL within a month from the date of the order.

2. The Appellant, GSPC Gas Company Limited is incorporated for the purposes to procuring and distribution of natural gas to retail customers, i.e. Domestic, Commercial/Non-Commercial, SMEs and CNG, and has its registered office at 2nd Floor, Block -15, Udyog Bhavan, Sector – 11, Gandhinagar – 382010.
3. The Appellant GSPC Gas Company Ltd. got amalgamated with GSPC Distribution Networks Limited alongwith three

other companies and the scheme of amalgamation was approved by the High Court of Gujarat vide order dated 30th March, 2015. Subsequently, the GSPC Distribution Networks Ltd. changed the name to "Gujarat Gas Ltd." Accordingly, the certificate of incorporation was issued by the Registrar of Companies, Ahmadabad for change of name from "GSPC Distribution Networks" to "Gujarat Gas Ltd." with effect from 15th May, 2015. Subsequently, Vide IA No.214 of 2015 in Appeal No. 213 of 2014, the 'Gujarat Gas Ltd.' applied to this Tribunal (APTEL) on 16.06.2015 for substitution of the Applicant (Gujarat Gas Ltd.) in place of GSPC Gas Company Ltd. and APTEL permitted to do so on 6th May, 2016.

4. The Respondent No.1/GAIL was incorporated in August, 1984 as a Central Public Sector Undertaking (PSU) under the Ministry of Petroleum & Natural Gas (MoP&NG). This company is mandated to work in the hydrocarbon sector in the areas of exploration and production and processing, storage, transportation, distribution and marketing and

also import of natural gas. The company was initially given the responsibility of construction, operation & maintenance of the Hazira – Vijaypur – Jagdishpur (HVJ) pipeline Project.

5. The Respondent No.2/Petroleum and Natural Gas Regulatory Board (PNGRB) is a statutory body constituted under the provisions of the Petroleum and Natural Gas Regulatory Board Act, 2006 (“PNGRB Act”) to regulate “the refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas excluding production of crude oil and natural gas so as to protect the interests of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas and to ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country and to promote competitive markets and for matters connected therewith or incidental thereto”.

6. The background of the Appeal and the details thereof as understood from the learned counsel of the Appellant and the documents submitted are as under: -

There was a writ petition filed by Dhrangadhra Prakruti Mandal against Union of India in 2011 (W.C. (PIL) No.47 of 2011) to the High Court of Gujarat praying that the High Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other writ, direction or order directing the Govt. of India

- a. to allot additional quota of natural gas for domestic and vehicular usage for the benefit of the general public and environment to the State of Gujarat at the APM rate at which rate the natural gas is being supplied to the cities of Delhi and Mumbai
- b. to prioritize and diversify the unutilized natural gas from non-priority sector to the CGD for their domestic and vehicular usage, as directed by the

Supreme Court of India in the cases of M.C. Mehta versus Union of India, reported in (2002) 4 SCC 356, which in turn would reduce the pollution and the cost of living, and

- c. to take steps to reduce air pollution in the State of Gujarat by converting the private and public vehicles from petrol and diesel to natural gas.

7. The High Court of Gujarat while disposing of the above writ petition (Writ Complaint (PIL) No. 47 of 2011) passed the following directions on 25.07.2012: -

- i. The Government of India is directed to allot natural gas for domestic and vehicular usage at the same rate to the city of Ahmadabad at which the same is supplied to Delhi and Mumbai to enforce the right of equality.
- ii. The respondent no.1 for the same reason is directed not only to discriminate between CGDs promoted by the Central PSUs and other CGDs but also among

Gujarat based CGDS in the matter of allocation of natural gas.

- iii. State of Gujarat is directed to pass necessary order compelling the owners of all the vehicles having registration in the State of Gujarat to use natural gas and, if necessary, even at the higher prices within a shortest possible period, at any rate, not exceeding one year from today for protection of the lives of the citizens living in this State.

8. Subsequent to the above order by the High Court of Gujarat, there was a Miscellaneous Civil Application (for direction) No.2477 of 2012 where the petitioner prayed for implementation of the High Court order dated 25th July, 2012 passed in Writ Petition (PIL) No.47 of 2011 and Writ Petition (PIL) No. 54 of 2011. The High Court of Gujarat passed the following two directions upon the Union of India on this prayer.

“60(1) The Government of India is directed to allot natural gas for domestic and vehicular usage at the same rate to the city of Ahmadabad at which the

same is supplied to Delhi and Mumbai to enforce the right of equality.

60(2) The respondent no.1 for the same reason is directed not only to discriminate CGDs promoted by the Central PSUs and other CGDs but also among Gujarat based CGDs in the matter of allocation of natural gas."

9. Pursuant to the above two orders of the High Court of Gujarat and subsequent guidelines for allocation/supply of domestic natural gas to CGD entities for CNG (transport) and PNG (domestic) dated 14.11.2013 formulated by Govt. of India, a number of Gujarat based companies were allocated gas for supply of CNG (transport) and PNG (domestic) in Gujarat.
10. In the guidelines for allocation/supply of domestic natural gas to CGD entities for CNG (transport) and PNG (domestic), formulated by Government of India, it was directed that GAIL (Presently GAIL (India) Ltd.) would supply domestic gas to CGD entities for purpose of CNG (transport) and PNG (domestic) at uniform lease price. However, the delivered price of domestic gas to individual

CGD entities for CNG (transport) and PNG (domestic) may vary on account of transportation charges and local taxes and duties.

11. The Appellant was one of the companies to be allocated APM gas and PMT gas by the Ministry of Petroleum and Natural Gas (MoPNG) for supply of CNG (transport) and PNG (domestic) on 14.11.2013 under the MoPNG allocation guidelines which were formulated to implement the judgment/order dated 25.07.2012 of the High Court of Gujarat delivered in PIL No. 47 of 2011. The Appellant was allocated 0.5132 MMSCMD of APM gas and 0.0705 MMSCMD of PMT gas for supply of natural gas to CGD entities for CNG (transport) and PNG (domestic). So far authorization for CGD network is concerned, the Appellant was authorized by Petroleum and Natural Gas Regulatory Board (PNGRB) for 5-year exclusive right for CGD network in Geographical areas of Nadiad, Navsari, Rajkot and Surendranagar vide different authorization letters dated 01.10.2013.

12. As far as tariff regulations are concerned Section 11(e)(ii) of the PNGRB Act empowers and mandates the PNGRB to regulate, by regulations, inter alia, transportation rates for common carriers or contract carriers. Section 22 of the PNGRB Act, inter alia, empowers and mandates the PNGRB to lay down by regulations, the transportation tariffs for common carriers or contract carriers, and the manner of determining such tariffs. The principle underlying determination of tariff is to ensure that the consumer interest is protected while the carrier/transporter gets back its cost as well as reasonable rate of return on such cost.
13. The Respondent No. 1/GAIL, after the Appellant had been allocated the PMT gas and APM gas, sent an e-mail dated 29.11. 2013 providing the details of delivery of the allocated volumes of gas and indicated that the delivery point for both the PMT gas and APM gas would be "Hazira/Suvali".

14. The Appellant, on 30.11.2013, in response to the above referred e-mail of the Respondent No. 1/GAIL wrote to the Ministry of Petroleum & Natural Gas, Government of India (with a copy to the Respondent No. 2/PNGRB) clearly stating, *inter alia*, that the proposed arrangement of the delivery point is not technically feasible as it cannot offtake the APM/PMT gas from Hazira/Suvali (delivery pressure 35-45 bar) as there is no arrangement to connect and flow the gas into GSPL High Pressure gas grid to which the Appellant's networks are connected. The Appellant therefore proposed that the Government of India direct the Respondent No. 1/GAIL to "swap the proposed gas from Hazira/Suvali to Dahej, Bharuch and deliver gas at the point of interconnection between PLL Terminal at Dahej and the GSPL pipeline network." Under this arrangement, they can offtake the gas from the GSPL grid in accordance with the Guidelines on Swapping of Natural Gas, issued by MoPNG dated 14.03.2012 ("**MoPNG Swapping Guidelines**").

15. The Respondent No. 1/GAIL responded to the swap proposal, vide its letter dated 07.12.2013, *inter alia* stating that "*However, GSPL has conveyed to MoP&NG that such arrangement within its pipeline network is not technically feasible citing pressure constraints of GSPL. Therefore even though, the domestic gas offered by GAIL at Suvali/Hazira was the least cost option; GAIL may now be required to supply the entitled quantity by CGD entities in North Gujarat by way of swapping the APM/PMT gas with its R-LNG and supply at GAIL-GSPL inter-connection point at Dahej, which enables delivery of gas on the high pressure network of GSPL. Under this option, as regards pipeline transportation tariff for supply of APM/PMT gas which is available ex-Hazira/ex-Suvali to the CGD entities in North Gujarat region, it may be noted that in terms of extant PNGRB regulatory framework, pipeline transportation tariff for natural gas pipeline shall be charged along the 'contractual path' for delivery of natural gas in the natural gas pipeline, based on the contractually*

defined entry and exit paths. GAIL's HVJ-DVPL upgradation tariff (currently Rs. 42.46 per MMBTU-GCV) plus statutory taxes shall be applicable subject to relevant orders and decisions that may be issued by PNGRB from time to time. Therefore this arrangement shall result in additional transportation cost to the CGD entities in North Gujarat."

16. In response to the Respondent No. 1/GAIL's above said letter, the Appellant wrote a letter dated 9.12.2013 to Ministry of Petroleum and Natural Gas, Government of India (with a copy marked to the Respondent No. 1/GAIL), in which it *inter alia*, in Para 5 stated "*GAIL has unfairly added transportation tariff component of Rs. 42.46/MMBTU while agreeing to shift the gas delivery point to Dahej, which will unnecessarily increase the CNG delivered price to customers by at least Rs. 3 per KG. This is absolutely avoidable if GAIL simply delivers the gas at GSPL's direct connectivity at PLL Dahej. GSPC Gas had already requested for the cheaper domestic gas at Dahej*

to be delivered at the point of interconnection between PLL Terminal at Dahej and the GSPL pipeline network (i.e. direct connectivity)."

17. The Appellant, as stated by them, on not getting any direct response from Respondent No.1/GAIL, finally approached the High Court of Gujarat for directions vide Misc. Civil Application (for direction) No. 2477 of 2012 in Writ Complaint (PIL) No. 47 of 2011 to resolve the issue.

The High Court of Gujarat in the above stated matter vide its order dated 10.12.2013 (in a Misc. Civil Application (for direction) NO. 2477 of 2012 in Writ Complaint (PIL) NO. 47 of 2011) recorded that the technical issue in relation to supply of gas was resolved, and GAIL (Respondent No. 1 herein) has agreed to supply the gas at the GSPL PLL direct connectivity at Dahej. The High Court also directed that the Appellant and the Respondent No. 2 will enter into necessary gas agreements.

18. Pursuant to the order of the Gujarat High Court dated 10.12.2013, the Appellant and the Respondent No. 1/GAIL had entered into two gas sales and transmission agreements namely: (a) Gas Sale and Transmission Contract (GSTC) dated 18.12.2013 (For APM gas) read

with Letter bearing reference no. GAIL/AZO/Gas Mktg/GSPC Gas/CGD-APM-SL/2013 dated 18.12.2013 ("**APM GSA**") and (b) Gas Sale and Transmission Contract (GSTC) dated 18.12.2013 (For PMT gas) read with Letter bearing reference no. GAIL/AZO/Gas Mktg/GSPC Gas/CGD-PMT-SL/2013 dated 18.12.2013 ("**PMT GSA**") (collectively the "**GSAs**"). Under the Article 4.1 of the GSA's, the Respondent No. 1/GAIL specifically agreed to supply the natural gas to the Appellant at the GSPL PLL Direct connectivity at Dahej, subject to the statutory tariffs decided by the regulatory authority, namely PNGRB. Accordingly, the Respondent No. 1/GAIL had started supply of the gas at GSPL PLL Direct connectivity at Dahej from 25.12.2013.

19. As a protest to payment of transportation charges of Rs.42.46/MMBTU, the Appellant submitted a letter on 22.01.2014 to Respondent No.1/GAIL which included the following two paragraphs alongwith others.

"The unilateral imposition of an inapplicable transportation tariff component of Rs.42.46/MMBTU, would deprive the customers from getting the cheaper domestic gas and would defeat main object of the said swapping guidelines as mentioned.

The said imposition is being illegally made by GAIL specifically to increase the price of gas for us as a Buyer and all our end consumers. Please note that GAIL's actions are clearly tantamount to "restrictive trade practice" as defined in s. 2(zi) of PNGRB Act as GAIL is clearly imposing conditions of delivery or to affect the flow of supplies in the market relating to natural gas or services in such manner as to impose on the consumers unjustified costs or restrictions.

The imposition of DVPL-GREP Zone 1 tariff when there is no physical movement of gas through DVPL-GREP, is clearly an act by GAIL of unilaterally imposing unjustified cost on consumers not connected to GAIL network or GAIL promoted city gas distribution networks; when the entire objective of the High Court Order and MoPNG directives has been to make available cheaper domestically produced gas to all city gas distribution companies equally and remove the discrimination that was being imposed in allocating such cheaper gas to only such city gas entities in which GAIL was a promoter shareholder.

The same discrimination and restrictive trade practice is now being sought to be repeated through imposition of inapplicable DVPL-GREP transportation tariff, when there is no physical movement of gas through DVPL."

20. Aggrieved by the actions of Respondent No.1/GAIL, of imposing the transportation tariff on the Appellant, the Appellant filed a case before the PNGRB (Case No. 89 of 2014) seeking directions: that (i) the imposition of transportation tariff by Respondent No. 1 was not applicable; (ii) that the Respondent No. 1 had engaged in restrictive trade practice and abuse of dominant position; (iii) to restrain the Respondent No. 1 from imposing any payment of transportations charges sought under the GSAs; and (iv) not to suspend or terminate the supply of gas under the GSAs.
21. PNGRB after scrutinizing all the correspondences made by the Appellant and Respondent No.1/GAIL and hearing the learned counsel of both the parties dismissed the complaint and a cost of Rs.5,00,000/- (Rupees Five Lakhs only) was imposed on the Complainant payable to the Respondent within a period of one month from the date of the order and hence the present appeal by the Appellant to APTEL.

22. From the above facts as reported, the crux of the case centers around the transportation tariff. The Appellant claims that they do not have to pay any transportation tariff to Respondent No.1/GAIL for delivering the natural gas at the PLL-GSPL interconnection point at Dahej, since Respondent No.1/GAIL is not using any gas pipeline of theirs for this purpose. The Respondent No.1/GAIL, however, is relying on an extant PNGRB regulation which allows them to claim transportation tariff based on a contractual path for virtual flow of gas even though they are not using any of their gas pipelines to deliver the gas at the PLL-GSPL interconnection point at Dahej.
23. It is the case of the Appellant that the Respondent No.2/PNGRB has allowed Respondent No.1/GAIL to impose the tariff of Rs.42.46/MMBTU for its HVJ-DVPL pipeline despite the fact that HVJ-DVPL pipeline does not at all transport any gas for the Appellant. As per the GSAs, the delivery point of gas is the GSPL PLL direct

connectivity at PLL's Dahej LNG terminal. The gas (Regasified LNG) is directly coming from PLL's regasification plant to GSPL pipeline. Respondent No.1/GAIL's HVJ-DVPL pipeline and even DVPL pipeline has nothing to do with this supply. Even though there is no physical molecule of gas passing through the HVJ-DVPL pipeline or the DVPL pipeline, the HVJ-DVPL pipeline tariff is imposed on the concept of "Contractual Path". There is no provision in the PNGRB Act nor is there any provision under any regulations made under the PNGRB Act that allow such imposition of pipeline tariff.

24. The Appellant has also stated that under the framework of PNGRB Act, the transportation charges cannot be made applicable when the entire transportation of gas is within the GSPL pipeline network independent of GAIL's pipeline. Appellant's another contention is that Respondent No.1/GAIL is wrongly seeking to rely the Respondent No.2/PNGRB's letter dated 4th February, 2013 on

transportation tariff for swapping of natural gas. The said letter in point No.(iii) stipulates that there needs to be contractually defined entry and exit path for “Contractual Path” to exist based on which Respondent No.1/GAIL can claim the transportation tariff.

25. In this case, the contractual delivery point is the point of direct connectivity between GSPL and PLL located within the LNG terminal at Dahej. The Respondent No.1/GAIL’s averment that Hazira is the entry point, is not supported by either the terms of the APM GSA and the PMT GSA nor by its own submissions before the Gujarat High Court where it undertook delivery of gas at GSPL PLL direct connectivity at Dahej. The oral order of the High Court of Gujarat dated 10th December, 2013 states.

“Mr. Syed, the learned Assistant Solicitor General of India appearing on behalf of the respondent submits that the technical problem that had accrued earlier regarding supply of the natural gas to the State of Gujarat has been resolved and GAIL has agreed to supply the gas at the GSPL PLL Direct Connectivity at Dahej, subject to the statutory tariffs decided by the regulatory authority, namely, Petroleum and

Natural Gas Regulatory Board. In view of the above agreement arrived at amongst the parties, no further order is necessary."

There is also no defined exit point in the GSAs since there is no usage of any GAIL pipeline and all exit points are on GSPL pipeline network. The delivery point in the PLL-GSPL interconnection is the entry point and not the exit point.

26. The Respondent No.1/GAIL in response to Appellant's above contention states that the case of the Appellant before the Tribunal that the transportation charges cannot be levied since there was no actual physical movement of gas in DVPL pipeline is legally untenable. It is submitted that on 04.02.2013, the Respondent No.2/PNGRB had issued a letter on transportation tariff for swapping of natural gas wherein it was specified that the extant tariff regulations of PNGRB emphasize adherence to "Contractual Path" for tariff determination;

while the contract can be based on physical or virtual flows, all that needs to be ensured is that the tariff is charged based on the **contractually defined entry and exit paths without any premium or discount.** In the present case, the Appellant had contracted for supply of APM and PMT gas under the APM GSA and PMT GSA dated 18.12.2013. The source of these gases were existing ONGC/Oil India fields as defined in the agreement dated 18.12.2013. In the gas sale and transmission agreement of APM gas, it stipulates:

Gas Sale, Transportation and delivery under this Agreement by the SELLER to the BUYER is from existing notified fields of ONCG, OIL., Tapti, Panna-Mukta and Ravva Agreement area as the case may be or any other Gas as notified by the Government from time to time.

For the PMT Gas in the gas sale and transmission contract, it stipulates:

The Seller is engaged, inter alia, in the business of transporting, trading and marketing of Gas. Pursuant to the decisions taken by Government of India, the Seller, as the designated nominee of the Government shall purchase natural gas at the stipulated price under the terms of the agreement between Seller and PMT JV for gas supplied from

Panna-Mukta and Mid and South Tapti Fields to be delivered to the Buyer at the Delivery Point.

27. During arguments, the learned counsel of the Respondent No.1/GAIL submitted a layout map where the collection center for both APM and PMT gas was shown as ONGC Hazira. Thus the entry point for the abovementioned gases was Hazira and the delivery point was Dahej as defined under the agreement dated 18.12.2013. The delivery point as mentioned in the APM gas agreement is:

Gas sold and transported to the Buyer pursuant to this Agreement shall be delivered by the Seller to the Buyer at the GSPL PLL Direct Connectivity at Dahej hereinafter referred to as Delivery Point.

For the PMT gas for delivery point, it mentions as:

Gas sold and transported to the Buyer pursuant to this Contract shall be delivered by the Seller to the Buyer at the Delivery Point at GSPL PLL Direct Connectivity at Dahej hereinafter referred to as Delivery Point.

28. Thus considering the source of the gas and the delivery point, contractual path in the present case was from Suvali/Hazira to Dahej and therefore the Respondent

No.1/GAIL was entitled to levy transportation charges based on the contractual path i.e. between Hazira and Dahej.

29. On the above issues, the Appellant's views are that since the Appellant will be required to pay only the price of APM/ domestic gas {considering the dominant objective of CGD getting low price), the contracts simply refer to and define "Existing Sources" of gas and also record that the gas being made available at the delivery point is from the "Existing Sources". This was strictly in compliance with the GOI Guidelines and the High Court Order. The term "Existing Sources" does not therefore indicate any agreement to a separate or pre-agreed "entry point" at the 'Existing Sources' nor does it provide for any pre-agreed "exit point" at the delivery point. There is no reference to any use of Respondent No.1/GAIL pipelines either physically or virtually in any of the contracts.

30. As regards the contractual path, the learned counsel for

the Appellant has relied on the contract/agreement signed with Respondent No.1/GAIL wherein the Article 18.5 provides as under: -

18.5 Entire Agreement

“This Agreement shall constitute the full Agreement between the parties and shall supersede all prior negotiations, representations, proposals and agreements, whether oral or written, regarding the subject matter of this agreement.”

31. This agreement dated 18.12.2013 does not speak about any swapping or liability of the Appellant to pay the transportation tariff based on the contract path from Hazira to Dahej. All the correspondence that took place between the parties prior to this agreement got null and void owing to this concluded agreement.

32. The learned counsel of the Appellant further emphasized that Respondent No.1/GAIL'S own letter dated 07.12.2013 made the statement that HVJ-DVPL tariff of Rs.42.46/MMBTU would be applicable if the delivery point for the gas was the GAIL-GSPL interconnection point. The

delivery point under the APM GSA and PMT GSA is not the GAIL-GSPL interconnection point but instead is the point of origin of the GSPL pipeline within the premises of the PIL's Dahej LNG terminal and hence the tariff of Rs.42.46/MMBTU does not apply in this case. The learned counsel also mentions that the Appellant obtains the Regasified LNG (RLNG) from the PIL terminal at Dahej in lieu of APM/PMT gas that was otherwise offered by Respondent No.1/GAIL. The swap agreement between the Appellant and Respondent No.1/GAIL substitutes the delivery of APM/PMT gas with the RLNG and therefore there is no question of Respondent No.1/GAIL bringing APM/PMT gas to Dahej and creating a contractual path in this regard.

33. As regards the transportation tariff, the learned counsel of the Respondent No.1/GAIL has also relied on the contract/agreement signed between the Appellant and the Respondent No.1/GAIL which both the parties executed out of their free will and consent. The clause

10.2 stipulates:

10.2 In addition to Gas Price as mentioned under Article 10.1 above, the Buyer shall pay to the Seller the following charges (as applicable):

a. The transmission rate shall be the "provisional initial unit natural gas pipeline tariff" as notified by PNGRB or (DVPL-VDPL Up-gradation Pipeline Zone-I) Natural Gas Pipeline i.e. Rs.42.46/MMBTU (Rupees Forth Two Point Forty Six Per MMBTU) (on Gross Heating Value basis).

And

a.1 The transmission rate shall be the "provisional initial unit natural gas pipeline tariff" of (name of the P/I) Natural Gas Pipeline i.e. Rs nil/MMBTU (Rupees nil per MMBTU) (on Gross Heating Value basis [name of the P/I network]).

Provided further that the above transmission charges are subject to revision/variation in line with the directives, instructions, orders, etc. of MoP&NG/PNGRB/Government Agency and accordingly shall be governed by the provisions of such directives, instructions, orders etc.

[OR/AND]

The transmission charges at the rate of Rs nil per thousand standard cubic meter (on NCV basis linked to nil Kcal/SCM).

Provided further that the above transmission charges are subject to

revision/variation in line with the directives, instructions, orders, etc. of MoPNG/PNGRB/Government Agency and accordingly shall be governed by the provisions of such directives, instructions, orders etc.

34. The learned counsel of Respondent No.1/GAIL interpreted the words "as applicable" to imply that the rate of transmission charges mentioned in the clause would be applicable subject to review/enactment of guidelines/regulations. The Respondent No.1/GAIL further submitted that the side letter dated 18.12.2013 to the agreement dated 18.12.2013 also specified that the Appellant would have to bear transmission charges for part of the gas which would be available on swapping. Thus the Appellant was fully aware that transmission charges would be applicable while executing the agreement dated 18.12.2013. The Respondent No.1/GAIL further quoted two more correspondences dated 07.12.2013 and 17.12.2013 prior to signing of the agreement on 18.12.2013 wherein applicability of

transmission tariff was clearly spelt out. As per the Letter of Credit submitted by the Appellant after the signing of the agreement, the Appellant also deposited the transmission charges of Rs.42.46/MMBTU which implies that the Appellant accepted the terms of the agreement in respect of transmission charges.

35. It is the contention of the Respondent No.1/GAIL that the Appellant for the first time raised the issue of transmission charges on 22.01.2013 after receiving the gas as per the agreement dated 18.12.2013. Before signing the agreement on 18.12.2013, the Appellant when appeared before the High Court of Gujarat on 10.12.2013 in W.P. PIL No. 47 of 2011 (*Dhrangadhra Prakruti Mandal v. Union of India*) knew that the Respondent No.1/GAIL took a stand before the High Court to supply the gas at GSPL PLL direct connectivity at Dahej as prayed by the Appellant before the High Court of Gujarat subject to statutory tariffs. It is also worth

mentioning that in none of the High Court of Gujarat's orders, the Appellant was held entitled to delivery of gas at Dahej without levy of transmission charges.

36. The Respondent No.1/GAIL further submits that the Appellant alongwith four other CGD entities of Gujarat namely; Adani Gas Ltd. (AGL), HPCL, Sabarmati Gas Ltd. (A Joint Venture of GSPC and BPCL, hereinafter SGL) and Charotar Gas Sahakari Mandli Ltd. (CGSML) entered into an agreement with the Respondent No.1/GAIL for supply of PMT and APM gas pursuant to MoP&NG Guidelines for allocation/supply of Domestic Natural Gas to CGD entities for CNG (transport) and PNG (domestic) dated 14.11.2013. The Respondent No.1/GAIL had originally proposed that the gas (APM & PMT) for all the above mentioned CGD entities can be delivered at Suvali/Hazira, being the cheapest option as no transmission charges would be levied upon delivery at Suvali/Hazira. The proposed delivery point as well as the CGD entities are located on the GSPL network(s) and above mentioned

CGD entities including the Appellant could have arranged to receive gas from Suvali/Hazira through swapping within GSPL network(s). However it was the Appellant who insisted on change of delivery point to Dahej citing technical infeasibility vide letter dated 30.11.2013 bearing No.GSPC Gas/C&M/HO/2013-14/053. Despite repeated requests of the Respondent, the Appellant did not provide any technical details to establish technical infeasibility of the proposed arrangement. This stand was reiterated even before the High Court on 03.12.2013 and taking cognizance of the same, MoPNG called a meeting on 05.12.2013 to be attended by GSPC, GAIL, HPCL, AGL & GSPL. As the meeting on 05.12.2013 remained inconclusive, it was proposed to continue the meeting on 06.12.2013. Though AGL, HPCL & GAIL attended the meeting, GSPC gas & GSPL did not attend the meeting on 06.12.2013; however subsequently, the Appellant took a complete U-turn and demanded delivery of most of the gas (up to 0.75 MMSCMD) at Dahej. In fact, the Appellant

admitted a different position in the rejoinder filed before the Respondent No.2/PNGRB by casually stating that in February, 2014 they were informed by their transporter that it was technically feasible to take gas from Suvali/Hazira.

37. That the Respondent No.1/GAIL vide email dated 14.02.2014 and letter dated 17.02.2014 had informed the Appellant that in order to make the proposal cost effective for all the CGD entities it is proposed to supply 1.1 MMSCMD at Suvali and the balance at Dahej to be apportioned proportionately to all CGD entities. The said proposal was made to ensure gas supply to all CGD entities on non-discriminatory basis so that benefit of cost reduction with respect to applicable tariff is made available to all PNG/CNG customers of the concerned CGD entities. However, the Appellant vide its letter dated 28.02.2014 in response to the above mentioned letter dated 17.02.2014, refused the above-mentioned proposal

stating that they are in a unique position to meet its requirement of gas for its South Gujarat market to the extent of 0.75 MMSCMD from Suvali delivery point without depending upon a swap arrangement. It is further submitted by the Respondent No.1/GAIL that the remaining four CGD entities in the Gujarat have not raised this dispute and the Appellant alone has filed this complaint.

38. The Respondent No.1/GAIL submits that the Appellant is bound by the terms of the agreement dated 18.12.2013 and they cannot go beyond the terms of the agreement without actually changing the terms itself in terms of the law laid down by the Supreme Court in **BSNL Vs. BPL Mobile Cellular Ltd., (2008) 13 SCC 597** wherein it was held that if the parties were ad idem as regards terms of the contract, any change in the tariff could not have been made unilaterally as any novation in the contract was required to be done on the same terms as

are required for entering into a valid and concluded contract. In **Appeal No.1,2 and 5 of 2012 [Indian Oil Corporation Ltd. Vs. Gujarat State Petroleum Corporation Ltd.]**, this Tribunal vide judgment and order dated 18.12.2013 had held that it was not permissible for Gujarat Petroleum to re-write the terms and conditions of gas supply agreement entered into between the parties.

39. In this regard, the Respondent No.1/GAIL also seeks to rely on the decision of the Supreme Court in **Shyam Telelink Ltd. Vs. Union of India, (2010) 10 SCC 165**, wherein it has been held that the maxim qui approbat non reprobat (one who approbates cannot reprobate) is firmly embodied in English common law and often applied by courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a

burden cannot take the former without complying with the latter.

40. The learned counsel of the Appellant on the above clause of transportation tariff (Article 10.2 of the contract) emphasizes that the DVPL-GREP upgradation tariff would be applicable only if it were applicable. Since the delivery point of the APM GSA and PMT GSA is clearly the GSPL-PLL direct connectivity point which is located within the premises of the PLL Dahej terminal itself, the said tariff is clearly not applicable.

41. The Appellant also reiterated that there was no concluded agreement between the Appellant and Respondent No.1/GAIL to supply the gas at Hazira/Suvali. The proposal of Respondent No.1/GAIL of giving the APM/domestic gas from Hazira/Suvali in the first instance and RLNG from a Dahej terminal through the use of DVPL pipeline at the inter connection point of GSPL about 500 meters away in the second instance remained as proposal

or offer and was not accepted by the Appellant. No contract fructified in terms of such offer of Respondent No.1/GAIL. A contract cannot come into existence till the proposal is unconditionally accepted by the other parties. The Appellant also referred to section 7 of the Indian Contract Act, 1872 which reads as under:

- "7. Acceptance must be absolute – In order to convert a proposal into a promise the acceptance must-
1. Be absolute and unqualified;
 2. Be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposal may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise, but, if he fails to do so, he accepts the acceptance.

As regards the contract signed on 18.12.2013, the Appellant has argued that this contract has not been in line with the principle of construction of contracts. The terms of the contract are to be interpreted with reference to the intention of the parties when the contract was

signed and such intention has to be gathered objectively by reading the contract as a whole and considering the circumstances under which the contract had come into force.

42. The Appellant also cited the Supreme Court's order in the case of Bank of India Vs. K. Mohandas (2009) 5 SCC 311 while in the court held as under: -

28. "The true construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards. Nor does subsequent conduct of the parties in the performance of contract affect the true effect of the clear and unambiguous words used in the contract. The intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. The nature and purpose of the contract is an important guide in ascertaining the intention of the parties.

31. "It is also a well-recognized principle of construction of a contract that it must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each clause should be interpreted so as to bring them into harmony with the other provisions, if that interpretation does no violence to the meaning of which they are naturally susceptible."

43. The Supreme Court order in another case on construction of contracts/surrounding circumstances is in the case of Sundaram Finance Ltd. Vs. State of Kerala AIR 1966 SC 1178 wherein the Supreme Court held as under: -

24. "The true effect of a transaction may be determined from the terms of the agreement considered in the light of the surrounding circumstances. In each case, the court has, unless prohibited by statute, power to go behind the documents and to determine the nature of the transaction, whatever may be the form of the documents."

44. On the issue of "PNGRB Guidelines" that could provide for charging of transportation tariff based on "contractual path", the Appellant's views are as follows:

The Respondent No.2/PNGRB wrote a letter dated 23.10.2012 to MoPNG on the specific subject of "Swapping of KG D-6 has for BGL at Shamirpet, Andhra Pradesh" and merely presented the PNGRB's interpretation that contractual path adherence is

necessary. In fact in Para (e) of the said PNGRB letter, PNGRB states that it is necessary that "tariff is charged based on the contractually defined entry and exit paths". The second of the PNGRB's letter dated February 4, 2014 addressed to all transmission entities has the subject matter "Transportation Tariff for Swapping of natural gas" and again in Para (iii) thereof it merely reiterates the need for adhering to contractually defined entry and exit points. However, this would not be applicable to the present circumstances since the only contractually determined point is the delivery point at the GSPL-PLL direct connectivity. Even if that position is applied to the present circumstances, the only tariff that can be applied is that of the GSPL pipeline tariff since the gas is delivered directly at the point of interconnection of GSPL with PLL's Dahej LNG Terminal.

The concluded contracts dated 18.12.2013 do not book any capacity on any Respondent No.1/GAIL pipeline. The

contract does not provide for any use of DVPL pipeline nor JVJ-DVPL pipeline. The contracts do not define any "entry point" nor does it define any "exit point" on the Respondent No.1/GAIL network. The contracts, instead are very clear that the gas volumes supplied thereunder will be delivered at the "GSPL-PLL direct connectivity at Dahej". The statement that gas would be supplied at the GSPL-PLL Direct connectivity subject to "*statutory tariffs decided by regulatory authority namely PNGRB*", are necessarily limited to the statutory tariff, as may be applicable. If and when the Appellant seeks the use of DVPL pipeline for transportation of gas to the inter connection point at a distance of 500 meters, the Zone 1 tariff of such pipeline which is Rs 42.46 as currently determined by PNGRB will be payable. It would be preposterous for GAIL to seek such tariff when its pipeline is not at all used to carry the gas.

45. The location where Respondent No.1/GAIL was offering in

the second instance to supply the RLNG was the point of interconnection between Respondent No.1/GAIL's DVPL pipeline and GSPL pipeline is located at a distance of 500 m outside the PLL's Dahej LNG Terminal. DVPL, which is the Dahej Vijaypur pipeline of GAIL originates from within the PLL's Dahej LNG terminal and continues onwards to Vijaypur in the State of MP. This DVPL pipeline interconnects with GSPL's pipeline that also originates from inside the PLL's Dahej LNG Terminal at a point located 500m outside the PLL's Dahej LNG terminal. Respondent No.1/GAIL therefore, instead of offering the RLNG at the point of origin of GSPL's pipeline inside PLL's Dahej LNG terminal had offered to provide the RLNG at the point of interconnection of DVPL and GSPL pipeline, both of which originate from within the PLL's LNG terminal. It was because of the proposed use of the DVPL pipeline to transport RLNG till the point of interconnection between DVPL and GSPL that Respondent No.1/GAIL stated that a transmission tariff of Rs 42.46/MMBTU would

be applicable. This tariff of Rs. 42.46/MMBTU was the Zone 1 DVPL Tariff and would have been applicable had Respondent No.1/GAIL's offer of delivery at the "GAIL-GSPL Interconnect Point at Dahej" been accepted since that would have resulted in DVPL pipeline being used for delivery of the RLNG. However, this offer was not accepted by the Appellant. Had the delivery point been at the GAIL-GSPL interconnect point, then there would have been actual utilisation and booking of capacity on the Respondent No.1/GAIL network and contractually defined entry and exit point would have been on Respondent No.1/GAIL's pipeline namely DVPL pipeline.

46. The basic aspect in regard to the present case is that no transportation would have been there if gas was ever envisaged through the gas pipe lines of Respondent No.1/GAIL from Hazira since they do not have any pipeline which can carry gas from Hazira to Dahej. Such path for gas transportation pleaded by

RespondentNo.1/GAIL as contractual is imaginary and illusory. The transportation tariff is to be allowed for a pipe line laid down by Respondent No.1/GAIL by incurring capital expenditure. Respondent No.1/GAIL can recover the transportation tariff that has been notified by PNGRB and there is no such tariff notified by PNGRB for Hazira to Dahej imaginary pipe line.

47. As regards the guidelines on swapping of natural gas issued by MoP&NG dated March 15, 2012, the learned counsel of the Appellant strongly contended that there has to be a pre-existing contract to have a swapping arrangement between the parties. If pre-existing contract is not available, contractual path cannot be determined. The learned counsel quoted clause (c) of the Swapping Guidelines issued by MoP&NG on March 15, 2012 as below:

(c) The rights and obligations of the parties involved, as set out under their contracts (GSA; GTA etc.) existing prior to any swapping arrangements should normally continue unchanged unless otherwise agreed to by the parties. However, fresh

GTA may be signed between the contracting parties for the actual gas swapped based on the contractual path and attendant tariff in accordance with the PNGRB guidelines.

48. In the present case, there was no contract prior to the one executed on 18.12.2013 which could have been used for swapping and accordingly these would have been a claim to protect the interest of the transporter of the gas. In fact there has been no concluded, binding or enforceable Gas Transportation Agreement (GTA) with Respondent No.1/GAIL existing as on 18.12.2013 which could be said to have been affected by finalization of RLNG supply as the source in place of APM/domestic gas.
49. The learned counsel of the Appellant also emphasized on clauses (a) and (b) of the Swapping Guidelines issued by MoP&NG on March 15, 2012 wherein it is mentioned that swapping has to be cost-effective and revenue-neutral for both the parties involved. The clauses (a) & (b) quoted by the learned counsel are as below:

- (a) All concerned parties (suppliers, consumers and transporters) to a potential swap transaction should co-operate to arrive at a cost-effective swap arrangement.
- (b) The operationalization of swapping should be such that all the parties involved are revenue-neutral over the entire length of the pipeline, with respect to contracts between these parties existing prior to the swapping arrangements.

50. The learned counsel for the Appellant states that a swapping arrangement under the GOI Guidelines would not be a swap that falls under the jurisdiction of Respondent No.2/PNGRB as it relates to allocation and supply of gas. Respondent No.2/PNGRB has jurisdiction only in relation to gas transmission and therefore cannot govern swapping of sources of gas under a gas supply arrangement.

51. On the cost-effectiveness and revenue-neutrality issues, the learned counsel of the Respondent No.1/GAIL referred to the letter by PNGRB dated October 23, 2012 written to MoP&NG on revenue-neutrality in regard to a

case of swapping of KGD6 gas for BGL Shamirpet, Andhra Pradesh wherein the following points were mentioned:

- “(b) Revenue neutrality with regard to transportation tariff is not feasible as per the extant PNGRB tariff regulations. The regulations deal with the principle of ensuring reasonable return to the transporter by adjusting the tariff through review of volumes, capital cost and operating cost. Further, regulations, provide that in case the volumes sold exceed the level of normative divisor considered in the tariff determination exercise, the consequential higher revenue earned by the entity would be passed on to all the shippers on the network through adjustment in tariff and swapping volumes would also be covered for the said purpose. The overall revenue neutrality with regard to revenue flows can be done by government if they so desire through pricing and taxation issues;
- (c) Since the requirement is with respect to determination of transportation tariff as a result of the swapping transaction, the consequential cost savings or incremental revenues to the concerned entities will not be taken into account by PNGRB as otherwise it would imply indirectly imposing concept of revenue neutrality to the transactions which is not part of extant regulations. As already stated earlier and at the cost of repetition, the concept of revenue neutrality is alien to the extant transportation tariff regulations;
- (e) The extant tariff regulations of PNGRB emphasize adherence to “Contractual path” for

tariff determination; while the contact can be based on physical or virtual flows, all that needs to be ensured is that the tariff is charged based on the contractually defined entry and exit paths.....”

52. The learned counsel also referred to the letter by MoP&NG on the issue of “Guidelines on Swapping of Natural Gas” dated 12th November, 2012 as a response to the above letter of PNGRB addressed to Secretary, PNGRB alongwith host of CEOs of different organizations. He quoted the relevant paragraph as below:

“3. It is, therefore, reiterated that the swapping of gas should be done in accordance with the provisions of the Guidelines and in the event of any disagreement, the matter may be agitated before the regulator namely, Petroleum and Natural Gas Regulatory Board for resolution of dispute.”

53. Subsequent to this letter of MoP&NG dated November 12, 2012, PNGRB issued directions to all the purchasers/marketers/transporters of natural gas vide letter dated February 4, 2013 the relevant directions of

which are reproduced below:

2.
 - i. The concept of 'revenue neutrality' with regard to transportation tariff for swapping arrangements is not feasible under the extant PNGRB tariff regulations. If the MoP&NG desires to maintain 'revenue neutrality', it would need to make appropriate changes in the pricing of natural gas;
 - ii. Transporters/shippers should mutually agree to contractual provisions for corresponding delivery of the swapped volume of natural gas in accordance with the provisions of the extant regulations;
 - iii. The extant tariff regulations of PNGRB emphasize adherence to 'contractual path' for tariff determination; while the contract can be based on physical or virtual flows, all that needs to be ensured is that the tariff is charged based on the contractually defined entry and exit paths without any premium or discount.
5. I am directed to convey that all producers/marketers/transporters of gas should accordingly implement these directions on transportation tariff for swapping arrangements of natural gas. Disputes, if any, in the matter may be formally filed before PNGRB for resolution.

54. In another context, Respondent No.1/GAIL has also referred to swapping of high cost RNLG in place of domestic gas as a substantial benefit to the Appellant and therefore, an obligation is claimed on the Appellant to pay

the transportation tariff of Rs 42.46 per MMBTU. As per the Appellant, the two aspects are distinct and separate. Respondent No.1/GAIL cannot seek higher gas price under the guise of seeking transportation tariff. Further cheaper gas being made available to CGD entities is a declared policy. Respondent No.1/GAIL cannot then be allowed to increase the price to the Appellant through transportation tariff when no pipe line of Respondent No.1/GAIL for transportation is used. The detailed and involved scheme under the GOI Guidelines was formulated by the Central Government to ensure economic pricing of gas to the Appellant and other similarly placed CGD entities in Gujarat and further to comply with the mandatory directions of the High Court of Gujarat. There was no whisper of any transportation tariff of Rs.42.46 per MMBTU or any other amount to be imposed in addition to the gas price in the GOI Guidelines or in the proceedings before the High Court on account of such swapping of gas.

55. The Respondent No.2/PNGRB also in their written submission to this Tribunal placed the complete facts of the Appellant's case and stood by the reasonings that they spelt out in their impugned judgment while dismissing the appeal of the Appellant. The Respondent No.2/PNGRB insisted upon the two major factors viz the Appellant signed the contracts with the Respondent No.1/GAIL on 18.12.2013 wherein it was mentioned that the Appellant would have to pay the transportation tariff of Rs.42.46/MMBTU to Respondent No.1/GAIL in addition to the price of the gas. The second major reasoning was that the Appellant is required to pay the transportation tariff to the Respondent No.1/GAIL as per the swapping guidelines which emphasize adherence to 'contractual path' for tariff determination as agreed between the parties under agreement.

56. After hearing the arguments put forward by the learned counsels of the rival parties and examining their written submissions, we observe the following:

Subsequent to allocation of APM gas and PMT gas to the Appellant by the Ministry of Petroleum and Natural Gas (MoPNG) for supply of CNG (transport) and PNG (domestic), the Respondent No.1/GAIL offered the natural gas to the Appellant for CNG (transport) and PNG (domestic) to deliver at Hazira/Suvali. The Appellant did not agree to receive the gas at Hazira/Suvali because of the pressure constraints of the GSPL pipeline which was to transport the natural gas received from the Respondent No.1/GAIL to the CGD network of the Appellant. The Appellant instead requested MoPNG who allocated the APM/PMT natural gas to the Appellant to advise the Respondent No.1/GAIL to supply the said natural gas to the Appellant at Dahej at the interconnection point of PLL-GSPL network by swapping the APM/PMT gas with RLNG for forward transportation of the said gas by GSPL to the Appellant's CGD network. Respondent No.1/GAIL in turn, this time offered the RLNG to the Appellant to deliver at the interconnection point of

GAIL-GSPL network at Dahej instead of PLL-GSPL interconnection point and also mentioned that in the case of delivering the natural gas at the interconnection point of GAIL-GSPL network, a transportation tariff of Rs.42.46/MMBTU would be applicable.

57. The main bone of contention for the rival parties so far was the natural gas delivery point i.e. Hazira/Suvali Vs. GAIL-GSPL interconnection point Vs. PLL-GSPL interconnection point. Having not agreed by the Respondent No.1/GAIL to deliver the gas at PLL-GSPL interconnection point, the Appellant preferred to approach the High Court of Gujarat on this matter. The oral order of the High Court of Gujarat on the matter reads as:

“Mr. Syed, the Ld. Assistant Solicitor General of India appearing on behalf of the Respondent submits that the technical problem that had accrued earlier regarding supply of the natural gas to the state of

Gujarat has been resolved and GAIL has agreed to supply the gas at the GSPL PLL Direct connectivity at Dahej, subject to the statutory tariffs decided by the regulatory authority, namely, Petroleum and Natural Gas Regulatory Board.

In view of the above agreement arrived at amongst the parties, no further order is necessary."

58. Owing to the above order of the High Court of Gujarat, the dispute between the Appellant and the Respondent No.1/GAIL regarding delivery point of the natural gas was resolved and both the parties signed thereafter two separate gas sales and transportation agreements for APM gas and PMT gas.

59. Though both the parties signed two separate agreements – one for APM gas for a sale price of US \$ 4.2/MMBTU and the other for PMT gas for a sale price of US \$ 5.73/MMBTU, the main dispute between them remained

in regards to transportation tariff. The Respondent No.1/GAIL claims in the instant case that the Appellant needs to pay them Rs.42.46/MMBTU as transportation charges as per their HVJ-DVPL- upgradation pipeline zone-1 tariff based on MoPNG swapping guidelines for swapping the APM/PMT gas at Hazira with the RLNG at Dahej. The Appellant claims that no transportation tariff is to be paid by them to the Respondent No.1/GAIL since they are not physically carrying the gas through their HVJ-DVPL upgradation pipeline nor through their DVPL-VDPL upgradation pipeline.

60. The HVJ pipeline of GAIL originates from Hazira in Gujarat and continues to Vijaypur in the state of Madhya Pradesh whereas the DVPL originates from Dahej in Gujarat to Vijaypur in Madhya Pradesh. There is no unidirectional pipeline to carry gas from Hazira to Dahej which has been confirmed by the learned counsel of the Respondent No.1/GAIL.

61. To investigate the matter on transportation tariff applicability, we now need to examine mainly the following three documents:-

- (i) The GSA and GTA signed on 18.12.2013 between the rival parties to know the nature of the contracts and the relevant clause therein regarding applicability of transportation tariff.
- (ii) The guidelines on swapping of natural gas issued by MoPNG on March 15, 2012
- (iii) The communication issued by Respondent No.2/ PNGRB to the producers/marketers/transporters of natural gas on February 4, 2013 on transportation tariff on swapping of natural gas.

62. Prior to signing of the agreements, there were a number of communications between the rival parties on the issue of delivery point following the guidelines on swapping of natural gas issued by MoPNG. In this regard of communication prior to signing of the contracts, the

Article 18.5 of the contracts reads as under:

18.5 Entire Agreement

“This Agreement shall constitute the full Agreement between the parties and shall supersede all prior negotiations, representations, proposals and agreements, whether oral or written, regarding the subject matter of this Agreement.”

The agreements signed on 18.12.2013 did not have any mention of swapping of natural gas, but there was a side letter signed on the same date i.e. 18.12.2013 by both the parties where in the following paragraph, there was a mention about swapping of part of the gas.

“Further, the Parties acknowledge that supply of part quantities under this Agreement shall require swapping of gas. Accordingly, any additional cost like transmission charges, any other charges, statutory levies, octroi, etc. incurred in view of swapping of such quantity of gas shall be applicable to the Buyer. The Seller shall inform such additional charges to the Buyer in writing from time to time and the Buyer agrees to pay the same to the Seller.”

The above Article of the contracts on Entire Agreement does not allow either party to claim anything which they

might have communicated to the other party prior to the agreement. Secondly, the side letter signed by both the parties also does not talk about which part of the gas would involve swapping nor was there any correspondence by Respondent No.1/GAIL to the Appellant on any additional transportation charges which became applicable because of swapping of a portion of the gas which as per the contracts, Respondent No.1/GAIL was required to inform the Appellant as and when such situation arises.

63. We have also examined the relevant clauses in both the agreements regarding transportation charges. We have observed that the relevant clauses on the transportation charge in the agreements are not strictly the same though the gas being supplied is the same for both the contracts i.e. RLNG and the delivery point is also the same i.e. the PLL-GSPL interconnection point. We have, however, observed that in both the contracts, it is written

at the beginning of the clause before talking of transportation charges and marketing margin etc. as follows:

“In addition to price as mentioned under Article 10.1/10.8 above, the BUYER shall pay to the SELLER the following charges (as applicable).”

64. As regards swapping, we have examined the definition of swapping and the relevant guidelines issued by MoPNG vide its letter dated March 15, 2012.
65. From the definition of swapping, it is very clear that the second party, in the instant case the Appellant has to indemnify the first party i.e. the Respondent No.1/GAIL from any additional financial liability on account of swapping of the natural gas. In the instant case, there has been no claim by Respondent No.1/GAIL having any additional financial liability to the Appellant for shifting the delivery point for gas from Hazira to Dahej. From the

guidelines, it is also noted that the swap arrangements should be cost-effective and revenue-neutral with regard to contracts between the parties existing prior to swapping arrangement. No such contracts between the parties have been reported to us to have been existed prior to signing the gas supply and transportation agreement dated 18.12.2013. It is also noted that the applicability of the 'contractual path' also in case of swapping needs to have a pre-existing contract between the parties which in this present case was not there. Further, it is also noted that any entity responsible for transportation of gas which in this case is the Respondent No.1/GAIL, cannot deny swapping of the same if it is technically feasible. In the present case, the Respondent No.1/GAIL agreed to shift the delivery point for the gas from GAIL-GSPL interconnection point to PLL-GSPL interconnection point before the High Court of Gujarat.

66. On the issue of transportation tariff on swapping of

natural gas, the directions given by Respondent No.2/PNGRB on February 4, 2013 originate from a particular case i.e. Swapping of KG D6 gas for BGL at Shamirpet, Andhra Pradesh for which Respondent No.2/PNGRB wrote a letter dated October 23, 2012 to MoPNG putting forward their views on that particular case. In the said letter, Respondent No.2/PNGRB mentioned about the 'contractual path' and added – 'while the contract can be based on physical or virtual flows, all that needs to be ensured is that the tariff is charged based on the contractually defined entry and exit paths.' In response to this letter of Respondent No.2/PNGRB, MoPNG simply referred to the Guidelines on swapping of natural gas and advised that in the event of any disagreement, the matter may be agitated before the regulator namely, Petroleum and Natural Gas Regulatory Board for resolution of dispute.

67. Since the directives of Respondent No.2/PNGRB to all the producers/marketers/transporters of gas vide letter dated

February 4, 2013 emphasized on contractual path for charging of transportation tariff linked to contractually defined entry and exit paths, we have tried to understand how Respondent No.1/GAIL and the Appellant have interpreted the entry and exit paths in their arguments before the Tribunal. In both the agreements for APM and PMT gas, there is a mention about source of gas. In the APM gas agreement, it is written as Existing Source(s) and the definition of Existing Source(s)/fields is given as: means gas available/produced from the fields of ONGC, OIL, Tapti, Panna-Mukta and Ravva agreement area. In the other agreement for PMT gas, the source of gas is written as Panna-Mukta and mid and south Tapti Fields. While interpreting the entry and exit paths, the learned counsel for the Respondent No.1/GAIL confirmed that all APM and Panna-Mukta, Mid & South Tapti gases are available at Hazira. The Respondent No.1/GAIL'S contention is – since the source of the gas to be supplied by them to the Appellant is available at Hazira, the entry

point for the gas to be delivered is at Hazira. The delivery point is any way written in the contracts as PLL-GSPL interconnection point at Dahej which makes the exit point. The Appellant now has to consider the contractual path as Hazira to Dehaj considering Hazira as entry point and PLL-GSPL interconnection point as exit point and a virtual flow of gas even though there is no physical flow of gas between Hazira and Dahej.

68. On the above issue of entry and exit paths, the contention of the Appellant is totally different. As per the learned counsel of the Appellant, the source of gas for both the APM and PMT gas is simply mentioned in the contracts just to link it to the price of gas. Since sale price of gas (US \$ 4.2/MMBTU for APM gas and US \$ 5.73/MMBTU for PMT gas) was as per Govt. of India's guidelines for allocation of gas for CNG (transport) and PNG (domestic), it is very much necessary to mention about the source of gas in the contracts.

69. Having gone through the GSA and GTA signed between the rival parties on 18.12.2013 specifically with respect to transportation tariff, guidelines on swapping of natural gas issued by MoPNG on March 15, 2012, Respondent No.2/PNGRB's directions on February 4, 2013 to all producers/marketers/transporters of natural gas on transportation charges on swapping on natural gas, along with all the written statements submitted by both the parties and the arguments of the learned counsels of both the parties before the Tribunal, our overall considered views on the entire case are as under:

The objective of making the Petroleum and Natural Gas Regulatory Board Act, 2006 as mentioned in the Act reads as under:

"An Act to provide for the establishment of Petroleum and Natural Gas Regulatory Board to regulate the refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas excluding production of crude oil and natural gas so as to protect the interests of consumers and entities engaged in specified activities relating to

petroleum, petroleum products and natural gas and to ensue uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country and to promote competitive markets and for matters connected therewith or incidental thereto."

The Article 11 (a) of the PNGRB Act, 2006 spells out the function of the Board as: The Board shall -

"Protect the interest of consumers by fostering fair trade and competition amongst the entities."

70. The objective of forming the Petroleum and Natural Gas Regulatory Board and its functions as mentioned above, clearly stipulate to protect the interest of the consumers of natural gas. Hence, undue imposition of any charges to the consumers will be a violation of the PNGRB Act, 2006. In the instant case, the RLNG is delivered directly at the PLL-GSPL interconnection point from the Petronet LNG facilities at Dahej. This does not involve any transportation of gas to deliver at the delivering point using any pipelines of the Respondent No.1/GAIL or any third party transporter. Hence, if the transportation charge based on virtual flow is imposed on the Appellant,

the end consumers of gas would have to bear this additional charge in addition to the price of gas, the marketing margin allowed for the entities and the related taxes etc. This is against the PNGRB Act's objective to protect the interest of the consumers. Exactly for this reason, for determination of natural gas pipeline tariff, the Consolidated Regulations Incorporating Amendment Regulations Notified as on 01.12.2015 in the chapter on determination of natural gas pipeline tariff, the Article 4 (2) – says:

“Prior to determination of the natural gas pipeline tariff, the Board shall issue a public notice on its website containing a public consultation documents providing an opportunity to stakeholders (including the entity concerned) to participate in the determination of the natural gas pipeline tariff.”

Since in the instant case, CNG (transport) and PNG (domestic) consumes are involved while paying for the transportation tariff based on contractual path with virtual flow where there was no use of any pipeline at all, we are

not aware, whether the stakeholders were consulted on imposition of such transportation charges.

71. As we understand, the question of charging transportation tariff based on a virtual flow arose in connection with a particular case i.e. Swapping of KG D6 gas for BGL at Shamirpet, Andhra Pradesh and there after Respondent No.2/PNGRB issued the letter on February 4, 2013 to all producers/marketers/transporters of gas directing them to follow this concept. MoPNG's guidelines on swapping of natural gas issued on March 15, 2012, however, does not talk of this concept. We feel, in the instant case, the transportation charges based on contractual path with virtual flow of gas is not applicable. This is corroborated by the following facts.

72. As per the guidelines on swapping of natural gas issued by MoPNG on March 15, 2012, there needs to be a pre-existing contract between the parties to swap the gas for

technical/operational reasons etc. We agree with the statements of the learned counsel for the Appellant in this regard. There was no pre-existing contract between the Appellant and the Respondent No.1/GAIL for supply of APM/PMT gas and transportation of the same before the two contracts were signed on 18th December, 2013. To supply gas at Hazira/Suvali was the initial offer of Respondent No.1/GAIL which they subsequently offered on their own to supply at GAIL – GSPL interconnection point. To finally supply the gas at PLL-GSPL interconnection point was as per the directive of the High Court of Gujarat. First contract was signed between the parties on 18.12.2013 only after the directive of the High court of Gujarat. No subsequent contract was also signed between the parties based on any swapping arrangement.

73. The offer/proposal by a party to another cannot be construed as contract. A contract cannot come into existence till the proposal is unconditionally accepted by the other parties. Section 7 of the Indian contract Act,

1872 reads as under: -

- "7. Acceptance must be absolute – In order to convert a proposal into a promise the acceptance must-
1. Be absolute and unqualified;
 2. Be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposal may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise, but, if he fails to do so, he accepts the acceptance.

The Supreme Court's order in the case of Bank of India Vs. K. Mohandas (2009) 5 SCC 311 also held as under: -

28. "The true construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards. Nor does subsequent conduct of the parties in the performance of contract affect the true effect of the clear and unambiguous words used in the contract. The intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. The nature and purpose of the contract is an important guide in ascertaining the intention of the parties.

31. "It is also a well-recognized principle of construction of a contract that it must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each clause should be interpreted so as to bring them into harmony with the other provisions, if that interpretation does no violence to the meaning of which they are naturally susceptible."

In another case on construction of contracts/surrounding circumstances in the case of Sundaram Finance Ltd. Vs. State of Kerala AIR 1966 SC 1178, the Supreme Court held as under: -

24. "The true effect of a transaction may be determined from the terms of the agreement considered in the light of the surrounding circumstances. In each case, the court has, unless prohibited by statute, power to go behind the documents and to determine the nature of the transaction, whatever may be the form of the documents."

74. On the request of the Appellant, there was only a shift of the source of the gas from Hazira to Dahej. There was no transportation involved. Moreover, based on the first offer of Respondent No.1/GAIL to supply gas at Hazira/Suvali to the Appellant, the Respondent No.1/GAIL did not

reportedly incur any expenditure on infrastructure build-up or any other capital cost to make them ready to supply the gas at Hazira. Hence, even otherwise, Respondent No.1/GAIL is not eligible for any compensation for any losses arising out of the shift of the source of the gas. Moreover, as per MoPNG's guidelines on swapping of natural gas, unless there is certain technical/operational problem, Respondent No.1/GAIL was required to agree for any swap proposal by the Appellant which, they agreed though after the order of the High Court of Gujarat. On the same issue, we also do not agree with the view of the learned counsel of the Respondent No.1/GAIL that since Respondent No.1/GAIL was supplying RLNG at Dahej which was costlier than the APM/PMT gas at Hazira, they are required to be compensated by additional transportation charges. This aspect is nowhere stipulated in the swapping guidelines nor anything of this sort is mentioned in the contracts signed by the parties on 18.12.2013. Respondent

No.1/GAIL agreed to supply RLNG instead of APM/PMT gas as per the laid down guidelines of the Govt. of India for allocation of gas to CNG (transport) and PNG (domestic).

75. The contract clause on transportation charges in the contracts signed on 18.12.2013 does not talk of direct applicability of transportation tariff. It says as applicable as prefix to different charges including transmission charges as per DVPL-VDPL up-gradation pipeline zone-1 tariff. Since delivering gas at the PLL-GSPL interconnection point does not involve any transportation of gas by using any gas pipeline, strictly as per the contracts signed on 18.12.2013, no transportation tariff is applicable. For a moment, if we assume that swapping of gas took place from GAIL-GSPL interconnection point to PLL-GSPL interconnection point, then it would have involved transporting of the gas from the PLL's Dahej terminal for about 500 to the delivery point using the

DVPL pipeline and in that case DVPL-VDPL up-gradation zone-1 tariff would have been applicable. But the Respondent No.1/GAIL has nowhere claimed that this type of swapping of gas took place between them. Instead, the Respondent No.1/GAIL in their all written replies to the present appeal and also the learned counsel of theirs has been claiming before the Appellate that Appellant is required to pay the transportation tariff as per HVJ-DVPL pipeline zone -1 tariff to Respondent No.1/GAIL ignoring the fact that in the contracts signed by both the parties on 18.12.2013, the tariff applicability was mentioned as per DVPL-VDPL zone -1 tariff and not the HVJ-DVPL zone-1 tariff. This situation has led to a big dichotomy. We have been made to understand by the learned counsels of both the rival parties that HVJ-DVPL pipeline cannot carry any gas from Hazira to Dahej since HVJ and DVPL lines both head towards Vijaypur only from two different starting points viz Hazira and Dahej. As against the above claim of Respondent No.1/GAIL for

transportation tariff as per HVJ-DVPL zone-1 tariff rate on the basis of swapping of gas, the Respondent No.1/GAIL has been raising the transportation tariff invoices to the Appellant as per the relevant contract clause (DVPL-VDPL zone-1 tariff) only. The Appellant also having left with no choice and under duress of invocation of the letter of credit by Respondent No.1/GAIL, has paid the transportation tariff as raised by Respondent No.1/GAIL.

76. The GSA and GTA contracts signed between the two rival parties on 18.12.2013 superseded all the previous negotiations, representations, proposal etc. between the parties including the offers of Respondent No.1/GAIL to deliver the gas at Hazira/Suvali and then at the interconnection point of GAIL-GSPL lines. The finally agreed delivery point for the gas was the PLL-GSPL interconnection point and there is no involvement of transportation of gas by Respondent No.1/GAIL to deliver it at this delivery point. It therefore, does not make

Respondent No.1/GAIL entitled for claiming any transportation tariff from the Appellant. The DVPL-VDPL zone-1 tariff could have been applicable if Respondent No.1/GAIL would have delivered the gas at the GAIL-GSPL interconnection point in the event of occurrence of some technical/operational problems at the PLL-GSPL interconnection point. The claim of Respondent No.1/GAIL for the HVJ-DVPL zone-1 tariff based on 'contractual path' with virtual flow of gas also does not have any merit in absence of a pre-existing contract and a concluded swapping arrangement agreement. We strongly feel that there is a clear contradiction between the relevant contents of the contracts on transportation charges and the claim of the Respondent No.1/GAIL on the same before APTEL. We do not, however, want to comment on the merits/demerits of the directives of the Respondent No.2/PNGRB to all the producers/marketers/transporters of natural gas on applicability of transportation tariff based on 'contractual path' with virtual flow of gas.

Considering all the related evidence and circumstances, we feel claiming of transportation tariff based on the assumption that Hazira to Dahej is the contractual path with virtual flow of gas does not carry any merit.

ORDER

In order to protect the interest of the consumers of the natural gas without also affecting the interest of the entity engaged for supply of the gas in the instant case, the impugned order passed by the Petroleum and Natural Gas Regulatory Board on 21st July, 2014 in the Case No.89 of 2014 filed by the Appellant against the Respondent No.1/GAIL is set aside. The Respondent No.1/GAIL is directed to refund the entire money which they collected from the Appellant as transportation charges to the Appellant within a month time from the date of issuance of the order and the Appellant is ordered to refund the appropriate amount accordingly to the consumers of the natural gas by adjusting with their

future bills on consumption of gas during the successive months immediately after receiving the amount from Respondent No.1/GAIL.

The Appeal is disposed of in the aforesaid terms.

Pronounced in the open Court on this 4th day of November, 2016.

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

Justice Ranjana P. Desai
[Chairperson]

√REPORTABLE/~~NON-REPORTABLE~~