

**APPELLANT TRIBUNAL FOR ELECTRICITY**  
**(APPELLATE JURISDICTION)**

**APPEAL NO. 104 OF 2016 &**  
**IA-249, IA-250 OF 2016**

**DATED : 26<sup>th</sup> July, 2019**

**PRESENT:-**

HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON  
HON'BLE MR. B. N. TALUKDAR, TECHNICAL MEMBER

**IN THE MATTER OF:-**

GAIL GAS LTD.,  
THROUGH ITS CHIEF OPERATING OFFICER  
GAIL GAS LIMITED  
13<sup>TH</sup> & 14<sup>TH</sup> FLOOR,  
JUBILEE TOWER  
B-35 & 36, SECTOR-1,  
NOIDA-201301 (UP)  
PHONE 01202532270

...APPELLANT(S)

**VERSUS**

1. PETROLEUM & NATURAL GAS REGULATORY BOARD  
1<sup>ST</sup> FLOOR, WORLD TRADE CENTRE,  
BABAR LANE, BARAKHAMBA ROAD  
NEW DELHI- 110001 (TEL : 23709136)

2. THE CHIEF MANAGER  
IDBI BANK LTD.,  
INDIAN RED CROSS SOCIETY BUILDING  
1<sup>ST</sup> RED CROSS ROAD  
NEW DELHI-110001 (TEL : 66281003)

...RESPONDENT(S)

Counsel for the Appellant(s) : Mr. Sachin Puri, Sr. Adv.  
Mr. Ajit Singh Verma  
Mr. Ajit Pudusery  
Mr. Kamil Khan  
Mr. Sandeep Kumar  
Mr. Navroop Singh Bakshi

Counsel for the Respondent(s) : Ms. Sonali Malhotra  
Mr. Prashant Bezboruah  
Mr. Anant Bhardwaj  
Mr. Amit Sanduja  
Mr. A. Ghosh, R-1

**JUDGMENT**

**Per Hon'ble Mr. B. N. Talukdar, Technical Member, (Petroleum and Natural Gas)**

1. GAIL Gas Ltd, the Appellant herein, has filed this appeal under Section 33 of the Petroleum & Natural Gas Regulatory Board Act, 2006 challenging the orders dated 22.05.2013 passed by the Petroleum and Natural Gas Regulatory Board invoking part of the bank guarantee submitted by the Appellant in respect of the city gas distribution networks in the geographical areas of Kota, Dewas, Meerut and Sonapat. The total amount of bank guarantee invoked for the four geographical areas combined together has been Rs. 3,53,81,000/-. The bank guarantees were submitted by the Appellant against any breach by the Appellant with respect to timely commissioning of the CGD networks and meeting the service obligations. The IDBI Bank Ltd was the primary obligator undertaking the payment to the Board against any breach by the Appellant.

2. The Appellant is a wholly owned subsidiary of GAIL (India) Ltd and has been incorporated on 27.5.2008 by GAIL for the purpose of implementing the City Gas Distribution projects in authorized cities; distribution and marketing of CNG as fuel for intercity as well as intra city vehicles; creating infrastructure and distribution and marketing of piped natural gas for domestic/commercial/industrial purposes, allied retail businesses at CNG refueling station; formation of JVs with Gas producers/strategic partners for implementation of CGD projects; and as a promoter of all existing JVCs for City Gas Distribution etc. The Appellant is a limited company under the Companies Act.

3. The Respondent No. 1, the Petroleum and Natural Gas Regulatory Board, (the Board) is a statutory body constituted under the provisions of the Petroleum and Natural Gas Regulatory Board Act, 2006 ("PNGRB Act") to regulate "the refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas excluding production of crude oil and natural gas so as to protect the interests of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas and to ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all

parts of the country and to promote competitive markets and for matters connected therewith or incidental thereto”.

4. The Respondent No. 2 is IDBI Bank Ltd, who issued the Performance Bank Guarantees to the Board on behalf of the Appellant as the primary obligator.

5. The gist of the facts of the case is as under:

Prior to the enactment of the PNGRB Act, 2006, the Ministry of Petroleum and Natural Gas (the Ministry), Government of India was the exclusive authority to decide on all matters relating to petroleum and natural gas sector in India. The Delhi High Court in the judgment dated 21.1.2010 in Writ Petition No. 8415 of 2009 and 9022 of 2009 filed by Voice of India and Indraprastha Gas Ltd., gave the following findings regarding the procedure adopted by the Board and also its powers under the Act :

*“39. We are of the opinion that Section 16 is the source of power as it gives statutory mandate to the Board to issue authorizations. Section 16 also confers monopoly on the Board to issue authorizations. Without notification of Section 16, Board does not have the power to*

*issue authorizations, inasmuch as there would be no ban on other entities from laying, building, operating or expanding CGD Networks.*

*40. We are further of the view that Sections 17, 18 and 19 of the PNGRB Act are all procedural Sections in aid of Section 16. In fact, Sections 17 to 19 lay down the procedure to be adopted by the Board for inviting applications from entities and selecting the best amongst them. These Sections do not give the Board the power to grant authorisation to an entity which has applied to it. This power is specifically provided under Section 16 of the Act and in absence of non-notification of the same, the Board cannot issue LOI's to any of the entities selected by it...."*

6. Special Leave Petition Nos. 5408 of 2010 etc., filed by the Board against the aforesaid judgment of the Delhi High Court having been disposed of by the Supreme Court, the findings recorded by this Court became final. Prior to the judgment of this Court clarifying the issue, the Board had started arrogating to itself the functions of granting authorisations and had invited various applications for setting up of CGD networks in various cities.

7. Vide letter dated 2.6.2008, the Appellant submitted expression of interest for laying, building and operating CGD networks for various cities including Kota, Sonapat, Dewas etc. Subsequently, vide letter 1/12.6.2009, the PNGRB issued letters granting authorization to the Appellant for laying, building operating or expanding CGD networks in Kota, Sonapat, Meerut and Dewas. While in Kota, Meerut and Dewas, the requirement under the authorization was creation of infrastructure for PNG domestic connections, in the case of Sonapat, the Board mentioned the criteria to number of domestic connections to be provided instead of infrastructure creation. It is the case of the Appellant that this criteria was wholly unreasonable because of the fact that it is not within the hands of the service provider to get the consumers to obtain connections and all that the service provider could have done is to ensure that the infrastructure requisite for providing the connections is laid down by it. In fact, under Section 34 of the Indian Contract Act, such a condition as laid down by the Board is void since it is contingent on the future conduct of living persons who are the consumers and who may not choose to avail of the PNG connection available in their area.

8. At this juncture, in view of the judgment of the Delhi High Court since the Board was held to be incapable of granting authorizations and in view of

the urgency to set up the networks, vide letter dated 29.6.2010, the Central Government in view of non-notification of Section 16 of the PNGRB Act granted authorization to the Appellant for setting up CGD networks in the cities of Kota, Meerut, Sonapat and Dewas etc. Shortly thereafter, vide notification dated 12.7.2010, the Central Government, notified Section 16 of the PNGRB Act to be effective from 15.7.2010.

9. The Appellant after being authorized to build the CGD networks started the work in right earnest and after achieving gas tie-up and financial closure and requisite permissions, started laying of pipeline, setting up the city gate stations and CNG stations etc required for the networks. However, as per the Appellant, the Appellant met with many constraints in laying the requisite pipelines and constructing the city gate stations and accordingly vide letter dated 31.7.2010, it wrote a detailed letter pointing out the constraints and the fact that due to various external factors, the progress of the CGD projects could not be achieved as envisaged by them. During this period, vide communication dated 7.9.2010, the Board issued show cause notice pointing out alleged non-compliance on the part of the Appellant on account of shortfall in inch-kms of pipeline to be laid in the city of Dewas.

10. Thereafter, vide communication dated 31.3.2011, after more than one year and nine months of the issue of the authorisation letters, the Board issued a communication to the Appellant that in Annexure 1 to the letters of authorisation for Kota, Dewas and Meerut, the words "infrastructure creation for PNG domestic connections (Nos.)" must be substituted by the words "PNG domestic connections (Nos)" and quarterly returns should reflect the change. As per the Appellant, this change made by the Board was arbitrary and illegal. As per the Appellant, though it protested this change but in view of the fact that the Board had the upper hand and could have invoked the bank guarantees submitted or even terminated the authorisation granted to it, had no alternative but to abide by the additional condition imposed by the Board on it.

11. The Appellant's view is that the Board, upon finding the issues raised by the Appellant vide its letter dated 31.7.2010 to be genuine, issued letter dated 18.8.2011 to the Chief Secretaries of various States involved pointing out the constraints expressed by the Appellant which shows the seriousness with which the matter was being considered by the Board.

12. Vide letter dated 25.8.2011, the Appellant wrote to the Board pointing out the various constraints faced by it in achieving the physical targets,



more particularly, the target regarding providing number of PNG connections to domestic customers. This was followed by letter dated 29.9.2011 wherein the Appellant pointed out the reasons which were beyond its control in achieving the target for providing gas connections to domestic customers.

13. Meanwhile, vide letter dated 15.3.2012 the Appellant pointed out to the Board that they had been successful in achieving the physical targets in respect of steel pipeline laying and CNG stations and that substantial progress had been achieved by them in the creation of MDPE network for domestic connections. The reasons for not achieving the target of provision of number of domestic PNG connections were explained in detail. At this juncture, the bank guarantees, which had been submitted originally, having expired, the Appellant renewed the same and were submitted by it for various cities like Sonapat, Meerut, Dewas and Kota.

14. The case of the Appellant is that inspite of being apprised of various constraints and impossibility of achieving the target of provision of specified number of PNG connections, the Board without considering any of the issues raised by the Appellant and without issuing a show cause notice or hearing it as provided under Regulation 16 of the Regulations, the Board vide its communication dated 22.5.2013 received by Appellant on 28.5.2013 in utter

violation of the procedure laid down under the Regulations and also the principles of natural justice, invoked the performance bank guarantees submitted by the Appellant for the various cities on the basis of the unilateral conclusion arrived at by it that the Appellant had failed to perform its obligations under the terms and conditions of the authorization.

15. After coming to know from the bank that the Board had invoked the PBGs submitted by the Appellant, it wrote a detailed letter to the Board on 27.05.2013 highlighting the efforts made by it to achieve the PNG domestic connection targets followed by two more letters dated 29.5.2013 and 31.5.2013 to the Board inter alia requesting for stay of the action of encashment of the PBGs till an opportunity of hearing is given by the Board. The Board, thereafter, on 12.6.2013 responded to the Appellant clarifying that the PBGs were encashed on account of default in achieving the targets of PNG domestic connections and not for failure to commission the CGD network and achieve gas tie-up. In the same letter, the Board also sought to direct that the Appellant make good the encashed portion of the PBGs as per provisions in Regulation 16(1)(c) of the Authorisation Regulations. Though the Appellant once again wrote a letter dated 20.6.2013 to the Board requesting for reversal of its action, it immediately on the same day (20.6.2013) filed Writ Petition No. 4739 of 2013 before the Delhi High Court.

16. The above Writ Petition came up for hearing on 29.7.2013 and the Delhi High Court, while entertaining the Writ Petition, recorded the statement of the counsel appearing for the Board that without the permission of the Court, no coercive steps would be taken against the Appellant in terms of the impugned Orders. The matter came up for hearing again on 15.12.2015 and the High Court disposed off the matter with permission to approach the Appellate Tribunal for Electricity within three weeks from that day.

Hence is the present appeal by the Appellant before the Appellate Tribunal for Electricity.

17. We have heard Mr. Sacchin Puri, senior counsel appearing for the Appellant and perused the submissions made by the Appellant. The gist of submissions is as under :

- (i) The Board has invoked the bank guarantees without issuing any show cause notice which the Board should have done in terms of Regulation 16 which deals with consequences of default and termination of authorization procedure.

- (ii) The Board has taken the impugned action without providing a hearing and opportunity to the Appellant. The Board should have disclosed the grounds for the proposed action giving an opportunity to the Appellant to present its case before the Board as provided in the PNGRB Act and relevant regulations.
- (iii) The Board has unilaterally changed the conditions of grant of authorization which was made by the Ministry, from provision of infrastructure for PNG connections to provision of number of PNG connections. This action of the Board is arbitrary and contrary to the provisions of the Contract Act. It has violated the provisions under Section 34 of the Indian Contract Act, 1872. The Board could not have prescribed physical criteria which are beyond the control of the Appellant or any other such entities implementing such CGD networks.
- (iv) The Board itself after having recognized the problems of giving PNG connections to customers, amended the regulations by revising the number of PNG domestic connections downwards which it did not consider for the Appellant.
- (v) The Appellant submitted all the reasons as to why it could not meet the physical targets in providing the domestic PNG connections which were due to factors beyond the control of the Appellant. These reasons could very well be considered as force

majeure considerations as defined in Clause 7 of the Application-cum-Bid document.

- (vi) The Board has not taken into consideration the circumstances arising out of non-supply of D6 gas by the Central Government on account of sectoral allocation of gas due to which the prices of PNG became very much higher than LPG. This is beyond the control of the Appellant which amounts to restrictions imposed by the Central Government and are clearly force majeure circumstances. Hence, the Board ought not to have taken the impugned action and instead it should have granted further time as prayed by the Appellant to meet the physical standards prescribed.
- (vii) The Central Government vide notification dated 10.9.2009 laid down that any person obtaining PNG connection will have to surrender their LPG connection and it has acted as a major dampener in people switching over to PNG connections. This also amounts to restrictions imposed by the Central Government and is clearly a force majeure circumstances. Even the Chairman of the Board itself took up the matter with Ministry of Petroleum & Natural Gas and yet without any application of mind, the Board has taken the impugned action against the Appellant.

- (viii) The Board failed to take into account the huge amount of time taken by various government/local agencies/NHAI to grant permission for laying the pipelines. These circumstances were beyond the control of the Appellant and are clearly force majeure circumstances.
- (ix) The impugned letter dated 22.5.2013 invoking the bank guarantees mentioned the ground that the Appellant had failed to commission the CGD Network and achieve gas tie-up. This was later clarified by the Board in its letter dated 12.6.2013 that it was on account of default in achieving the targets of PNG domestic connections. This itself speaks volumes about the non-application of mind by the Board while taking the impugned action.
- (x) The impugned letter dated 23.5.2013 invoking the bank guarantees reached the Appellant only on 28.5.2013 while the same reached the Respondent No. 2 on 24.5.2013. It seems to be a deliberate attempt to prevent any remedial action by the Appellant against the encashment of the bank guarantees and is an egregious fraud played on the Appellant by a statutory authority which is bound always to act fairly and reasonably.
- (xi) Reference may also be made to the judgments given below while framing our arguments :

- Supreme Court Case (2014)9SCC 105 dated August 4, 2014 in Gorkha Security Services Vs. Government (NCT of Delhi) and others.
- Appellate Tribunal for Electricity's judgment dated 28.4.2017 in Appeal No. 196 of 2016.
- ILR (2010) III Voice of India Vs. Union of India & Ors.
- (2003) 7 Supreme Court Case 418 dated August 21, 2003 in Bihar State Mineral Development Corporation & Anr Vs. Encon Builders (I) (P) Ltd
- Supreme Court Case (2000) 2 SCC 536 in Kolhapur Cane Sugar Works Ltd & Anr Vs. Union of India and Ors.

18. We have heard Ms. Sonali Malhotra, counsel appearing for the Board and perused the Counter Affidavit submitted by the Board. The gist of submissions is as under :

- (a) The Appellant has not approached the Tribunal with clean hands. It has deliberately suppressed and concealed important and relevant correspondences that got exchanged between the Board and the Appellant including details of personal hearings given to the Appellant by the Board. By concealing/suppressing material

documents and facts, the Appellant has lost any right for the appeal to be heard on merits as per the settled position of law laid down by the Hon'ble Supreme Court of India in plethora of judgments. Consequently, the Appellant is not entitled to any relief for its own wrong doings and conduct and the Hon'ble Tribunal should consider dismissing the present appeal without going into the merits at all.

- (b) In the context of suppressing/concealing the facts, it may be relied upon the Supreme Court's judgment (2010) 2 SCC 114 dated December 3, 2009 in Dalip Singh Vs. State of Uttar Pradesh and Ors --

*"Hari Narain v. Badri Das, AIR 1963 SC 1558; Welcome Hotel v. State of A.P., (1983) 4 SCC 575; 1983 SCC(Cri) 872; G. Narayanaswamy Reddy v. Govt. of Karnataka, (1991) 3 SCC 261; S.P. Chengalvaraya Naidu v. Jagannath, (1994) 1 SCC 1; Prestige Lights Ltd. v. SBI, (2007) 8 SCC 449; R v. Kensington Income Tax Commissioners, (1917) 1 KB 486 (CA), relied on*

*Jurisdiction under Article 32 and 226 of the Constitution is extraordinary, equitably and discretionary and it is imperative that the petitioner approaching the writ Court must come with clear hands and put forward all the facts before the Court*



*without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim. (Para 10)"*

- (c) The Appellant was given an opportunity for presenting its case before the Board communicated vide letter dated 07.09.2010 (for Meerut Geographical Area) on 14.09.2010, vide letter dated 06.09.2010 (for Sonapat Geographical Area) on 16.09.2010 and vide letter dated 07.09.2010 (for Dewas Geographical Area) on 16.09.2010 in respect of the first year targets. Only the letter dated 07.09.2010 in relation to the Dewas Geographical Area has been annexed to the appeal as Annexure A-7 at page 83 of the appeal. The remaining letters have not been annexed nor mentioned in the appeal at all. Further, the events subsequent to the above mentioned letters have also not been mentioned anywhere in the appeal and have been suppressed/concealed.
- (d) The Appellant has suppressed/concealed the fact that it was given a personal hearing in respect of Dewas and Sonapat Geographical Areas on 16.09.2010 at 11.00 hrs. The Dewas GA had deficiencies in achievement of the milestone of "inch-kms",

and it was for this reason that the show cause notice dated 07.09.2010 (Annexure A-7 page 83 of the appeal) for Dewas GA was issued by the Board under regulation 13, Schedule D and Regulation 16(1)(a) of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008.

- (e) After hearing submissions of the Appellant's representatives on 16.09.2010 in respect of Dewas and Sonapat GAs, the Board allowed the Petitioner to complete the default in the milestone (inch-Kms) of the first year by 31.12.2010 which was otherwise scheduled to be completed by June, 2010, without imposing any penalty, provided the targets for the second year would remain unchanged for all the GAs. The Board also clarified to the Appellant that any amount exceeding the targets of the first year and completed by December, 2010 would be taken into consideration for the second year targets. It was agreed by the Appellant in this hearing that the time period for completion of second year targets would remain as per the original date.
- (f) The Appellant has also suppressed the fact that a notice dated 16.03.2012 was issued by the Board to the Appellant under

Section 23 of the Petroleum and Natural Gas Regulatory Board Act, 2006 and Resolution 16 of the Authorisation Regulations, asking the Appellant to depute an official to appear before a Committee established by the Board to look into the compliance issues relating to the GAs of Kota, Dewas, Sonapat and Meerut and to present its case before the Committee on 29.03.2012 at 2.30 pm.

- (g) The Board gave a personal hearing to the Appellant on 29.03.2012 for all the GAs after reviewing the progress of the Appellant in the second year. After noting the shortfalls, the Appellant was given an opportunity to indicate a reasonable target for PNG domestic connections which they could complete in next 3 months time. The Appellant subsequently submitted their own targets for next 3 months time which also they could not meet.
- (h) Considering all the letters that got exchanged between the Board and the Appellant and specifically the hearings on 16.09.2010 and 29.03.2012, it very well demonstrates that there has been no violation of the principles of natural justice.
- (i) The encashment of PBG was done due to serious non-compliance and violations of terms and conditions of authorization granted

to the Appellant and failure to take remedial measures as envisaged under Regulation 16 of the Authorisation Regulations and Schedules thereunder by the Appellant.

- (j) In the case of Sonapat, the Board rightly mentioned the criteria as number of domestic PNG connections. On the contrary, in the case of Kota, Meerut and Dewas, it was only through inadvertence that in Annexure 1 of the letters granting authorization, it was mentioned as "Infrastructure Creation of PNG Domestic Connections (Nos) instead of "PNG Domestic Connections (Nos)". This is also clear from the bid document itself, wherein at serial No. D in Section III – Financial Bid Form' one of the criteria is – "Present value of the number of PNG domestic customers bid in the CGD network during the period of exclusivity in terms of exemption from the purview of common carrier or contract carrier". The norms of PNG connections have also been specified in the Authorisation Regulations in the bidding criteria at Regulation 7(1)(d).
- (k) The Appellant never questioned Regulation 7(1)(d) or the bid document in respect of bidding criteria of number of PNG connections and quoted its own numbers in the bid and was successful bidder.

- (l) It is the responsibility of the entity to tie up for gas supplies as per Regulations 11 (1) & (2) of the Authorisation Regulations. The Board does not have any role to arrange for gas per se. Moreover, it is clear that as per the Clarifications dated 26.02.2009 mentioned in response to Serial No. 7 of Clarifications, any connection charged or uncharged, i.e., gas supplied or not would be treated as PNG domestic connection. Therefore, non-availability of gas is not a valid reason for not achieving the targets in terms of compliance of authorization terms and conditions.
- (m) The physical targets that were part of authorizations were quoted by the Appellant itself and its bids were not unilaterally imposed by the Board and the Appellant won the bids based on its own quotation on the basis of PNG domestic connections along with others.
- (n) In favour of our arguments with regards to encashment of PBG, reliance may be placed upon the following judgments :
- Appeal No. 13 of 2016 in M/s Jay Madhok Energy Pvt Ltd Vs. PNGRB in APTEL.
  - Appeal No. 216 of 2016 in M/s Maharashtra Natural Gas Ltd Vs. PNGRB in APTEL.

- Appeal Nos. 159 & 161 of 2016 in Central U.P. Gas Ltd. Vs. PNGRB in APTEL.
- Gujrat Urja Vikas Nigam Ltd. Vs. GERC & Ors (Appeal No. 217 of 2014 in APTEL).
- Zillion Infra Projects Pvt Ltd. Vs. Fab-Tech Works and Constructions Pvt Ltd. (FA(OS) 537/2015), High Court of Delhi.

### **IN OUR CONSIDERATION**

19. It is now necessary to first have a look at the facts and circumstances of the case. On the issue of the allegations by the Board on suppression and concealment of facts and documents by the Appellant, extensive submissions have been advanced by the Board. We, however, propose to first examine the case on merits and while doing so, we feel the allegations might automatically get addressed if we observe that the Appellant is trying to mislead the Tribunal in the adjudication.

20. The Petroleum and Natural Gas Regulatory Board Act, 2006 was enacted on 31<sup>st</sup> March, 2006 without Section 16 which deals with Authorisation giving statutory mandate to the Board to issue authorization to entities. The Section 16 was notified by the Central Government vide notification dated 12.07.2010. As regards the authorizations under this appeal, i.e., to set up the CGD networks in the cities of Kota, Meerut,

Sonepat and Dewas, the same were first issued by the Board on 1/12.06.2009. Since till that time, as per the order of the Delhi High Court dated 21.01.2010 in Writ Petition Nos. 8415 of 2009 and 9022 of 2009 filed by Voice of India and Indraprastha Gas Limited, the Board did not have the power to issue authorization in absence of notification of Section 16 of the PNGRB Act, 2006, the entities approached the Ministry of Petroleum and Natural Gas (the Ministry) to grant the said authorization. Considering the order of the Delhi High Court and also the entities' bids as per the Board's selection process and their investments already carried out, the Ministry vide its order dated 29.06.2010 granted the authorisation to the Appellant for setting up of CGD network in the cities of Kota, Meerut, Dewas and Sonepat etc. The Board also in its order mentioned that the entities would be bound by the various regulations of the Board including those pertaining to inter-alia work commitments etc.

21. The work commitments mentioned in the Board's authorization included the parameter of PNG domestic connections. In the case of the authorization for Kota, Meerut and Dewas, this parameter was mentioned as "Infrastructure Creation for PNG Domestic Connection (Nos.)" whereas in the case of Sonepat, the same was mentioned as "PNG Domestic Connection

(Nos.)". The Board subsequently on 31.03.2011, issued an amendment to Authorisation (Annexure-1 of Schedule-D) which states as under :

*"With reference to subject authorization issued vide letter ref. MI/CGD Meerut/Authorisation dated 12.06.2009, the words "Infrastructure creation for PNG Domestic Connection (Nos.)" in Annexure-1 shall be read as 'PNG Domestic Connections (Nos.)".*

Similar letters were also issued by the Board to the Appellant for Dewas and Kota GAs.

22. The Appellant's strong contention is that the Board did not have the power to amend the above parameters as the authorization was granted by the Ministry. The Appellant also contends that the Board while amending the parameter of infrastructure creation for PNG domestic connection referred to its authorization dated 12.06.2009 which is not a valid authorization since the Ministry itself issued authorization on 29.06.2010. The Board could not have made the amendments of an order issued by the Ministry. The Ministry alone could have amended the authorization. The Appellant also alleges that in the original authorization by the Board, the Board in the case of Sonapat, unreasonably changed the criteria to number of domestic connections.



23. In the above context, the Board straightaway denied the allegation and clarified that the mention of PNG domestic connection (Nos.) in the Sonapat GA was very much in order whereas in the case of Kota, Meerut and Dewas, the same was inadvertently mentioned as "Infrastructure Creation of PNG Domestic Connection (Nos.). Due amendment was done /carried out vide order dated 31.03.2011 to correct the situation and also to keep the Appellant at par with the other authorizations of the first round of CGD bidding and maintain consistency in approach and to comply with the terms of Authorisation Regulations and the bidding document.

24. The Board further submits that the number of PNG connections has also been specified in the Authorisation Regulations in the Bidding Criteria at Regulation 7(1)(d) and was also one of the important bid parameters in the bid document itself. The bidders were required to quote specific milestones as per Section III of the Financial Bid Form of the sample bid document. At Serial No. D of Section III – it states the following :

*"Present value of the number of domestic customers bid in the CGD networks during the period of exclusivity in terms of exemption from the purview of common carrier or contract carrier."*

We have checked the above particular documents and found them to be in order.

25. The Board also submits that the Appellant never questioned Regulation 7(1)(d) or the bid document in respect of the bidding criteria of number of PNG connections at any time nor during the public consultation process and quoted its own number for domestic PNG connections in its bid.

26. Now, the major issues that have remained to be addressed are in respect of the following :

- (i) Compliance of terms and conditions of authorization in regards to physical targets by the Appellant.
- (ii) Compliance of provisions of Regulation 16 of Authorisation Regulations for encashment of PBG by the Board.

27. The authorization for development of CGD networks in all the four cities, viz., Kota, Meerut, Dewas and Sonapat were issued by the Board in June, 2009 and the exclusivity period was for five years. The physical target that were required to be met by the Appellant for each year were spelt out separately. The Board was authorized by the provisions of Regulation 13 of the Authorisation Regulations, 2008 to monitor the progress of the projects.

28. Regulation 13 reads as under :

***"13. Post-authorization monitoring of activities (pre-commissioning).***

*(1) An authorized entity is required to provide, on a quarterly basis, a progress report detailing the clearances obtained, targets achieved, expenditure incurred, works-in-progress and any other relevant information in the form at Schedule E.*

*(2) The Board shall seek compliance by the entity to the relevant regulations for technical standards and specifications including safety standards through conduct of technical and safety audits during the pre-commissioning phase, as well as on an on-going basis thereafter, for ensuring safe commissioning and operation of the CGD network.*

*(3) The Board shall monitor the progress of the entity in achieving various targets with respect to the CGD network project, and, in case of any deviations or shortfall, advise remedial action to the entity."*

In the instant case, the Board's monitoring of the project is found to be in order as per (3) above.

29. Regulation 16 of the Authorisation Regulations, 2008 deals with the consequences of default and termination of authorization procedure which reads as under :-

***"16. Consequences of default and termination of authorization procedure.***

*(1) An authorized entity shall abide by all the terms and conditions specified in these regulations and any failure in doing so, except for force majeure, shall be dealt with as per the following procedure, namely: -*

*(a) the Board shall issue a notice to the defaulting entity allowing it a reasonable time to fulfill its obligations under the regulations;*

*(b) no further action shall be taken in case remedial action is taken by the entity within the specified period to the satisfaction of the Board;*

*(c) in case of failure to take remedial action, the Board may encash the performance bond of the entity equal to percentage shortfall in meeting targets of inch-kms and/or domestic connections. Provided that the value so encashed would be refunded, if the entity achieves the cumulative targets at the end of exclusivity period for exemption from the purview of common carrier or contract carrier. In case of failure to abide by other terms and conditions specified in these regulations performance bond shall be encashed as under :*

*(i) 25% of the amount of the performance bond for the first default; and*

*(ii) 50% of the amount of the performance bond for the second default;*

*Provided that the entity shall make good the encashed performance bond in each of the above cases within two weeks of encashment failing which the remaining amount of the performance bond shall also be encashed and authorization of the entity terminated.*

*(iii) 100% of the amount of performance bond for the third default and simultaneous termination of authorization of the entity.*

*(d) the procedure for implementing the termination of an authorisation shall be as provided in Schedule G;*

*(e) without prejudice to as provided in clauses (a) to (d), the Board may also levy civil penalty as per Section 28 of the Act in addition to taking action as prescribed for offences and punishment under Chapter IX of the Act."*

30. The physical parameters for which annual milestones were mentioned in the authorizations were as under :

- CGS (No.)
- CNG Mother Stn. (Nos.)
- CNG On-line Stn. (No.)
- Steel Grid (inch-Km)
- PNG domestic connections (No.).

31. From the correspondences that took place between the Appellant and the Board, we observe that admittedly, there were shortfalls in meeting the physical targets by the Appellant till the time of encashment of PBG by the Board. The Appellant, however, explained to the Board through various letters and discussions the major reasons as to why the target could not be met as desired. Letter dated 31.07.2010 to the Board explained about the non-availability of permission for laying pipeline along National Highway from NHA and Ministry of Road Transport and Highways and the public resentments faced because of their laying of pipeline along narrow roads etc. The Appellant also wrote similar letters dated 25.08.2011 and 29.09.2011 to the Board explaining the constraints being faced by the Appellant. The letter of 25.08.2011 highlighted the point that the domestic customers were reluctant to switch over from LPG connections to PNG connections because of the Ministry's notification that the customers will have to surrender the LPG connections within 60 days of switching over to PNG connections. The

Appellant subsequently vide its letter dated 15.03.2012 informed the Board that it could achieve the physical targets in respect of laying of steel pipeline and installation of CNG stations but was lagging behind in respect of PNG domestic connections. Here the Appellant reiterated the earlier constraint about the reluctance of the PNG Domestic customers to switch over from LPG to PNG. Additionally, it highlighted the constraint of non-availability of domestically produced gas viz., D6 gas because of which it had to source the gas from RLNG which was costlier than domestically produced gas. On the issue of reluctance to switch over from LPG to PNG by the customers, the Appellant also cited Section 34 of the Indian Contract Act, 1872 which deals with a contract being contingent with the future conduct of a living person.

32. On the above submissions of the Appellant, the Board's contention is that the Appellant while bidding for the projects should have taken into account all the possible constraints because the physical targets were not imposed upon the Appellant. These were as per their own quoted figures. The reasons shown by the Appellant were not acceptable to the Board. On the issue of reluctance on the part of the customers to switch over from LPG to PNG, the Appellant has made only a general statement. The Appellant has not submitted any data as to how many customers ever refused to take PNG connection; rather there were complaints from certain groups of

customers that the Appellant was not taking action to provide PNG connection in their kitchen and approached the Board to impress upon the Appellant. The Government's notification to surrender LPG connection, as per the Board did not fit in to the terms of Section 34 of the Indian Contract Act. The notification did not prevent the customers from opting for PNG connection in future even if there was some sort of reluctance (if assumed) at the beginning.

33. As regards the non-availability of domestically produced gas, the Board's contention is that the responsibility to tie-up gas supplies lies with the bidder as per Regulation 11(1) and (2) of the Authorisation Regulations. On this issue, clarification was sought by the potential bidders at the time of bidding. The Board clarified the same on 26.02.2009 stating that any connection charged or uncharged, i.e., gas supplied or not, would be treated as PNG domestic connection. Even if gas is not available, the Appellant still could have met its target of PNG connection.

34. The Appellant also has brought to our notice the force majeure circumstances that persisted in the present case. The force majeure clause, as it appears in clause 7 of the Application-cum-Bid document, is as under :

*"7.0 Force Majeure*

*Force Majeure shall mean and be limited to the following:*

*a) War / hostilities*

*b) Major Riots or Civil Commotion*

*c) Earthquake, flood, tempest, lightning or other natural physical disasters.*

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

As per the Board, none of the reasons provided by the Appellant could be considered as force majeure condition. On item 7(d) above also, no actual restrictions were imposed by the Central Government or any other statutory body. The Board also has brought to our notice the last para of Clause 7 of the Application-cum-Bid document, which the Appellant did not mention, which reads as under :

*"The authorized entity shall within one week of occurrence of above causes notify PNGRB about the occurrence of the force majeure event and provide PNGRB all details of arising and ceasing of the impediment. The time and performance of the respective obligations suspended by the force majeure shall stand extended by the period(s) for which such conditions of force majeure last. PNGRB's decision, whether such force majeure conditions did actually exist shall be final and binding."*

The above clarifies that the final say on application of force majeure condition lies only with the Board.

35. On overall considerations, the Board's contention is that the Appellant was given ample opportunities to achieve the physical targets as stipulated,



but the Appellant failed to do so. As per the Board, the Board gave a personal hearing on 29.03.2012 to the Appellant. During personal hearing, having found the progress of the physical targets to be non satisfactory, the Appellant was given an opportunity to indicate a reasonable target for PNG domestic connections which they could complete within next three months time. The Appellant accordingly submitted its targets for next three months time, but these targets also could not be met by the Appellant. The Board after completion of three years of authorization (out of 5 years exclusivity period), found out the status of achievements in respect of PNG domestic connections till 30.06.2012 with respect to targets of first 2 years which shows as under :

**Status of achievement till 30.06.2012 w.r.t. Targets of first 2 years**

<i>Name of the GA</i>	<i>Physical Parameters</i>	<i>Cumulative Target till June 2011 (1<sup>st</sup> and 2<sup>nd</sup> Year combined)</i>	<i>Achieved till 30/06/2012 (Till the end of 3<sup>rd</sup> Year)</i>	<i>Cumulative Achievement in %</i>
<i>Kota</i>	<i>Domestic PNG Connections</i>	<i>22000</i>	<i>120</i>	<i>0.55%</i>
<i>Dewas</i>	<i>Domestic PNG Connections</i>	<i>10000</i>	<i>198</i>	<i>1.98%</i>
<i>Sonepat</i>	<i>Domestic PNG Connections</i>	<i>19000</i>	<i>3503</i>	<i>18.44%</i>
<i>Meerut</i>	<i>Domestic PNG Connections</i>	<i>20000</i>	<i>777</i>	<i>3.89%</i>

It is clearly observed from the above tabulation that even after 3 years, the progress made by the Appellant against the targets of first 2 years was very much negligible. As per the Board, the Appellant was virtually granted additional one year to fulfill its obligations and yet, the Appellant failed to do so. The Board also states that the PBGs were encashed on 22.05.2013, i.e., after one year of the above situation (as on 30.6.2012) when the Appellant's progress was still negligible.

36. Let us now examine the allegation made out by the Appellant that the Board did not issue any show cause notice to the Appellant and hear them as per Regulation 16 before encashing the PBGs. On this issue, the Board has contended by producing certain documents before us demonstrating that due notice was served to the Appellant and also heard them before encashing the PBGs.

37. We have observed that the Board started monitoring the progress of the projects from completion of the very first year of the exclusivity period under provision of Regulation 13 of the Authorisation Regulations. The Board, in order to verify the performance during the first year of the project, issued the following letters to the Appellant asking it to appear before a committee of the Board with details of data submitted by the Appellant :

- Letter dated 06.09.2010 for Sonapat GA to appear on 16.09.2010.

- Letter dated 07.09.2010 for Meerut GA to appear on 14.09.2010.
- Letter dated 07.09.2010 for Dewas GA to appear on 16.09.2010.

The Board has pointed out that only the letter for Dewas GA was referred to in the appeal. We have examined the above letters and found them to be in order.

38. The Board claims that personal hearing was given to the Appellant on 16.09.2010 at 11.00 hours for the GAs of Dewas and Sonapat which the Appellant has not brought to the notice of APTEL. We have gone through the letter dated 07.09.2010 issued by the Board to the Appellant on Dewas GA asking the Appellant to appear before the Board's Committee and found that this letter was served as a Notice for hearing under Regulation 16(1)(a) of the Authorisation Regulations.

39. We have also observed that the Board issued another notice vide letter dated 16.03.2012 to the Appellant under Section 23 of the PNGRB Act, 2006 and Regulation 16 of the Authorisation Regulations for the GAs of Kota, Dewas, Sonapat and Meerut for hearing on 29.03.2012 at 2.30 pm. The Board claims that this personal hearing was given to the Appellant on the said date of 29.03.2012. We have observed that this notice also has not been referred to in the appeal.

40. Before taking a view on the appeal based on merits, we have also examined the letter of the Ministry of Petroleum and Natural Gas dated 29.06.2010 granting authorization for CGD network in the GAs of Kota Meerut, Dewas and Sonapat and observed the following :

*"4. The mentioned entities would be bound by the various regulations of PNGRB, including those pertaining to inter-alia work commitments, network tariff, technical standards and specifications, safety standards, quality of service standards etc."*

41. As per the above order, the Appellant is bound to abide by Regulation 16 of the Authorisation Regulations for consequences of default inter-alia work commitments. There have been admittedly obvious defaults on the part of the Appellant to fulfill the target of PNG domestic connections as on the date of encashment of PBGs. The Board has encashed part of the PBGs on 30.05.2013 though the communication on encashment was issued on 22.05.2013. As per our observation, the Board has rightly followed the Regulation 16(1)(c) while encashing the PBGs. In terms of public interest also, we are of the opinion that successful and timely completion of the projects is of paramount importance. On the above ground itself, the present appeal deserves to be dismissed. Having examined the case on

merits, we would also like to see that no injudicious exercise has been applied by the Board on the Appellant. We would, therefore, like to examine the case from the point of view of law.

42. In view of the well settled principles of law laid down by the Apex Court and also by this Tribunal in connection with Bank Guarantees, we cannot interfere with the encashment of bank guarantee unless it is pointed out that there is a fraud on the part of the beneficiary or irretrievable harm or injury involved in the case.

43. The contract between the bank and the beneficiary is held to be an independent contract irrespective of the dispute between the bank's customers and the beneficiary.

44. The Delhi High Court in Siti Energy Limited Vs. PNGRB in W. P. (C) 125/2016 has decided as under :

*"25. The law relating invocation of bank guarantees is no longer res integra. The law is well settled that the interference by the Courts is permissible only where the invocation of the bank guarantee is against the terms of the guarantee or if there is any fraud. In the absence of the same, the bank is liable to pay the guaranteed amount without any demur whatsoever and the bank is bound to honour the guarantee*

*irrespective of any dispute raised by its customer since a bank guarantee is an independent and a separate contract. It is also a well settled principle that fraud, if any, must be of an egregious nature, which would vitiate the very foundation of such a bank guarantee and the beneficiary seeks to take advantage of the situation. Allowing encashment of bank guarantee would result in irretrievable harm or injustice to one of the parties concerned has also been recognized by the Courts as a justifiable ground for interference, however, the harm or injustice contemplated must be of such an exceptional and irretrievable nature as would override the terms of the guarantee [vide U.P. Cooperative Federation Ltd. vs. Singh Consultants and Engineers (P) Ltd. (1988) 1 SCC 174; Vinitec Electronics Private Ltd. vs. HCL Infosystems Ltd. (2008) 1 SCC 544; Himadri Chemicals Industries Ltd. vs. Coal Tar Refining Company (2007) 8 SCC 110; Mahatma Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engg. Coop. Ltd. (2007) 6 SCC 470.] In a recent decision M/s. Adani Agri Fresh Ltd. vs. Mahboob Sharif & Ors. (2015) SCC OnLine SC 1302, the Supreme Court while reiterating the principles of law laid down in the above decisions further explained that the fraud, if any, must be of an egregious nature as to vitiate the underline transaction."*

45. We also rely on the judgment of the Supreme Court in Himadri Chemicals Industries Limited. This Tribunal also relied on this judgment in Appeal No. 216 of 2016 dated 07<sup>th</sup> April, 2017 (M/S. MAHARASHTRA NATURAL GAS LTD. Vs. PNGRB) where the following was considered :

*"18. ....In **Himadri Chemicals Industries Limited**, after considering several judgments on the point, the Supreme Court has held that a bank guarantee is an independent and a separate contract and is absolute in nature. The existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of a bank guarantee. The Supreme Court cited two grounds on which alone encashment can be enjoined i.e. fraud of an egregious nature which would vitiate the very foundation of a bank guarantee or letter of credit and there is evidence to show that the beneficiary seeks to take advantage of the situation and cases where allowing encashment of a bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. None of these conditions are present in this case. Hence, it is not possible for us to interfere with the impugned order."*

The present case is identical to the above case. This case also does not exhibit any fraud on the part of the Board as well as no irretrievable injustice has been caused to the Appellant. Hence, we do not want to interfere with the impugned decision of the Board.

46. In any case, the PBGs in the instant case have already been encashed and therefore, even otherwise, it is not possible for us to interfere with the impugned order.

47. Based on our discussions and observations on the facts and circumstances of the case considering both the points of view of merit and law, the appeal is liable to be dismissed and is accordingly dismissed. If the Appellant has not made good the encashed bank guarantees, it shall make them good within three weeks from today. Needless to say that the IA Nos. 249 and 250 of 2016 also do not survive for consideration and hence stand disposed of.

48. There is no order as to costs.

**Pronounced in the Open Court on this 26<sup>th</sup> day of July, 2019.**

**(B. N. Talukdar)**  
**Technical Member (P&NG)**

**(Justice Manjula Chellur)**  
**(Chairperson)**

**√REPORTABLE/NON-REPORTABLE**