

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APPEAL NO. 110 OF 2020

Dated: 16th July 2021

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Dr. Ashutosh Karnatak, Technical Member
(P&NG)**

In the matter of:

Mahanagar Gas Limited

MGL House, G-33

Bandra – Kurla Complex

Bandra(East),

Mumbai – 400051.

.....Appellant

VERSUS

1. Petroleum and Natural Gas Regulatory Board

First Floor, World Trade Centre,

Babar Road,

New Delhi - 110001

2. GAIL (India) Limited,

GAIL Bhawan,

16, Bhikaji Cama Place,

R. K. Puram,

New Delhi-110066

3. ONGC Limited

Plot No. 5A-5B,
Nelson Mandela Road,
Vasant kunj,
New Delhi – 110070.

....Respondent(s)

Counsel for the Appellant:

Mr. Saurav Aggarwal
Mr. TrinathTardakamalla
Ms. Rashi Goswami

Counsel for the Respondent(s):

Mr. Utkarsh Sharma &
Ms. Kaveri Vats for R-1

Mr. Sacchin Puri (Sr. Adv) &
Mr. Yoginder Handoo for R-2

Mr. M. G. Ramachandran &
Mr. Shashwat Kumar for R-3

J U D G M E N T

PER HON'BLE MR. ASHUTOSH KARNATAK, TECHNICAL MEMBER

BACKGROUND

- 1.0 The Appellant filed the present Appeal (MGL) challenging the Petroleum and Natural Gas Regulatory Board's ("PNGRB/Respondent No 1") order dated 18th March 2020 ("Impugned Order") by way of which the PNGRB directed the Appellant and Respondent No 2, GAIL (India) Ltd., to make payment of the transportation charges for the Gas being transported through the Uran-Trombay Natural Gas Pipeline

("UTNGPL") by Respondent No 3, ONGC, in accordance with the Provisional Initial Unit Tariff Order TO/12/2013 dated 30th December 2013 ("Tariff Order").

2.0 In the Present Appeal, MGL has prayed to:-

- (i) Set aside and quash the impugned order dated 18th March 2020 passed by the PNGRB in Case No. PNGRB/Legal/1-BC/14/2019 and allow the prayers made by the Appellant in the complaint filed by it before the PNGRB in Case No. Legal/124/2015.
- (ii) Declare that the PNGRB fixed Transportation Tariff does not apply to the sale of Gas by ONGC to GAIL at Trombay under the ONGC — GAIL GSA.

3.0 Facts of the Case

3.1 The Appellant, Mahanagar Gas Limited (MGL) is a company registered under the provisions of the Indian Companies Act, 1956 established in the year 1995. The Appellant's main shareholders are Respondent No. 2/ GAIL and the British Gas (BG) Group. It is a city gas distribution company and is undertaking the supply, sale and distribution of Compressed Natural Gas ('CNG') for the automotive sector as well as it is a supplier of Piped Natural Gas ('PNG') to the domestic and commercial and industrial consumers in and around the city of Mumbai. The Government of India has allocated APM gas to the Appellant to encourage creation of more gas distribution infrastructure.

3.2 The Respondent No 1, PNGRB i.e. 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") notified via gazette notification dated 31 March 2006 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 interest 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.

- 3.3 Respondent No 2 i.e GAIL (India) Limited was incorporated in August 1984 as a Central Public Sector Undertaking (PSU) under the Ministry of Petroleum and Natural Gas. 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.
- 3.4 Respondent No 3, Oil and Natural Gas Corporation (ONGC) Limited is public sector undertaking under the Ministry of Petroleum and Natural Gas. It is India Largest Public sector oil and gas exploration and production company. It is the owner and operator of the Uran–Trombay Natural Gas Pipeline or the UTNGPL which has been in existence since 1978. The length of the UTNGPL is 24 Km and its diameter is 20" (earlier 18" pipeline, which was replaced in May 2008 with a new 20" pipeline). The Respondent No. 3 utilizes UTNGPL to supply natural Gas from its gas processing plant located at Uran to Trombay for purchase by Respondent No 2.

3.5 ONGC and GAIL entered into long-term Gas Supply Agreement dated 7th July 2006 (ONGC-GAIL GSA), for supply of natural Gas at various delivery points for an agreed price.

In terms of the GSA, the Seller is Respondent No. 3 i.e. ONGC while the Buyer is Respondent No. 2 i.e. GAIL.

3.6 Certain provisions of the ONGC-GAIL GSA may be referred to. These include the following:

(a) The Recitals of ONGC-GAIL GSA are as follows:

"(A) Seller produces Gas from the Producing Areas (as hereinafter defined) and is able to offer Buyer the Seller's Gas (as hereinafter defined) as per the Production Profile (as defined hereinafter), produced from the Producing Areas covered under LTGP 2000 as available till 2014-15. The Seller agrees to provide the Gas profile for remaining term of the Agreement two years in advance.

*(B) Seller wishes to sell and Buyer wishes to purchase the Seller's Gas made available by the Seller at the **Custody Transfer Points** (as hereinafter defined)."*

(b) The following definitions are relevant (as per clause 1.1. of GSA):

(m) "Buyer's Pipeline" means the pipeline owned by the Buyer into which Seller's Gas will be delivered herein at the Delivery Point. In the event Buyer does not own the pipeline into which Seller's Gas is delivered at the Delivery Point, Buyer's Pipeline shall mean the

pipeline nominated by Buyer to take delivery of Seller's Gas.

"(t) "Delivery Points" means the point at which the Parties agree deliveries of Seller's Gas shall be made under this agreement as set forth in Schedule A.

(oo) "Price" means the price to be paid by Buyer to Seller for one thousand SCM or Seller's Gas delivered by Seller to Buyer hereunder as set forth in Schedule B."

(vv) "Seller's Gas" means Gas produced by Seller from the Producing Areas for delivery and sale to Buyer hereunder.

(c) Article 4.1 of the ONGC - GAIL GSA provides that the sale and purchase of the Seller's Gas, i.e. ONGC's Gas, takes place at the 'Delivery Point'.

(d) Article 5.1 of the ONGC – GAIL GSA provides that "*all deliveries of Seller's Gas hereinunder shall be made by Seller to Buyer at the Delivery Point*".

(e) Article 15 of the ONGC – GAIL GSA then deals with the price to be paid by the Buyer, i.e. GAIL to the Seller, i.e. ONGC. The price of gas ex landfall price was as fixed by the Government and the transportation charges were to be agreed between the parties. Together these components constituted the price. While the quantum of the transportation charges is not specified in the said GSA, the transportation charges were agreed between ONGC and GAIL as Rs. 12/KCM.

- (f) Article 19 of the ONGC-GAIL GSA provides for Title and Risk Transfer at the Delivery Point as follows:

"Title and risk in the Seller's Gas shall pass from Seller to Buyer at the offtake pipeline flange at the inter-connection of Seller's Gas gathering and delivery system and Buyer's Pipeline at the Delivery Point. Upon delivery at the Delivery Point, Buyer shall be deemed to be in exclusive control and possession of Seller's Gas and shall be fully responsible for and shall indemnify Seller against any damages or injury resulting from the transportation, handling or use of the Seller's Gas."

- 3.7 On 5th October 2007, Schedule-A to the GSA was signed and incorporated into the ONGC-GAIL GSA. The said Schedule-A consisted of the tabular representation of the delivery points, custody transfer points, custody transfer measurement system, frequency, typical pressure etc., as per the 'production area' and 'region'.
- 3.8 In terms of Schedule A to the ONGC – GAIL GSA, in respect of Western offshore region and production area Uran, the delivery point for the Trombay Sector is stated to be Trombay Terminal. Once, GAIL offtakes this Gas at the Delivery Point, it conveys it further downstream through its own gas pipeline system (Trombay sub-network of its Mumbai Regional Natural Gas Pipeline system), where the Gas is sold to other customers including M/s MGL.
- 3.9 On 5th June, 2009, MGL (Appellant) entered into a long-term Gas Sales and Transportation Contract with GAIL for

transportation and supply of APM Gas (Administered Price Mechanism Gas) in order to meet its City Gas requirement.

- 3.10 Owing to upgradation of the Uran-Trombay Natural Gas Pipeline on 30th May 2008, after replacing old 18 inch line with a new 20 inch line, ONGC vide letter dated 24th September 2009 to GAIL, sought to fix transportation charges at Rs. 616.04/KCM w.e.f. 1.10.2009 instead of the agreed transportation charges as Rs. 12/KCM, against which GAIL replied vide letter dated 29th September 2009, that consent of its customers would be required before such a steep rise is made and till that time the revised amount be put on hold.
- 3.11 Meanwhile, on 30th September, 2009 ONGC, under Regulation 19(1) of the PNGRB (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008 ("Authorization Regulations"), approached PNGRB ('the Board') **seeking declaration of the Uran-Trombay pipeline as a dedicated pipeline.**
- 3.12 PNGRB (Respondent No. 1) responded vide letter No. Infra/PL/Exis/19/UTPL/ONGC/01/19 dated 04th December 2009 directing ONGC to instead apply under Regulation 17(1) of the Authorization Regulations to declare the pipeline **as a common carrier pipeline.**
- 3.13 In the meanwhile, GAIL vide email dated 14th December 2009 informed ONGC that its customers have raised whether an increase in transportation charges needs the approval of MoPNG and/or PNGRB. It was further mentioned that in case such approval is required, whether ONGC has obtained any such approval.

3.14 On 30th June 2010, ONGC submitted a fresh application to PNGRB, and the authorization was granted by PNGRB on 03.05.2011, thereby declaring the Uran-Trombay Natural Gas pipeline network as a common carrier with a common carrier capacity of 1.5 MMSCMD.

3.15 Thereafter, ONGC applied for fixation of transportation tariff under Section 22 of the Act in August, 2010 and in furtherance to the correspondence with PNGRB, a revised tariff proposal was submitted by ONGC in February 2012 to PNGRB.

Based on this proposal, PNGRB passed an order dated **30th December 2013** fixing the provisional initial unit pipeline tariff for Uran-Trombay pipeline as Rs.5.70 per MMBTU, **to apply retrospectively from 20.11.2008.**

3.16 Soon after passing of the above order by PNGRB, ONGC raised a debit note on GAIL for recovery of transportation tariff on the basis of the tariff fixed with effect from 20.11.2008 for transportation of Gas from Uran to Trombay.

Vide email dated 31st March 2014, GAIL communicated to the Appellant that the provisional tariff had been notified by the PNGRB for Uran-Trombay Natural gas pipeline and ONGC had raised a demand upon GAIL for additional transportation charges with effect from 2008 which GAIL would be passing upon the Appellant in terms of the Gas Sales and transportation contract between GAIL and MGL.

3.17 Subsequently, GAIL vide email dated 08th April 2014, made a demand on the Appellant on the basis of demand raised by ONGC for an amount representing tariff calculated as per PNGRB fixed tariff order, which the Appellant (MGL) resisted.

MGL through various communications with GAIL, kept protesting the debit notes raised by GAIL for payment of transportation tariff fixed by PNGRB w.e.f. 20.11.2008 questioning its applicability stating vide email dated 07th April 2014 to GAIL that:

"Considering the custody transfer at Trombay, ONGCL's Uran - Trombay gas pipeline becomes its dedicated product pipeline and not a Common carrier/contract carrier pipeline, offering unbundled transportation services to a gas marketer like GAIL or any other shipper. Therefore, regulated tariff of Rs. 5.70/MMBTU declared by PNGRB in itself is questionable...."

...In view of the above, GAIL may like to take up suitably with ONGCL or any other appropriate authority about applicability of such transportation charges."

As per the Appellant, ONGC could not have raised any debit note to claim the transportation tariff from GAIL, since ONGC was carrying its own Gas from Uran to Trombay.

3.18 While GAIL kept pursuing its demand for payment, MGL approached PNGRB in November 2014 seeking clarity on the issue.

PNGRB, inter alia, conveyed vide letter No. PNGRB/M©12/MISC dated 14th November 2014, that the transportation tariff for a common carrier pipeline was determined as per the Act and regulations framed by the PNGRB and any dispute regarding the same could only be

settled on receipt of a complaint made under Section 24 or 25 of the Act.

In the meanwhile, GAIL while following up with the Appellant on the payment of transportation charges demanded by ONGC, informed MGL vide email dated 03rd January 2015, that it would encash the Letter of credits provided by MGL, in case the amount due by MGL is not received by 07th January 2015.

3.19 Thereafter MGL approached PNGRB on 18th February 2015 filing a complaint section 25 of the Act against PNGRB, GAIL and ONGC seeking following relief:-

- a) declare/clarify that the order dated 30th December, 2013 only fixes "transportation tariff" to be paid by a third-party user (shipper/marketer) for the utilization of the pipeline as a "common carrier" by such third party to transport its Gas;***
- b) declare/clarify that the order dated 30th December, 2013 cannot be read, interpreted or applied such that ONGC can charge the tariff fixed thereunder (Rs.5.70/MMBTU) even for the Gas that it sells (i.e. transfers custody of and title to) to GAIL at Trombay, whether retrospectively or going forward;***
- c) Declare/clarify that the reading, interpretation and application of the order dated 30th December, 2013 by ONGC is against the PNGRB Act and the regulations framed thereunder;***
- d) Declare/clarify that GAIL cannot pass on the demand towards such tariff to the Appellant, and the demands***

made should be quashed;

e) Declare/clarify that without prejudice, and on a separate note that ONGC is in breach of regulations that require it to charge a provisional tariff, which it did not charge, and should therefore not be allowed to take advantage of its own breach, and should not be allowed to charge tariff on this ground as well."

3.20 By an interim order dated 04th March 2015, PNGRB directed all parties **to maintain status quo** with respect to the demand of transportation charges till the order is specifically vacated by PNGRB/ Court.

Finally, PNGRB passed an order dated 15th Oct 2015 dismissing MGL's complaint stating:

"The Petition is dismissed.

The Petitioner shall pay an amount of Rs.5.00 Lakh to ONGC as cost."

3.21 Since the Appellate Tribunal was not functioning at that time, MGL filed a Writ Petition before the Hon'ble High Court of Delhi, being W.P (C) No. 10589/2015. During the pendency of the writ, since the Tribunal was to become functional soon, the Hon'ble High Court vide order dated 30th November 2015, while sending the appeal to the Tribunal for deciding on merits; disposed of the petition, inter alia, **with the direction that MGL will give an undertaking of its Board of Directors to pay GAIL the disputed amount if ultimately found due from MGL to GAIL.**

3.22 Thereafter, the Appellant filed an appeal against the 2015 Order of PNGRB before this Hon'ble Tribunal (being Appeal No. 147 of 2016).

The Appellate Tribunal, vide its judgment and order dated 20th September 2019, set-aside the order dated 15th Oct 2015 passed by PNGRB, upon considering parties pleadings and arguments, and remanded the matter back to PNGRB.

In the above order dated 20th September 2019, the Tribunal had framed the following issues for determination (at para 31 of the order):

"....

- a) Whether ONGC carries its own Gas through the Uran-Trombay pipeline to deliver to GAIL at Trombay; or*
- b) Whether ONGC carries third party GAIL's Gas to deliver at Trombay through the common carrier Uran-Trombay pipeline.*
- c) In the above cases, what should be the transportation tariff that ONGC should charge from GAIL? ..."*

While answering the above-mentioned issues, the Tribunal in para 47 [pg.312] of its judgment categorically recorded as under:

".....47. The contract between ONGC and GAIL clearly defines the delivery point where the Gas carried by ONGC is delivered to GAIL and from this point the title and risk in the seller, i.e., ONGC's Gas get transferred to the buyer, i.e., GAIL. The delivery point mentioned in the contract between ONGC and GAIL is mentioned as Trombay and on this issue, there is

no controversy among the rival parties viz., the Appellant, ONGC and GAIL. The Board, however, in its impugned order, has recorded as Uran and not Trombay to be the delivery point. Hence, the question arises whether on declaration of the Uran-Trombay pipeline as Common Carrier, the contract which was signed between ONGC and GAIL much before the declaration of common carrier gets nullified. No party has brought to our notice either through its written submission or oral arguments in the Court saying that declaration of the Uran-Trombay pipeline overrides the contract between ONGC and GAIL..."

3.23 It is also pertinent to note that during the pendency of the Appellant's appeal (being Appeal No. 147 of 2016) before this Tribunal, PNGRB fixed the final transportation tariff for UranTrombay Natural Gas pipeline (UTNGPL) by its order dated 1stNovember 2018 (the "**Final Tariff Order**") as INR 34.73/MMBTU, with effect from 1 April 2019.

3.24 On 18thMarch 2020, the PNGRB (by way of the Impugned Order) dismissed the Appellant's complaint and directed the Appellant and GAIL to pay transportation charges to ONGC as per the Tariff Orders fixed by the PNGRB.

It is to be noted that the PNGRB in the Impugned Order specifically and clearly held that UTNGPL was a pipeline owned by ONGC and the Gas flowing through the UTNGPL was ONGC's own Gas, and that the "delivery point" for such Gas was Trombay.

It has been clearly stated by PNGRB in the above order (para 22), that:

"... the Respondent No. 3 is carrying its own Gas from Uran to Trombay for supplying to Respondent No. 2 and other customers at the Delivery Point i.e.Trombay. However, price of Gas is fixed by MoPNG at landfall point, which is Uran and GAIL is liable to pay transportation charges from Uran to Trombay in terms of clause 15.4 of GSA".

The operative part of the Impugned Order provided as follows:

"In view of the above facts, circumstances and deliberations, the complaint is dismissed and we hereby direct the Complainant and Respondent No. 2, to pay the transportation charges as per the transportation tariff fixed by PNGRB from time to time for Uran-Trombay Natural Gas Pipeline, authorized as a common carrier."

3.25 The major conclusions as per the Impugned Order by PNGRB are:

- The "delivery point" for UranTrombay Natural Gas pipeline (UTNGPL) was Trombay (para 16 of impugned order).
- ONGC is carrying its own Gas from Uran to Trombay for supplying to GAIL and other customers at the Delivery Point i.e.Trombay. However, price of Gas is fixed by MoPNG at landfall point, which is URAN and GAIL is liable to pay transportation charges from URAN to Trombay in terms of clause 15.4 of GSA (para 22 of the impugned order).
- MGL and GAIL to pay the transportation charges as per the transportation tariff fixed by PNGRB from time to time for Uran-

Trombay Natural Gas Pipeline, authorized as a common carrier (Final order statement of the Impugned order).

4.0 Aggrieved by the PNGRB order dated 18th March 2020, the Appellant approached the Tribunal on 20th April 2020.

The Appellant stated that in its assessment, it is submitted that there are no material facts in issue.

Further, questioning the reasonability of PNGRB's judgement, the Appellant highlighted the following questions by law:

"...

- i. *"Whether the Impugned Order could have overlooked and ignored the findings and observations of the Hon'ble Tribunal in the Judgment passed on 20 September 2019, in particular in paragraphs 46 to 48 of the APTEL judgment, which were binding on the PNGRB?"*
- ii. *Whether the PNGRB failed to consider that the Hon'ble Tribunal had already considered and rejected the other argument raised by ONGC as regards the applicability of the PNGRB-fixed transportation tariff on ONGC's own Gas being transported for being sold to GAIL?*
- iii. *Whether the PNGRB could have dismissed the Appellant's complaint on completely new grounds, which was not the basis of the previous decision and in teeth of the Hon'ble Tribunal's judgment dated 20 September 2019, as also the binding judgments of the Hon'ble Delhi High Court in the case of IGL v PNGRB 2012 ELR (Delhi) 1013 as approved and affirmed by the Hon'ble Supreme Court in PNGRB v IGL (2015 (7) SCALE 288)?*

- iv. *Whether the PNGRB-fixed transportation tariff being applied to the own Gas being supplied by the owner of the pipeline to its buyer, would make: (a) the said declaration of the pipeline as a common carrier void and ultra vires the Act, and/or (b) the fixation of tariff by the PNGRB as void, both having been done without notice to the affected parties and contrary to the Act?*
- v. *Alternatively, whether the said "transportation tariff" would be applicable only in respect of the common carrier or the contract carrier capacity of a pipeline declared as a common carrier, i.e. when the pipeline transports Gas owned by a third party / shipper, and would not apply when the owner of the pipeline is transporting its own Gas for its marketing purposes?*
- vi. *Whether the transportation tariff fixed by the PNGRB, which is several times higher than the contractual rate of transportation charges charged by Respondent No 3 to Respondent No 2, can be passed through to the Appellant such as to impact the Appellant, without the PNGRB first hearing the Appellant before the said tariff is fixed?*
- vii. *Whether the Impugned Order is unreasoned, baseless and therefore against principles of natural justice and bad in law and liable to be set aside?*
- viii. *Whether the PNGRB fixed transportation tariff can be imposed retrospectively with effect from 20 November 2008?*

- ix. *Whether the Impugned Order fails to consider the provisions of the Act and the applicable and relevant Regulations and the consequent prejudice being caused to the Appellant?*
- x. *Whether the Impugned Order is bad in law for having been issued / passed without the signature of Member (Legal), who is an essential member of the Board?"*

5.0 The case was heard by this Tribunal wherein detailed arguments were done during the course of hearings and final submissions were made by the counsel representing the parties in the present appeal. The learned counsels for the Appellant and all respondents have raised various points during the course of hearings including the legality of the order dated 18th March 2020 passed by the PNGRB itself on account of non-signing of the same by Member (Legal), PNGRB.

The case has been heard in detail by this Tribunal. However, it is asserted that before dealing with other issues related to the case, it is pertinent to deal with legal validity of the impugned order dated 18th March 2020 given by PNGRB which is not signed by the Member (Legal), PNGRB.

5.1 Submissions by Appellant and Respondents on the PNGRB Order been issued / passed without the signature of Member (Legal).

5.1.1 Appellant (MGL)

In its final written submission dated 28th Oct 2020, the Appellant has submitted the following:

"1.3 The Impugned Order was passed by the PNGRB in contravention of the view taken by the Hon'ble APTEL in its judgment dated 20 September 2020 (in Appeal No 47 of 2016) and was also not signed by the Member (Legal) of the PNGRB, making it void ab initio and non-est under the provisions of the Petroleum and Natural Gas Regulatory Board Act 2006 ("PNGRB Act")."

MGL has further contended that the Impugned Order is dated 18th March 2020, whereas Member (Legal) of PNGRB demitted office on 19th March 2020. Hence, despite holding office at the time of passing the Impugned Order, there is no signature and/or observations by the Member (Legal) in the Impugned Order. The PNGRB has stated no reason why the Impugned Order was being treated as final on 18th March 2020 in the absence of Member (Legal) having not signed either in the agreement or in dissent.

Further, PNGRB has failed to produce any document on record that suggests that the Member (Legal) was agreeable to the final decision contained in the Impugned Order or was even aware of such decision, or even dissented with the same after considering the same.

Appellant has pointed out that in the present case, the complaint was filed by the Appellant under Section 12(1)(a) read with Section 25 of the PNGRB Act challenging the applicability of the PNGRB's Tariff Order when ONGC was transporting its own Gas through its own pipeline and it was imperative for the Member (Legal) to assess the dispute and decide upon the questions of law by way of observations in the Impugned Order, which at present are absent.

Thus, MGL has disputed the validity of the Impugned order on account of non-signing by the Member (Legal).

5.1.2 Respondent No. 1 (PNGRB)

PNGRB, in its written submissions, has stated that after the case was duly heard by a Bench comprising of four members of the Board, including Member (Legal), as a general practice, one of the members wrote the order on behalf of the Board and then circulated it to others on 18.03.2020.

Although 03 of the Members of the Board signed the order on 18.03.2020 while Member (Legal), who was to demit office on 19.03.2020, neither signed the order nor passed a dissenting order.

Thereafter, the order, containing the signatures of the other three Members, which were affixed on 18.03.2020, was webhosted on the website of the Board.

PNGRB has stated that the impugned order cannot be treated as invalid since the matter has been heard in accordance with the provisions of the Act and having been signed by majority (3 other members). The fact of non-signing of the order by the Member (Legal) may at best be inferred that he dissented with the impugned order.

In support, PNGRB has relied on the judgment in case of *State of Madhya Pradesh Through Principal Secretary & Anr vs Mahendra Gupta & Ors (2018) 3 SCC 635*, wherein the Hon'ble Court upheld the order passed by Chairperson and one member of State Transport Authority (**considering it as a majority decision**), although another member heard the matter but did not sign the order on account of his transfer.

5.1.3 Respondent No. 2 (GAIL)

GAIL, in its submissions has contested the **validity of the Impugned** Order, stating that this document cannot be construed an Order in the eyes of law and is a nullity since the same is unsigned by Member (Legal), even though the same was placed before him on 18.3.2020 and uploaded after he already retired on 19.3.2020.

5.1.4 Respondent No. 3 (ONGC)

ONGC, in its written submissions has stated that the Impugned Order should be considered **as a valid judgement** in the eyes of law notwithstanding the absence of signature of the Member (Legal), considering it as a decision by majority as provided in Section 8 (3) of the PNGRB Act, which reads as under:

"8. Meetings of the Board:

.....

(3) All questions which come up before any meeting of the Board shall be decided by a majority of the members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote."

ONGC has pointed out that, it will be incorrect to say that the **decision made** by Member (Legal) for a valid judgement is a must as there is no special power or veto power given to the Member (Legal) in the **decision-making process**.

It has further stated that:

"...from the last date of hearing (24.01.2020) till the date of the Impugned Order (18.03.2020), which is a period of more than one and a half months, the act of signing of the Impugned Order by the Chairperson, two members and Secretary of the PNGRB must have taken place, which clearly shows that the discussions and deliberations must have taken place between the Chairperson and the three members. It further shows that the conclusion reached by the Chairperson and the two members is the final conclusion after such discussions and deliberations."

ONGC has cited other cases in support of its submissions (on validity of the impugned order):

a) **State of M.P. v. Mahendra Gupta, (2018) 3 SCC 635:**

Wherein, the Hon'ble Court upheld the order passed by Chairperson and one member of State Transport Authority (**considering it as a majority decision**), although another member heard the matter but did not sign the order on account of his transfer.

b) **M/s. Maruti Udyog Ltd. v. The State of Haryana, 2013 SCC OnLine P&H 3440:**

Wherein the Hon'ble Court stated that once an order been passed by the Tribunal, it cannot be overruled by the failure of the ministerial staff to communicate the same and shall not entitle the Chairman of the Tribunal to re-constitute another Bench to rehear the appeal.

Further, The Hon'ble Court decided that in the said case, since the decision of the Tribunal was by majority of the Members as per Section 57(3) of the Act and majority of the Members have decided in a particular manner, the third Member even if he has

not signed the same or had reservation with the view of the majority will not be of any consequence and shall not affect the opinion of the majority. The only consequence would be that in further appeal, the benefit of dissenting view may not be available to appreciate the counter view.

c) Government of India, BSNL v. Acome and Others, 2007 SCC OnLine Del 226:

Wherein the Hon'ble Court concluded that:

"...The Law Commission has noted the settled law that in International Arbitrations, the dissenting opinion is not a part of the award, and if given, it remains on record only as a part of information unless the arbitration rules provides otherwise. I have gone through the arbitration agreement in the present case. It does not require that the arbitral award has to be unanimous, or that an opinion of the minority of arbitrators is to form part of the arbitral award."

d) CIMMCO Ltd v. Union of India, 2019 SCC OnLine Del 7655:

The issue in the case was of withdrawal from the arbitration proceedings by one of the arbitrators, when the Arbitral Tribunal was just about to render an Award.

The Hon'ble Court stated that where the Arbitral Tribunal comprises more than one Arbitrator, the signatures of the majority of all members of the Arbitral Tribunal would be sufficient for framing an Award, so long as reasons are given for any omitted signature.

"...In other words, while Subsection (1) of Section 31 provides that the Arbitral Award should be in writing and should bear signatures of all members of Arbitral Tribunal, Subsection (2) of the very same Section envisages a situation where majority of the Arbitral Tribunal

signs the award and the remaining member(s) chooses not to sign the same. The only caveat entered in Subsection (2) of Section 31 is that the majority members comprising the Arbitral Tribunal should give reasons for the omission of the signature(s) of the remaining member(s)."

6.0 At this point, the Tribunal has to preliminary decide the validity of the impugned order in the situation of non-signing of the same by Member (Legal) of the PNGRB.

Deliberations:

6.1 It is an admitted fact that the Member (Legal) has not signed the Impugned Order and the Chairperson and the two Members have signed the Impugned Order on 18.03.2020.

6.2 It is observed that even though the order was dated 18th March 2020 and Member (Legal) has demitted the PNGRB office on 19.03.2020, however, in the order, it was mentioned that the **'Member (Legal)'** has neither signed nor dissented with the Impugned Order.

6.3 It is also an admitted fact by PNGRB that the Impugned Order was uploaded on PNGRB website subsequent to retirement of **'Member (Legal)'** i.e. after 19th March 2020.

With the above facts, Tribunal has to decide on validity of the impugned order.

6.4 The present case presents following probable scenarios:

- a) All the members including Chairman of the PNGRB would have agreed unanimously and signed the Impugned order – In that case, the order would have been valid.
- b) Member (Legal) would have signed the Impugned order but with a dissent. In that scenario, the order would have been still valid with a majority decision of the Chairman and the other Members of PNGRB.
- c) Member (Legal) did not sign the order nor expressed his dissent, which is the current scenario.

6.5 At this point, the following questions emerge in this case:

- a) Despite majority members of board signing the order, can an order be considered valid, when a mandatory member i.e. Member (Legal) who participated in the hearing has not signed the final order as per Section 24 of the PNGRB Act.
- b) Whether the Member (Legal) was part of the discussions in the decision-making process.

6.6 Here, relevant provisions of PNGRB Act related to role of Member (Legal) must be looked into:

The following provisions of the PNGRB Act highlight the statutory requirement of including Member (Legal) in the adjudicatory process before the PNGRB:

- i. Section 3 of the PNGRB Act provides for the establishment and incorporation of the Board and Section 3 (3) states that:

"The Board shall consist of a Chairperson, a Member (Legal) and three other members to be appointed by the Central Government".

- ii. Section 4(1) of the PNGRB Act specifically provides for the qualifications of the Member (Legal) and states that:

"The Central Government shall appoint the Chairperson and other members of the Board from amongst persons of eminence in the fields of petroleum and natural gas industry, management, finance, law, administration or consumer affairs..."

- iii. Section 13 of the PNGRB Act states that:

"(1) The Board shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely...

(2) Every proceeding before the Board shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code (45 of 1860) and the Board shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974)".

- iv. Section 24(1) of the PNGRB Act provides for adjudication of complaints by the PNGRB and states that:

"Save as otherwise provided for arbitration in the relevant agreements between entities or between an entity or any other person, as the case may be, if any dispute arises, in respect of matters referred to in subsection(2) among entities or between

an entity and any other person, such dispute shall be decided by a Bench consisting of the Member (Legal) and one or more members nominated by the Chairperson..."

- v. Section 24(2)(a) of the PNGRB Act provides that:

"The Bench constituted under sub-section (1) shall exercise, on and from the appointed day, all such jurisdiction, powers and authority as were exercisable by a civil court on any matter relating to – (a) refining, processing, storage, transportation and distribution of petroleum, petroleum products and natural gas by the entities..."

- vi. Section 29 of the PNGRB Act provides that,

"Every order made by the Board under this Act shall, on a certificate issued by an officer of the Board, shall be executable in the same manner as if it were a decree of a civil court..."

As evident from above relevant clauses from the PNGRB Act, PNGRB has the power to impose civil penalty under Section 28 and Order of the Board has been statutorily treated as Decree of a civil court under Section 29 of the Act. Therefore, the Board clearly has the essential trappings of a court.

- 6.7 Any proceeding or an action by the PNGRB in a complaint may result in adverse consequences affecting the rights and interest of an entity. The statutory provisions contained in the PNGRB Act establish the mandatory requirement of Member (Legal), especially when the PNGRB is discharging adjudicatory functions.

Involvement of Member (Legal) in the decision-making process has to be ensured by a quasi-judicial body discharging adjudicatory functions in addition to regulatory and advisory functions (such as the PNGRB).The presence of a judicial member with competence and expertise in law is a necessity in order to sustain the power of adjudication provided to such quasi-judicial body.

Thus, when adjudicatory orders are made the signature of judicial member in the order is necessary.

- 6.8 In the present case, there is an ambiguity with respect to non-signing of the order by Member (Legal) and no material evidence has been produced to suggest that any discussions and deliberations took place between the Chairperson and the three members (including Member Legal), leading to the culmination of final order by The Board. This leads to an element of doubt, whether Member (Legal) has been involved during the decision-making process since his mere presence during the hearings does not corroborate this. In our opinion, there may have been a possibility that during his deliberations and discussions with other Board members, he may have influenced the decision of other Board members.
- 6.9 The cases relied by PNGRB/ ONGC in their written submissions are not commensurate with the present case in view of the different nature of orders where a mandatory member like in case of Member (Legal) for PNGRB dealing with quasi-judicial cases was not involved.
- 6.10 Reference is drawn to the below judgements related to role of all members of tribunals/ commissions which are of *quasi-judicial nature*.

(a) **In the Appellate Tribunal For Electricity at New Delhi (appellate Jurisdiction) Appeal No. 233 of 2016: Global Energy Pvt. Ltd. And Karnataka Electricity Regulatory Commission**, held "*..... that the work of the Commission which is of a quasi-judicial nature is one of joint responsibility of all Members. The Commission as a body should sit together and the order of the Commission has to be the result of the joint deliberations of all Members of the Commission acting in a joint capacity. All Members of the Commission who heard the matter should sign the order. If the order is not signed by all Members who heard the matter it will be invalid as it will not be order of the Commission. This is in line with the fundamental proposition that a person who hears must decide and divided responsibility is destructive of the concept of judicial hearing. If a Member dissents he must give reasons for the dissent and that shall form part of the order.*" In the said matter, the Tribunal while remanding the matter back "*.....concluded that the impugned order is non est and void as the matter was heard by three Members and order was signed by two Members. This is against the basic principle that one who hears the matter should sign the order.It has ignored the fundamental principle of judicial decision-making which applies to quasi judicial bodies as well that one who hears the matter must sign the order. We are told that the Member who heard the matter could not sign the order dated 01/09/2016 because he was out of the country from 31/08/2016 to 02/09/2016 (both days inclusive) in connection with a workshop on 'Smart Grid'. We are shocked at this explanation. Writing of a judgment is a serious matter. Judgments deal with rights and obligations of parties. In the power sector in most cases huge stakes are involved and each matter has commercial implications. But even if a matter does*

not involve high stakes all the same it decides rights and obligations of parties. "

- (b) *In **United Commercial Bank Ltd.** the seven judge bench of the Supreme Court was considering the question whether the Industrial Tribunal (Bank Disputes) had jurisdiction to make awards. The Tribunal consisted of three Members i.e. Mr. Aiyar, Mr. Sen and Mr. Mazumdar. After the Tribunal commenced its sittings Mr. Mazumdar was absent on various dates. Thereafter Mr. Aiyar was absent for a considerable period as his services were placed at the disposal of Ministry of External Affairs for some other work. Mr. Sen and Mr. Mazumdar sat together and from 23/11/1949 to 20/02/1950 made certain awards. Mr. Aiyar joined Mr. Sen and Mr. Mazumdar on 20/02/1950. They heard the parties and made some awards. The objection to the jurisdiction was two-fold. Firstly, it was urged that in the absence of Mr. Aiyar the two Members had no jurisdiction to hear anything at all without the appropriate notification and Mr. Aiyar's services having ceased to be available on 23/11/1949, he cannot sit again with the other two Members to form the Tribunal in the absence of notification under Section 7 of the Industrial Disputes Act. The Supreme Court considered the relevant provisions of the Industrial Disputes Act. The objection raised to the jurisdiction to make awards was upheld. It was held that all the interim awards made and signed by Mr. Sen and Mr. Mazumdar and final awards made and signed by Mr. Sen, Mr. Mazumdar and Mr. Aiyar were without jurisdiction. While coming to this conclusion the Supreme Court laid down the basic principles governing the decision-making process to be followed by the quasi-judicial bodies as under: "5. It is thus clear and indeed it is not disputed that the Tribunal as a body should sit together and the award has to be the result of the joint*

deliberations of all Members of the Tribunal acting in a joint capacity. Section 16 requires that all Members of the Tribunal shall sign the award. This again emphasizes that the function of the Tribunal is joint and it is not open to any Member to refrain from signing the award. If the award is not signed by all Members it will be invalid as it will not be award of the Tribunal."..... "9. That seems to us to be the correct position because the fundamental basis on which the Tribunal has to do its work is that all Members must sit and take part in its proceedings jointly. If a Member was casually or temporarily absent owing to illness, the remaining Members cannot have the power to proceed with the reference in the name of the Tribunal, having regard to the absence of any provision like section 5(4) or 6(3) in respect of the Tribunal. The Government had notified the constitution of this Tribunal by the two notification summarized in the earlier part of the judgment and thereby had constituted the Tribunal to consist of three Members and those three were Mr. Sen, Chairman, Mr. Mazumdar and Mr. Chandrasekhara Aiyar. Proceeding with the adjudication in the absence of one, undermines the basic principle of the joint work 18 and responsibility of the Tribunal and of all its Members to make the award "13. The result is that all the interim awards purported to be made by Mr. Sen and Mr. Mazumdar as well as the final awards made by the three must all be held to have been made without jurisdiction. It seems to us that the only way in which the Government could have put matters right was by a notification issued in February, 1950, constituting the Tribunal as a fresh Tribunal of three Members (and not by proceeding as if a vacancy had been filled up on 20th February, 1950, under section 8) and three Members proceeding with the adjudication de novo. Even if the contention of the respondents that Mr. Chandrasekhara Aiyar continued throughout a

Member of the Tribunal were accepted, in our opinion, the appellants' objection to the jurisdiction of the three persons to sign the award must be upheld. Section 16 which authorizes them to sign is preceded by section 15. Unless they have complied with the provisions of section 15, i.e., unless all the three have heard the matter together, they have no jurisdiction to make the award in terms of section 15 and have therefore also no jurisdiction to sign the award under section 16. In any view of the matter the awards are therefore without jurisdiction."..... "15. In our opinion the position here clearly is that the responsibility to work and decide being the joint responsibility of all the three Members, if proceedings are conducted and discussions on several general issues took place in the presence of only two, followed by an award made by three, the question goes to the root of the jurisdiction of the Tribunal and is not a matter of irregularity in the conduct of those proceedings. The absence of a condition necessary to found the jurisdiction to make the award or give a 19 decision deprives the award or decision of any conclusive effect"

..... "17. On the admitted principle that the work of the Tribunal, which is of a quasi-judicial nature, is one of joint responsibility of all its Members,"

"59. It is quite true that a quasi-judicial Tribunal enjoys greater flexibility and freedom from the strict rules of law and procedure than an ordinary court of law, but however much informality and celerity might be considered to be desirable in regard to the proceedings of an Industrial Tribunal, it is absolutely necessary that the Tribunal must be properly constituted in accordance with the

requirements of law before it is allowed to function at all. I fail to see further how the issuing of a formal notification under section 7 of the Act could delay the proceedings of the Tribunal or hamper expeditious settlement of the disputes. Section 16 of the Industrial Disputes Act makes the imperative provision that the award of a Tribunal shall be in writing and shall be signed by all the Members. So long as there is no change or alteration in the original notification which constituted the Tribunal, the expression "all the Members" must mean and refer to all the members whose names appear in this notification and, unless all of them sign the award, it would not be valid or operative award in the law."

This case calls for the following corrective actions at the end of PNGRB :

- 1. Benchmarking the timeline to decide the tariff related issues which may have impacts on customer and operators.**
- 2. Develop a procedure to handle complaints and disputes as per Section 24 & 25 of the PNGRB Act. It needs to encompass the process, i.e. receipt of complaint till resolution thereof under 24 or 25 of the Act, within a benchmark timeline to be decided by PNGRB.**
- 3. Action taken Report on instructions issued by APTEL shall be filed on affidavit every quarter end, in first week of the succeeding month. It needs to be reconciled from the beginning of tribunal.**

Order

In light of the above-cited references at 6.10 and Section 24 of the PNGRB Act, the impugned order dated 18th March 2020 by PNGRB cannot be termed a legal and valid order on account of non-signing by the Member (Legal).

Thus, it is ordered that:-

- 1) The impugned order dated 18.03.2020 passed by PNGRB is hereby quashed and set aside.
- 2) The matter remanded for fresh adjudication by the PNGRB. PNGRB, while deciding the case afresh, shall also specifically decide these issues in totality:
 - a) Whether the transportation tariff determined under Tariff Order dated 30th Dec. 2013 or any further tariff orders passed by PNGRB has any application to Gas by ONGC from Uran to Trombay for delivery to GAIL at Trombay, as it is the transportation of ONGC's "own" Gas.
 - b) Whether the PNGRB fixed transportation tariff can be imposed retrospectively with effect from 20 November 2008?
 - c) Did the Uran to Trombay pipeline be declared by way of a notification to be a Common Carrier in terms of the Act and the Regulation?
- 3) It is, however, clarified that the parties might raise any other issue during the hearing. PNGRB shall hear all the parties

and decide the matter following the law within three months from the date of appointment of Member (Legal).

No order as to costs.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERENCING ON THIS 16TH DAY OF JULY, 2021**

**(Dr.Ashutosh Karnatak)
Technical Member**

**(Justice Manjula Chellur)
Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~