IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 105 OF 2015 & IA NOS. 169 & 242 OF 2015

Dated: 10th March 2021

Present: HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

HON'BLE DR. ASHUTOSH KARNATAK, TECHNICAL MEMBER (P&NG)

IN THE MATTER OF

Bharat Petroleum Corporation Limited
Bharat Bhavan,
4 & 6, Currimbhoy Road,
Ballard Estate, P.B. No. 688,
Mumbai – 400 001 **..... Appellant**

VERSUS

1. **Sabarmati Gas Limited**
   Plot No. 907, Sector-21
   Gandhi Nagar – 382021 (Gujarat)

2. **GAIL (India) Limited**
   16, Bhikaji Cama Place,
   New Delhi-110066

3. **Petroleum and Natural Gas Regulatory Board**
   Through its Secretary
   First Floor, World Trade Centre, Babar Road,
   New Delhi – 110 001 **..... Respondents**

Counsel for the Appellant … **Mr. Rajat Navet**

Counsel for the Respondent(s)… **Mr. M.G. Ramachandran, Sr. Adv**
Mr. Piyush Joshi
Ms. Sumiti Yadava
Mr. Abhishek Prakash
Ms. Manali Joshi
Mr. Shubham Arya for R-1

Mr. Sachhin Puri, Sr. Adv
Mr. Sandeep Mahapatra
Mr. Dhananjay Grover for R-2

Ms. Sonali Malhotra for R-3

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, JUDICIAL MEMBER

1. The matter was taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. The appeal at hand has been preferred by Bharat Petroleum Corporation Ltd. (hereinafter referred to as "the appellant" or "BPCL") feeling aggrieved against order dated 13.02.2015 passed by the third respondent Petroleum and Natural Gas Regulatory Board (hereinafter referred to as "PNGRB" or "the Board") holding it guilty of indulgence in restrictive trade practices. The impugned order has been rendered by the Board in proceedings taken out in terms of this tribunal's Judgment dated 28.11.2014 passed in Appeal no. 14 of 2014 whereby the judgement/order of the PNGRB dated 14.11.2013 had been set aside and the matter arising out of the complaint of the first respondent Sabarmati Gas Ltd. (hereinafter referred to as "SGL") was remanded back. The directions in the remand order were for fresh consideration of the complaint of SGL by the Board in light of the observations made particularly requiring examination of the issues from the standpoint as to whether this

tribunal's judgment dated 18.12.2013 in Appeal nos. 1, 2, 5 & 7 of 2012 (involving another entity as the complainant agitating grievances similar to those urged by SGL) would be applicable to the facts of the present case. It may be mentioned here itself that this litigation has also involved the second respondent GAIL (hereinafter referred to as "GAIL"), allegations similar to those levelled against the appellant having been directed against it as well in the complaint of SGL though it not having been held guilty of any such misdemeanor.

THE FACTS

3. It is necessary to set out the background facts at some length. This narration would include, per force, note being taken of certain developments concerning other entities (GSPCL and GSPL). Since chronology of events is of import, there is bound to be some digression mid-course from the facts crucial to the parties herein.

4. The appellant BPCL is engaged in the business of refining, marketing of petroleum products including Re-gasified Liquefied Natural Gas (for short, RLNG) in India, import of crude and petroleum products.

5. The second respondent GAIL is also a company, *inter alia*, engaged in the sale and supply of RLNG including the procurement of RLNG from PLL which owns, operates and maintains the Dahej LNG terminal, it (GAIL) having also laid down and established, and operates & maintains, the DVPL (Gas Pipeline) for transportation of RLNG from Dahej LNG terminal, the DVPL pipeline being interconnected at Vijaypur to other pipelines namely, HVJ-DVPL-

GREP Pipeline (Hazira-Vijaypur-Jagdishpur & Gas Rehabilitation and Expansion Project & Dahej-Vijaypur Pipeline Network).

Dahej LNG Terminal

6. It is not in dispute that a company named Petronet LNG Limited (PLL) - co-promoted by GAIL, Indian Oil Corporation Ltd. (IOCL), Oil and Natural Gas Commission (ONGC) and BPCL - owns, operates and manages the Dahej LNG Terminal which was commissioned in 2004. One of the main objectives of PLL is to import Liquified Natural Gas (LNG) into India, develop facilities for receiving, re-gasification and sale of re-gasified LNG to intermediate off takers like IOCL, BPCL and GAIL.

7. The parties are on common ground as to the facts that for purposes of setting up the Dahej Terminal, a foreign supplier of LNG, named RasGas, had entered into an agreement with PLL for sale of LNG by it (RasGas) from Qatar on 31.07.1999. In pursuance of the said agreement, GAIL was required to establish a pipeline named the Dahej Vijaypur Pipeline (for short, DVPL) for transportation of RLNG to consumers. Concededly, by order dated 13.11.1999, the Ministry of Petroleum and Natural Gas (MoPNG) of Government of India (GoI) nominated GAIL as the sole transporter of RLNG from Dahej Terminal to prospective consumers. GAIL approved the laying down of DVPL (Gas Pipeline) on 18.12.2001. Pursuant thereto, GAIL in due course built the HVJ pipeline incurring expenditure said to be Rs.10,000 Crores.

8. On 24.07.2003, GSPCL requested PLL for direct purchase of RLNG required by it from Dahej LNG terminal at the 49th Board Meeting of PLL. This was not accepted for the reason that the entire quantum

of RLNG had been committed to be sold to GAIL, Indian Oil and BPCL based on the significant initiative taken by such companies including financial guarantees and commitments.

Arrangements involving GAIL

9. In February 2004 (on 07.02.2014, 12.02.2014 and 16.02.2014), three separate Long term Gas Supply Agreements (GSAs) were entered into between GAIL, Indian Oil and BPCL respectively with GSPCL for sale and purchase of RLNG wherein the delivery point of RLNG was agreed to be at 500 meters from Dahej LNG terminal with stipulation that the RLNG would be transported from Dahej LNG terminal to the delivery point through the DVPL (Gas Pipeline) of GAIL. From the said delivery point, the gas was to be transported through GSPL network. Accordingly, a 70-meter interconnection between DVPL and GSPL (pipeline subsidiary of GSPCL) was established on 23.03.2004 and RLNG supplies to GSPCL through this 70 mtr interconnection commenced on 24.03.2004. Admittedly at the said stage, the DVPL (gas pipeline) was the only pipeline commissioned or available for direct connectivity with Dahej LNG Terminal. The GSPCL, thereafter, would take delivery of gas in pursuance to the long-term GSAs at the distance of 500 meters from Dahej LNG terminal.

10. There is no dispute as to the fact that the capacity committed by PLL to GAIL, IOCL and BPCL was 7.5 MMTPA and out of the said capacity, the share of the appellant BPCL has been only 0.75 MMTPA. For availing the said share, BPCL has a contractual arrangement with PLL in the form of a Gas Sales and Purchase Agreement and another contractual arrangement with GAIL, it being

the Transporter, the commitment under the contract being that transportation of the share of BPCL would be carried out through the GAIL pipeline. There is no contest as to the fact of existence of the said arrangement between BPCL and GAIL in the form of Gas Transportation Agreement (GTA) dated 7.10.2005. Indisputably, in terms of the said GTA, the appellant BPCL is under a "Ship or Pay Quantity" ("SOPQ") liability which contemplates annual obligation on BPCL to deliver a minimum quantity of gas at the "Delivery Point" or pay for it if BPCL fails to transport the stipulated minimum quantity from the said pipeline. The relevant clause reads thus:

> *11.3 Ship or Pay Obligation*
>
> *"11.3.1 With effect from the Commencement Date, during each Contract Year throughout the term of this Agreement, the Shipper accepts an annual obligation such that the Shipper agrees to deliver Gas at Delivery Point or pay for, if the Shipper fails to so deliver Gas at Delivery Point thereof a minimum quantity of Gas (the, "Ship or pay Quantity" or "SOPQ")"*
>
> (emphasis supplied)

Events involving SGL and other entities

11. On 04.04.2006, the Joint Venture Agreement was entered into between GSPCL and BPCL to establish SGL for City Gas Distribution.

12. It is not contested that on 17.10.2006, at the 69th meeting of the Board of Directors of Petronet LNG Limited, it was *inter alia* recorded that:

> *"… recently during handling of the spot cargos sources by PLL, constraints were observed regarding getting the pipeline capacity (from the existing system) for*

transportation of the additional volumes of RLNG. PLL had to resort to re-scheduling of a few of its cargoes from RasGas to meet the storage requirement. The operating experience of the supply change have brought out that there is reasonable probability of complete shutting down of PLL's operations due to operational disruptions/aberrations in GAIL system (it has happened at least once so far) resulting in stoppage of RLNG evacuation and thus losses due to flaring."

13. It appears that the Board of Directors of PLL felt that having a second source of evacuation would provide more flexibility to the system and partially mitigate the risk of any disruption in the GAIL system, adding to the security of energy supply. In light of this, the PLL Board approved the direct connectivity from PLL's LNG terminal and the pipeline network to be constructed by GSPL.

14. Indisputably, pursuant to the decision taken as above by the PLL Board, GSPL was granted direct connectivity to its pipeline with Dahej LNG terminal which enabled it (GSPL) to transport RLNG from Dahej LNG Terminal directly without the need to use any part of the DVPL (Gas Pipeline) of GAIL i.e. the 500 Metres of the DVPL Pipeline from Dahej LNG Terminal where there was an interconnectivity to GSPL Pipeline. The said entity (GSPL) concededly developed the said infrastructure in 2007-08 including the independent gas pipeline with direct connectivity to Dahej LNG terminal. It has been brought out by GAIL through its submissions at the hearing, and not refuted by any other party, particularly SGL, that the GSPL pipeline was declared and authorized as a Common carrier by PNGRB on 27.07.2012 under Regulation 18 of the PNGRB Natural Gas Pipeline Authorization Regulations.

15. The first respondent Sabarmati Gas Ltd. (SGL) is a joint venture of the appellant (BPCL) and another entity named Gujarat State

Petroleum Corporation Ltd. (GSPCL), the JV having been incorporated for the purposes of undertaking city gas distribution, it being actually engaged in City Gas Distribution (CGD) in the Sabarkantha, Mehsana and Gandhinagar geographical areas in the State of Gujarat.

16. It was in March 2009 that SGL engaged BPCL in negotiations for procurement of gas required by it (SGL) for CGD Network. Sabarmati. It appears that simultaneously it (SGL) was also discussing with GSPL the possibility of procurement of gas from its resources. Both such procurements were gas available from BPCL and GSPCL at Dahej LNG Terminal i.e., the imported LNG regassified to RLNG.

17. It is admitted case of all sides that SGL, then contemplating to purchase RLNG from the appellant BPCL, by its letter dated 25.05.2009, had requested that it be permitted to transport the gas through the GSPL Pipeline**.** BPCL, however, by its reply dated 15.06.2009, informed SGL that since it (BPCL) had back-to-back arrangements committed with GAIL for transmission of gas from PLL facilities to Delivery Point, it could not agree to the such request.

18. In the wake of the negotiations, and the above-mentioned exchange of communications, SGL entered into a Gas Sales Agreement (GSA) dated 29.6.2009 with the appellant BPCL for purchase of natural gas from the latter, it being obtained from re-gasification of liquefied natural gas (RLNG) from the Dahej LNG Terminal to the premises of SGL, the quantity being 0.15 MMSCMD of gas on daily basis for period from 1.7.2009 to 28.04.2028.

19. The parties also admit that another supplementary agreement dated 30.9.2009 for supply of an additional capacity of 0.1 MMSCMD of RLNG was entered into between SGL and BPCL**.** As at the time of

negotiating the first GSA dated 29.06.2009, prior to execution of the supplementary GSA dated 30.9.2009, SGL approached BPCL by letter dated 8.9.2009 once again requesting for incorporation of GSPL Direct Connectivity but BPCL, by reply dated 15.9.2009, expressed inability to agree reiterating the reason with reference to its back-to-back arrangement GAIL.

20. It is admitted that in terms of the GSA dated 29.6.2009, as indeed the Supplementary GSA dated 30.09.2009, gas is delivered by BPCL to SGL at "Delivery Point" which has been specified in the contract as a point on pipeline owned and operated by GAIL, 500 meters away from the Dahej Terminal.

21. It is fairly admitted that the financial terms of the GSA between SGL and BPCL were set out in a Price Side Letter dated 29.6.2009 executed simultaneously. In its terms, the contract price for gas under the said GSA was to be determined on the basis, *inter alia*, (a) contract price, (b) taxes and duties. The contract price payable in Indian Rupee (INR) was to consist of Re-gasification Charges, Transmission Charges and other charges. The said document would also provide for liability towards "transmission charges" it being defined by the said Price Side Letter to mean the actual amount charged by the gas transporter (GAIL) to the Seller (BPCL) for transmission of gas from PLL's facilities to the Delivery Point. Similar arrangement exists vis-à-vis the Supplementary GSA.

22. There is no dispute as to the fact that in terms of the Price Side Letter, the parties have agreed that SGL, the Buyer, is liable to pay for any variation/change in the Price on account of any change in law in terms of Article 11.2 of the GSA, nothing in the Price Side Letter to be deemed to have any overriding effect thereupon. Accordingly, and in terms of the said Price Side Letter, BPCL has

been charging Connectivity Charges from SGL as per the Prices fixed by GAIL from time to time.

23. It is also not contested that after the enactment of the Petroleum and Natural Gas Regulatory Board Act, 2006 ("PNGRB Act"), and establishment of the Board, it having framed and notified, on 20.11.2008, the Petroleum & Natural Gas Regulatory Board (Determination of Natural Gas Pipeline Tariff), Regulations 2008 (hereinafter referred to as "the Tariff Regulations").

24. On 16.12.2009, Authorisation was given by PNGRB in favour of SGL for the CGD network in the Geographical areas of Sabarkantha, Mehasana and Gandhinagar with the condition of firm agreement for procurement of minimum quantum of gas.

25. In due course, GAIL submitted a petition under the said Tariff Regulations before the PNGRB seeking determination of transportation tariff on the HVJ/DVPL Trunk Gas pipeline. On 19.4.2010 PNGRB issued a Letter of Acceptance to GAIL in regard to the authorisation of the Central Government, relating to DVPL pipeline. The order of PNGRB stipulated the provisional initial unit Natural Gas Pipeline Tariff for the existing HVJ-GREP-DVPL & DVPL – GREP Up-gradation also holding that the tariff on levelized basis shall be Rs.25.46 per MMBTU for the existing HVJ-GREP-DVPL Pipeline and that GAIL would be required to submit for approval (by the Board) the apportionment of the levelized tariff over all the tariff zones with detailed calculations. Subsequently, by Order passed on 09.06.2010, the PNGRB approved the tariff of Rs. 19.83 per MMBTU for zone 1 of HVJ-GREP-DVPL Pipeline and Rs 42.46 per MMBTU for zone 1 of DVPL-GREP Up gradation declaring the date of applicability for such tariff to be 20.11.2008. In the wake of the said Order dated 09.06.2010, GAIL admittedly called upon the

parties to pay as per the revised tariff fixed by the Board, also conveying that the revised zone 1 tariff would be applicable for the PLL interconnection also.

Complaints of Restrictive Trade Practices

26. In the meanwhile, a complaint had come to be filed by GSPCL alleging that it (GSPCL) was not being not allowed to procure the RLNG under the Gas Supply Agreements with GAIL, Indian Oil and BPCL, through its own GSPL Pipeline connectivity. On 10.10.2011, PNGRB passed an order on the said complaint of GSPCL (hereinafter referred to as "*the GSPCL case*") holding, *inter alia*, that GAIL, IOCL and BPCL by such acts had Indulged in restrictive trade practices. The said decision of PNGRB was challenged by all the said three entities (GAIL, IOCL and BPCL) by Appeals (nos. 1, 2 and 5 of 2012) before this tribunal.

27. It is not in dispute that referring to the tariff determination by PNGRB mentioned earlier by order dated 09.06.2010, the second respondent GAIL issued debit notes covering the additional transportation charges from 20.11.2008 onwards. Based on such communication, the appellant BPCL, in turn, by its letters dated 16.03.2011 and 05.04.2011 called upon SGL to make the payment of Rs. 9,45,98,966/- and Rs. 4,66,82,262/-, as per debit notes received from GAIL, for the period from 20.11.2008 to 15.09.2010 for supplies made to it (SGL).

28. It is undisputed case that SGL did not pay in terms of above demand of BPCL. Instead, it filed a Petition before the Board on 28.3.2012 (registered as Case No. 08/2013) under Section 25 read with Sections 11(a), 12(b)(v) and 13(i)(g) of the PNGRB Act accusing the

appellant BPCL, and the second respondent GAIL, of indulging in restrictive trade practice by not allowing SGL to take gas directly from the GSPL pipeline also praying that it be allowed to use the said GSPL connectivity. In the said complaint, SGL placed reliance on the order dated 10.10.2011 passed by PNGRB in the GSPCL case wherein the Board had allowed direct connectivity to GSPCL and had directed the IOCL, BPCL and GAIL to deliver to GSPCL the contracted RLNG at the point of direct connectivity between GSPL pipeline and Dahej LNG Terminal.

29. On being called upon to respond, the appellant BPCL filed its reply to the Complaint objecting on various grounds including limitation, arbitration caluse, inadmissibility of prayer it being in the nature of plea for rewriting or alteration of terms and conditions of a contract and refuting the accusation of indulgence in restrictive trade practices. The appellant also submitted before the Board that any change in Delivery Point would have serious consequential monetary consequences for it (BPCL) on account of contractual obligations in terms of the GTA dated 07.10.2005 entered into between GAIL and BPCL. The appellant also pleaded that if the PNGRB was of the view that contractual terms agreed upon between the parties were to be amended, appropriate directions be passed obliging GAIL to make suitable changes or amendments in the said GTA and that BPCL be relieved of the SOPQ obligations thereunder to the extent the gas was to be supplied through the GSPL pipeline.

30. The second respondent GAIL also resisted the proceedings on similar lines.

31. While the appeals in the GSPCL case were pending before this tribunal, the PNGRB rendered its decision on the complaint (Case

No. 08/2013) of first respondent (SGL) on 14.11.2013, *inter alia*, holding thus:

> *"I am of the view that since the gas being provided through GAIL's transport network, the charges of same are required to be borne by the Petitioner. If the Petitioner was so aggrieved by the stand of the Respondent No. 1 in denying direct connectivity, as sought by it. It could have brought to the notice of erstwhile MRTP Commission/CCI for relied even as it had entered into the GSA with BPCL in absence of any other even as it had entered into the GSA with BPCL in absence of any other opinion. It has also not been brought to the attention of this Board that there was such an initiation by the Petitioner. Therefore, I am inclined to believe that the Petitioner had entered into the GSA with BPCL voluntarily and out of its own free will. I do not find any merit in the relief sought by the Petitioner in the prayer, however, as the connectivity through GAIL's pipeline shall entail payment of dual tariff i.e., GAIL's Pipeline and GSPL's network which in turn shall have to be borne by the customers of SGL*
>
> *Keeping in view the interest of consumers and the entities involved:*
>
> - *Direct connectivity as was sought by the SGL through GSPL pipeline be given from PLL's facility at Dahej within 30 days of the Order.*
> - *BPCL shall stand absolved from paying ship or pay charges to GAIL for the quantity of gas contracted to be sold by BPCL to SGL w.e.f 30 days of the Order.*
> - *Accordingly the quantity of gas reduced from BPCL's ship or pay obligation shall be reduced from contracted capacity of GAIL's network and shall be considered as common carrier capacity for the purposed of determination of tariff."*

32. It is clear from the above-said order that the PNGRB held only BPCL to be guilty of restrictive trade practice by not allowing SGL to take Gas from GSPL Pipeline and issued directions accordingly. The Board also directed that transmission charges would be paid by SGL

as per rate fixed for GSPL Pipeline and further that the demands raised by letters dated 16.3.2011 and 5.4.2011 be rectified accordingly.

33. Within a few weeks, however, of the said decision on complaint of SGL, this tribunal rendered decision in GSPCL case (Appeal nos. 1,2, and 5 of 2012) on 18.12.2013 setting aside the order dated 10.10.2011 of PNGRB dated 10.10.2011 dealing with the Restrictive Trade Practices allegations made by GSPCL holding, *inter alia*, as under:

> *"104. Summary of our findings:-*
> *i) In the light of our detailed discussion made above, it has to be held that the conclusion arrived at by the Petroleum Board to the effect that the Appellant GAIL had indulged in "Restrictive Trade Practice" by abusing the dominant position with regard to Delivery of the gas sales by the Appellants to Gujarat Petroleum through HVJ/DVPL gas pipelines laid, operated and maintained by the Appellant GAIL is patently wrong. Hence, the impugned orders are liable to be set aside."*

34. It may be mentioned here itself that the above judgment dated 18.12.2013 of this tribunal in GSPCL case is under challenge before Supreme Court, the appeal being presently pending. It is fairly conceded that there is no stay granted against the said decision by the Supreme Court. It also bears mention that the first respondent SGL has been permitted by the Supreme Court, by order dated 29.10.2014, to join the said proceedings as an intervenor on the ground the decision rendered there would have bearing on its interests.

35. Meanwhile, the appeal (no. 14 of 2014) of BPCL against the decision of PNGRB rendered on 14.11.2013 in the complaint (Case

No. 08/2013) of first respondent (SGL) was decided by this tribunal by judgment on 28.11.2014, *inter alia*, as under:

> *"SUMMARY OF OUR FINDINGS:-*
> *28. In the light of the foregoing, we hold that the best course of action would be to remand the matter back to the Petroleum Board so that the Petroleum Board may examine the matter from the standpoint of whether this Tribunal's judgment dated 18.12.2013 in Appeal Nos. 1,2, & 5 of 2012 would be squarely applicable to the present Appeal i.e. Appeal No.14 of 2014 or not in the light of the rival contentions held out by the parties. We are not expressing any opinion on this aspect.*
>
> *29. We also notice that Sabarmati (R-1) has a vested right to be heard by the Petroleum Board in the process of the determination of provisional initial tariff in the light of this Tribunal's judgment passed on 06.01.2014 in the matter of Reliance Industries vs. PNGRB and GSPL (Appeal No.222 of 2012). Consequently, the tariff order to be reworked by the Petroleum Board as suggested above will have to be passed after providing the R-1 an opportunity to be heard and taking into account its submissions in respect thereto.*
>
> *30. In view of our above findings, the Order impugned is set aside and remanded for consideration of the aspect which we have indicated above. The Board will hear the parties concerned and decide the issue in accordance with law. With these observations, the Appeal is disposed of."*

36. On 04.02.2015, the second respondent SGL, in pursuance of the above order of remand, filed Case (no. 123 of 2015) before the PNGRB seeking reworking of the Tariff for DVPL/DVPL upgradation pipeline after considering the submissions of SGL. Besides this, the remand proceedings on the issues involved in case no 08 of 2012 for considering the applicability of decision dated 18.12.2013 in GSPCL case (Appeal nos. 1, 2 and 5 of 2012) were also taken out.

37. It is pointed out by the appellant BPCL that when the matter came up for fresh consideration in terms of the remand order, the Board by order dated 07.01.2015 observed thus:

> *"The findings of the Board, thus no more exist and a comparative analysis of this matter has to be made by us in the light of the judgment dated 18.12.2013 delivered by APTEL in Appeal Nos. 1, 2 & 5 of 2012 "IOCL vs. GSPCL & Ors.".*
>
> (emphasis supplied)

38. On 13.02.2015, the Board passed the impugned order on the complaint of restrictive trade practices, based on majority opinion, *inter alia*, holding that the Judgment passed by this tribunal in GSPCL case (Appeal nos. 1, 2 & 5 of 2012) is not applicable to the facts of the present case. It also observed that other findings returned by the previous order dated 14.11.2013 were not being modified since such findings had not been examined by this tribunal and that modification of the same, would amount to review, scope of which is limited. The operative part of the impugned order reads thus:

> *"On consideration of the pleadings, evidence and the written submissions, the facts relating to Appeal No. 1 2 & 5 of 2012 and Appeal No. 141/2014 appears to be distinct as discussed above and are also being summarized hereunder.*
>
> *1. The GSA was executed between GSPCL and GAIL in the year 2004 when there was only one pipeline from which gas could be delivered from Dahej LNG Terminal whereas the GSA between Sabarmati Gas Ltd. and BPCL was entered into on 26.6.2009 and at that point of time, there were two*

pipelines as the GSPL's gas pipeline connecting directly with the Dahej LNG Terminal was commissioned on 27.10.2008.

2. GAIL was imposing only Zone-1 DVPL tariff on GSPCL whereas in Sabarmati's case, 2 sets of charges are being imposed for delivering gas at the same delivery point. The imposition of levying Zone-1 tariff for DVPL pipeline, at the most, could have been justified for the said 500 mtr. but the imposition of DVPL I GREP upgradation tariff cannot be justified Sabarmati Gas Ltd. is not a DVPL I GREP customer and delivery point falls at the same common point and there cannot be 2 sets of tariff for the same point.

3. GSPCL is a buyer and seller of bulk quantity of natural gas and has long term contracts with power plants, refineries and CGDs etc. and the change in tariff can easily be adjusted or recovered retrospectively and Moreover, such activities of marketing are not regulated by the Board under the Act; whereas. Sabarmati Gas Ltd. is a CGD entity and sells gas. in a price sensitive market, to retail consumers and its activities are also regulated by the Board under the Act and difference in price can hardly be recovered from such consumers with retrospective effect.

4. GSPCL had presented its case during the process of tariff determination of DVPL before the Board and had specifically contended that DVPL tariff should not be applied to GSPCL whereas Sabarmati (SGL) was never given any opportunity of hearing during the process of tariff determination of DVPL.

ORDER

The APTEL's judgment dated 18.12.2013 delivered in Appeal No. 1, 2 and 5 of 2012 does not apply to Appeal No. 14 of 2014 pertaining to Case No. 8 of 2013 'Sabarmati Gas Ltd. vs. BPCL and Another' and therefore the findings/directions of the board, which are being reproduced hereunder for ready reference still hold good and which shall be considered as part of the judgment.

BPCL (R-1) is directed to cease its restrictive trade practise of preventing access to the GSPL's Pipeline to the Petitioner with immediate effect. It shall be entitled to claim the transmission tariff from the Petitioner at such rate, which have been fixed by this board for GSPL's Pipeline and the claims, as raised by it vide letters dated 5.4.2011 and 16.3.2011 shall be rectified accordingly.

The petitioner shall submit the details before the Board within 3 months pertaining to the recovery of transmission charges from its consumers during the questioned period, if any as it cannot be allowed undue enrichment by retaining itself the amount so recovered and, therefore. the petitioner is directed to deposit the entire amount. If realized. with the Board to ensure its proper appropriation.

The petitioner for realization of the amount of compensation, regarding inter-connection charges can approach the

appropriate forum/Court as it does not appear to be maintainable before this Board."

THE APPEAL

39. The appeal at hand challenges the above decision of the PNGRB on the complaint of SGL.

40. It may be mentioned here that the petition of the second respondent SGL (Case no. 123 of 2015) seeking reworking of the Tariff for DVPL/DVPL upgradation pipeline after considering its submissions was disposed of by the Board by order dated 23.06.2015 holding that the petition of SGL was premature and thus declining to proceed further. The appellant herein (BPCL) and second respondent herein (GAIL), however, felt aggrieved by some observations, conclusions and declarations in the said order. The order, thus, was challenged by two separate appeals (Appeal no. 172 of 2015 filed by BPCL and Appeal no. 227 of 2015 filed by GAIL) which were segregated from the matter at hand by order dated 13.01.2021 upon joint request of the parties. The said appeals, however, were disposed of on 24.02.2021, as not pressed, upon it being clarified, with consent of all sides, *inter* alia, that the impugned observations, conclusions and declarations in the said order shall not be treated as final or binding, the related issues and contentions of parties thereupon being open to be agitated in proceedings on the subject that may be taken out in future.

41. The issue raised by SGL about it having been denied the opportunity to represent against the tariff before the PNGRB is subject matter of abovesaid other set of appeals and shall be considered in such context. In this view, and in view of the fact that the impugned order concerns the allegation of restrictive trade practice adopted by

insistence on use of pipeline and delivery point of GAIL, the grievances raised by SGL about GAIL not applying tariff as per PNGRB tariff order and that two different tariffs are being imposed by GAIL are extraneous to the matter at hand. The issue in the present case is not as to whether or not the tariff order is being applied properly, It is rather as to whether or not insistence on supplying gas at Delivery Point of GAIL is a restrictive trade practice.

42. We must observe at this stage that by order dated 28.11.2014, this tribunal had set aside the previous dispensation of PNGRB and had remanded it in entirety for fresh consideration. There was neither any consideration nor affirmation of the conclusions reached in the order of Board which had been set aside and vacated. It is not correct to contend that the remand was limited or restricted. The PNGRB had also understood the import of the directions in remand order correctly as reflected in proceedings recorded on 07.01.2015. In this view, the reiteration of previous conclusions without applying mind to various contentions in light of findings recorded in GSPCL case was improper. The observation in the impugned order that any modification in its earlier findings by order dated 14.11.2013 would amount to impermissible review demonstrates a misdirected and misguided approach.

43. Though the issue of limitation has not been pressed before us, since it was one of the grounds pleaded before the PNGRB, we may observe here that the order passed in proceedings taken out on remand cannot be assailed on such ground. Further, we endorse the argument of the respondent SGL that it is a settled principle of law that restrictive trade practices are actions *in rem* that cannot be settled by arbitration. In this context, the law laid down by Supreme Court that only disputes that relate to actions *in personam* can be

settled by arbitration, while disputes relating to actions *in rem* are non-arbitrable by their nature and need to be settled in courts of law only has to be borne in mind. Reference may be made to the case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. and Ors.* (2011) 5 SCC 532.

44. Be that as it may, we have examined the merits of the contentions urged as to the legality or otherwise of the findings returned by the impugned order.

45. As is clear from the preamble, the PNGRB Act was enacted with the objective "*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*", one of the primary aims being "*to protect the interests of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas*", *inter alia*, by ensuring "*uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country*" and promoting "*competitive markets*" *and for matters connected therewith or incidental thereto*". The law has established the PNGRB ("the Board") vesting it with various responsibilities, *inter alia*, including jurisdiction to frame and enforce regulatory framework, perform adjudicatory role for resolving disputes and undertake investigative responsibility vis-à-vis such complaints as bring out cases of restrictive trade practice – it being anti-competitive – coupled, of course, with the power and jurisdiction to take corrective or punitive action.

46. The law prohibits "*Restrictive Trade Practice*" which has been defined by Section 2 (zi) of the PNGRB Act, 2006 as under:

“"restrictive trade practice" means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular, -

(i) which tends to obstruct the flow of capital or resources into the stream of production, or

(ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to petroleum, petroleum products or natural gas or services in such manner as to impose on the consumers unjustified costs or restrictions …;

47. It may be mentioned that the above definition is *pari materia* similar to the definition of same undesirable activity (Restrictive Trade Practice) given in Section 2(o) of the erstwhile Monopolies and Restrictive Trade Practices Act, 1969 (“MRTP Act”).

48. The meaning and import of the expression “restrictive trade practice” has been subject of discourse in various authoritative pronouncements of the Supreme Court and various High Courts. The law on the subject has developed also in the specific context of the Competition Act, 2002 and its predecessor MRTP Act.

49. We do agree with the submissions that, under the PNGRB Act, commission of acts which have the effect of preventing, distorting or restricting competition in any manner constitutes Restrictive Trade Practice. Similar provision existed in the erstwhile MRTP Act. Under the Competition Act, 2002, Restrictive Trade Practices is a part of Anti-Competitive Agreements as those which cause or are likely to cause an appreciable adverse effect on competition within India. The law deals with certain particular instances of Restrictive Trade Practices, namely, those which bring about manipulation of prices or conditions of delivery in a manner that it imposes on the consumers unjustified cost or restriction. Under the erstwhile MRTP

Act, restrictive trade practices were dealt with under Section 33 and included agreements restricting to whom goods are sold or from whom goods are bought; any agreement requiring purchaser of goods to purchase some other goods, as a condition of purchase; any agreement restricting the employment of any method, machinery or process in manufacture of goods etc. By virtue of Section 3 of the Competition Act, 2002, the specie of Anti-Competitive Agreement would include (a) tie-in arrangement, including any agreement requiring a purchaser of goods, a condition on such purchase, to purchase some other goods; and (b) refusal to deal.

50. There is no contest to the proposition that every restraint or condition in the agreement will not be of the nature of Restrictive Trade Practices. In fact, it is possible that such restraint or condition in certain situations may be necessary to promote competition, to make available goods and services in an organized form, to have equitable distribution, etc. and, therefore, fully justified [*Tata Engineering and Locomotive Company Limited v. Registrar of the Restrictive Trade Agreement, New Delhi* (1977) 2 SCC 55 and *Mahindra and Mahindra Limited v. Union of India* (1979) 2 SCC 529].

51. The respondent SGL relies on certain decisions of the Competition Commission declaring tie in arrangement as anti-competitive, they including *Consumer Online Foundation v. Tata Sky Limited*, 2011 SCC OnLine CCI 12: [2011] CCI 11; *Fx Enterprise Solutions India Pvt. Ltd. V. Hyundai Motor India Limited*, 2017 SCC OnLine CCI 26; and *Sonam Sharma v. Apple Inc. USA*, 2013 SCC OnLine CCI 2: [2013] CCI 19 : (2013) 114 CLA 255. We only wish to observe that

decision on such accusation has to be rendered in light of facts and circumstances of each case.

52. It is a settled position of law that in order to determine as to whether a particular trade practice is restrictive or not, three aspects are to be considered:

(i) The fact that is peculiar to the business to which the restraint is applied;

(ii) What was the condition before and after the restraint is imposed; and

(iii) What is the nature of the restraint and what is its actual and probable effect.

53. As noted above, it is also well settled that every trade practice which may be in restraint of trade is not necessarily a restrictive trade practice. The question as to whether or not a trade practice is restrictive has to be decided not on theoretical reasoning but by seeing the practical aspects and by enquiring as to whether the trade practice may have the effect of preventing, distorting or restricting competition.

54. The source of LNG being supplied, the pipeline (DVPL) through which it was contracted (by GSA) to be made available and the delivery point (500 meters down the line) are same in case at hand as were the facts in relation to the GSPCL case. Unlike the case of GSA of SGL (in matter at hand), the GSPCL pipeline was not in existence when GSPCL had entered into similar (if not identical) GSAs with IOCL, BPCL and GAIL. While it is the argument of the appellant BPCL, as indeed of second respondent GAIL, that the

decision of this tribunal in GSPCL case squarely applies to the present controversy the facts and circumstances being wholly identical and on all fours (barring the fact that GSPCL pipeline had come into existence prior to the contract between the parties at hand), the complainant first respondent SGL, joined by third respondent PNGRB, contend that the above mentioned dissimilarity (existence of alternative pipeline) creates a material distinguishing feature for which reason the previous decision (in GSPCL case) has to be kept aside there being no fault in the impugned view taken by majority in the Board.

55. In above context, it is imperative that the key findings returned in judgment dated 18.12.2013 in GSPCL case (Appeal nos. 1,2 and 5 of 2012) be noted. The same may be summarized thus:

(i) Zone-1 tariff fixed by PNGRB for HVJ-GREP-DVPL Pipeline in terms of PNGRB's Order dated 09.06.2010 became the transmission charges at the Delivery Point.

(ii) The connectivity charges mentioned in the GSA is nothing but transportation charges for transmission of gas through DVPL gas pipelines up to the delivery point.

(iii) The order of a statutory authority (e.g. PNGRB) increasing the tariff, cannot be considered to be restrictive trade practice committed by the Seller.

(iv) Mere insistence on use of gas pipeline by the off-takers for taking delivery of RLNG contracted for purchase when the pipeline has been laid with significant investment along with other facilities to enable the importation and supply cannot amount to restrictive trade practices.

(v) Change of Delivery Point for any gas being sold by BPCL has serious monetary consequences to BPCL on account of Ship or Pay Quantity (SOPQ) stipulations in the GTA between BPCL and GAIL and the said issue ought to have been considered by the Board.

(vi) The parties having entered into the GSA with open eyes and full knowledge and comprehension of the terms and conditions of the contract, the buyer cannot be allowed to

seek change in delivery point as the same would amount to rewriting or creating a new contract by a Court which is not permissible in law.

(vii) The parties having entered into agreements freely and voluntarily, there is no question of invoking the doctrine of fairness and reasonableness against one party for the purpose of altering the terms of the contract.

56. Upon careful scrutiny of the facts and material placed before us, we are clear in mind that the judgment dated 18.12.2013 passed by this tribunal in GSPCL case (in Appeal nos. 1, 2 and 5 of 2012) - with the logic, reasoning and conclusions of which we are in agreement - squarely applies to the case at hand as well, the Board having missed crucial facts and misconstrued and misapplied the law.

57. It is not disputed that the GSA dated 16.02.2004 entered into between BPCL and GSPCL is identical, almost verbatim, and contains similar clauses and provisions as those of GSAs entered into between the appellant BPCL and first respondent SGL. The Price Side Letter in GSA of GSPCL also contained identical terms with respect to “transmission charges” as the Price Side Letter in the matter at hand. The complaint, on which impugned proceedings were held, filed by SGL with PNGRB was founded on identical facts, identically articulated, based on availability of alternative GSPCL pipeline described as cheaper mode of transportation, as in the complaint of GSPCL on which the order was rendered in that case which was set aside by this tribunal by judgment dated 18.12.2013.

58. There can be no denial of the fact that the basic issue in both complaints (of GSPCL as was subject matter of previous case and of SGL which is the subject matter in case at hand) has been same viz. BPCL & GAIL have indulged in restrictive trade practice by

"tying in" the requirement of taking delivery of RLNG only by using the DVPL of GAIL, to the extent of 500 meters till the Delivery Point**.**

59. The appellant defended its contractual terms, and succeeded in doing so, for sound reasons accepted by this tribunal in GSPCL case and is right in pressing the same defenses on similar fact-situation in the matter at hand arising out of complaint of SGL. It validly points out that the Transmission Charges received by it under the GSA with SGL are not its revenue but instead "*passed through*" to GAIL. The Transmission charges levied in terms of the Side Letters under GSAs have been fixed not by the Seller or the transporter but by the PNGRB, a statutory authority in exercise of its regulatory function. The change of Delivery point specified in GSAs, as requested by the Complainant SGL and allowed by the Board, amounts to rewriting a contract by a Court, which is not permissible in law. The appellant BPCL had entered into the GTA with GAIL for transportation of gas prior to (on 07.10.2005) the GSAs with SGL. In terms of the said GTA, BPCL is under an obligation to pay for a minimum stipulated quantity as per the "SOPQ" (Ship or Pay Quantity) obligation. If a change of "Delivery Point" is directed, and forced upon the BPCL without corresponding obligation on part of GAIL to agree to modify the terms of GTA so as to relax the SOPQ liability, it (BPCL) would suffer undue financial burden for no fault on its part.

60. We are not inclined to accept the argument of SGL that the clauses of GTA relevant for appreciating the plea of SOPQ liability have been withheld or that on reading of material to the extent disclosed such claim be rejected. The matter was subjected to inquiry before the Board twice (second time after remand). If any documents beyond those shared required to be considered, there was nothing

stopping the SGL (the complainant) from seeking discovery. The submission that the formula in Clause 11.1 clearly stipulates that the Prevailing Transmission Tariff is “excluding spur line charges” which covers the 500m pipeline is founded on baseless assumption as to the nature of the said segment of pipeline.

61. The appellant rightly points out that the complaint was filed by SGL (as was also the case of complaint of GSPCL) after the determination of higher tariff (increased from Rs. 8.74 per MMBTU to Rs. 19.83 per MMBTU) by the PNGRB by order dated 09.06.2010, the timing reflecting the motive to be more of commercial gain.

62. We agree that the logic and reasoning invoked by this tribunal in GSPCL case holds good and applies with equal force to the complaint of SGL. It is not in dispute before us that in terms of the contract (GSAs and Price Side Letters) between the parties, and by virtue of the order dated 09.06.2010 of PNGRB, Zone-1 tariff fixed for HVJ-GREP-DVPL Pipeline is the transmission charges payable at the Delivery Point. We must add here that PNGRB has fallen in error in appreciating the facts by misreading the documents. It has observed that there is nothing mentioned in the agreement about transmission charges. This finding is perverse and contrary to the record as transmission charges have been clearly defined in the GSAs and also have been clearly stated in the Price Side Letters which are part thereof.

63. An order of a statutory authority (PNGRB) increasing the applicable tariff adds to the burden of the buyer but the same cannot be grudged or made a ground to accuse the transporter, or the seller using the transportation network of the former with consent of the buyer (under contractual arrangement), of indulging in Restrictive

Trade Practice since such levy or it's rate is not a matter of volition for either of them (transporter and seller), all players (and that includes the buyer) being bound by the decision of statutory regulator in such regard.

64. Mere insistence on the use of gas pipeline by the off-takers for delivery of RNLG contracted for purchase when the pipeline has been laid and declared to be available as a common carrier or contract carrier cannot amount to Restrictive Trade Practices. For such charge to stick, something more needs to be shown which, as we shall see in the discussion that follows, is missing here just as it was amiss in case of GSPCL.

65. There is no reason why it should be held anything but that the parties to the dispute at hand had entered into the agreements freely and voluntarily. Aside from the suggestion at the negotiation stage that it be allowed to take the delivery of gas to be purchased under the GSAs through the GSPCL Pipeline, SGL did not press the issue further and instead opted to accept the terms stipulating off-take at the delivery point on DVPL of GAIL. There is no privity of contract between GAIL and SGL in so far as the RNLG purchased from the appellant under subject GSAs is concerned. The contracts with the appellant do not suffer from such vices as of undue influence, coercion etc. There is, therefore, no case made out for invoking the doctrine of fairness and reasonableness against one party for the purpose of altering the terms of the contract.

66. This tribunal had observed in previous judgment that the issue arising out of burden on seller in the nature of "SOPQ" under the GTA with GAIL required to be considered, the change of delivery point not being fair without corresponding amendment of GTA between BPCL and GAIL being brought about. The said caution has

been ignored by the PNGRB in the impugned judgment as well rendering its fairness questionable. Such direction is impermissible also because it amounts to rewriting of the contract which is not permissible for an adjudicatory forum, not even in exercise of its regulatory powers vis-à-vis a contract that has become operative. The law to such effect is well settled and if there is an authority required to support this conclusion, we may refer to the ruling of Supreme Court in *Shin Satellite Public Company Limited Vs. Jain Studios Limited* (2006) 2 SCC 628.

67. The main thrust of the arguments of the respondent complainant SGL, as indeed of the Board, has been that the case of GSAs of SGL is materially distinct from that of GSPCL because by the time the said GSAs were executed in June 2009, two pipelines had come into existence the pipeline of GSPCL providing the alternative route for transportation which was not available earlier when GSPCL itself had negotiated the GSAs with IOCL, BPCL and GAIL, the non-availability of such alternative being the turning point in complaint of GSPCL. Though this difference in factual matrix cannot be denied, we find it not sufficient in itself to arrive at conclusions different from those reached in complaint of GSPCL. We elaborate our reasons hereinafter.

68. It is conceded that in the case of GSPCL as well as in matter involving SGL, the quantities of gas being supplied are out of the quantities committed for transmission through GAIL pipeline under GTA of BPCL with GAIL. When the GTA was executed (on 07.10.2005) by GAIL and BPCL, no other alternative route for transportation existed. The existence of said facts and circumstances, particularly GTA with GAIL, was within the knowledge of SGL. From the facts and circumstances, it is clear that

the GSAs are product of free will and consent. A *fortiori*, we are not in the least doubt, the respondent SGL had taken an informed and conscious decision of its own volition to enter into the GSAs, one after the other, on conditions set out therein particularly as to use of DVPL and off-take at delivery point of GAIL and the financial terms connected thereto.

69. It is the argument of BPCL that the two pipelines had come into existence after 27.10.2008. If existence of more than one pipeline was to be determining factor on issue of restrictive trade practice, the same would have rendered the GSAs (of IOCL, BPCL and GAIL with GSPCL) open to criticism in GSPCL case (Appeal nos. 1, 2 & 5 of 2012) inviting a finding by this tribunal to the effect that at least after 27.10.2008, insistence on the part of GAIL, IOCL and BPCL to continue to supply gas at the GAIL Delivery Point amounted to a restrictive trade practice. We need not speculate on these lines since such line of argument does not seem to have been pressed for consideration in the previous case of GSPCL.

70. What we find to be nailing the contention on above subject raised by SGL are the fact, as brought out by GAIL during its submissions – and such facts were not refuted – concerning the pipeline of GSPCL. It is not denied that the said pipeline developed by GSPCL – touted as the alternative available for transportation of gas purchased from BPCL by SGL – had been commissioned in 2007-08 and that it was declared as a common carrier by the PNGRB on GSPL pipeline was declared and authorized as a Common carrier by PNGRB on 27.07.2012 under Regulation 18 of the PNGRB Natural Gas Pipeline Authorization Regulations. The fact that the said pipeline was not a common carrier till 27.07.2012 takes the

steam out of the case that it could and should have been permitted to be used as the means of transportation for SGL by BPCL.

71. The second respondent SGL has attempted to make out a case of undue influence or coercion based on contentions that around the time the GSAs were being negotiated with BPCL, it (SGL) was pursuing the matter of authorization for the business of City Gas Distribution and there was pressure on it (SGL) to arrange for supplies this being within the knowledge of GAIL and BPCL. The argument is that the position in which the SGL was placed at the time was abused by BPCL and GAIL to dictate the terms of GSAs which tied-in the transportation requirement to increase pricing. We are not impressed. This is an argument which seems to have been invented during the proceedings it not even finding expression in any of the grounds in complaint. There was admittedly no pressure exerted by BPCL or GAIL. It was SGL which had approached BPCL (and not the other way around) for purchase (or sale) of gas and arrangements for its off-take/delivery through GSAs. The external pressure, if there was any existing, for being ready with RNLG to cater to the business of CGD was not attributable to BPCL or GAIL but stemmed from own commercial interests of SGL. It is not contested that it is PNGRB which has been fixing tariff which is charged by the second respondent GAIL and that the entire Connectivity Charges received by BPCL from SGL are passed on by BPCL to GAIL. Clearly, BPCL does not gain from costs concerning transportation payable to GAIL, it being a matter of "*pass through*". At the cost of repetition, we observe again that the terms and conditions of the GSAs in both cases (that of GSPCL and SGL) are similar if not identical. It may be that SGL is a CGD entity while business of GSPCL is different. The nature of business has no

relevance to the alleged act of restrictive trade practice as admittedly the GSAs in both the cases are identical.

72. Admittedly, it is not even the case of SGL that it had signed the two GSAs, with a gap of some days, without knowing the terms and conditions set out therein and, therefore, it cannot contend that it did not sign the GSA with open eyes. Having entered into the Contract with open eyes and full knowledge and after comprehension of its terms and conditions, it cannot be allowed to agitate that it is not bound by some of the terms and conditions or that any term and condition is not applicable or requires to be altered. In taking this view we draw strength from the decision of Supreme Court in *Indian Oil Corporation Vs. Raja Transport Pvt. Ltd.* (2009) 8 SCC 520.

73. We find that PNGRB has fallen into error by observing that there is no evidence to suggest that the entire LNG Sale Purchase agreement between Ras Gas and PLL was dependent upon continuation to take RLNG at the Delivery Point and that the 500 meter connectivity facility is not part of the HVJ-GREP and further that SGL had never recorded its consent to become a transmission customer of DVPL Pipeline. The said finding in the teeth of ratio and findings of this tribunal in the judgment dated 18.12.2013 passed in GSPCL case (Appeal nos. 1, 2 and 5 of 2012) that the 500 meter connectivity pipeline is part of the HVJ-GREP Pipeline.

74. The respondent SGL has argued that neither the Central Government nor PLL, have ever considered it to be mandatory that all the gas sourced from the Dahej LNG Terminal should necessarily be transported through the use of DVPL Pipeline only. It is pointed out that the Board of PLL had authorised GSPL to lay down the gas pipeline independent of DVPL Gas pipeline as an additional pipeline in the area. While conceding that there may have been some

understanding between GAIL, BPCL, Indian Oil and ONGC that the DVPL Pipeline be laid for evacuation of RLNG, it is argued that the DVPL line was not constructed with the stipulation that it will be the exclusive pipeline in the area for all times to come. In our view, nothing turns on the assumptions on which such plea is urged. It is correct that GSPL was allowed to lay down its own independent pipeline as the alternative route of transportation in 2007-08. But that did not relieve GSPCL of its contractual obligations under GSA stipulating delivery point at GAIL pipeline. The second respondent has undertaken contractual obligation to avail of same delivery point 500 meters away from the terminal on DVPL till 2028. It is contractually bound with such stipulation notwithstanding the fact that DVPL is one of the two alternative routes that have become available.

75. It cannot be ignored that the appellant BPCL has an earlier agreement (GTA darted 07.10.2015) with GAIL, under which BPCL has an obligation for minimum quantity transportation failing which BPCL will incur liability towards SOPQ which is a financial loss with no corresponding gain. This commitment is of vintage prior to the date on which the GSPL direct connectivity became operational and also anterior to the GSAs with SGL. Concededly, BPCL does not retain the transportation charges levied up to the Delivery Point. Having persuaded the BPCL to commit itself to firm capacity over a long term, the buyer SGL cannot be allowed to expose the former to a position where it would suffer losses for no fault on its part. If the Board was inclined to direct change in Delivery Point, it was obliged to consider the feasibility of making consequential amendments to the terms and conditions of the GTA dated

07.10.2005. Since no such endeavor was made or mooted, the directions given are rendered lopsided, unfair and unjust.

76. The argument based on text of sub-point (v) of Clause 11.3.2 of GTA excluding from the determination of SOPQ quantities the volume of gas not delivered due to *force majeure* as per Article 13 which, in turn, statedly would include the effect of acts of court or statutory authorities does not impress us. As observed elsewhere, the Board cannot rewrite the contract entered upon by parties out of free will and consent without exercise of any undue influence. would be considered as force majeure events. It is impermissible to seek cover of an impermissible order only to wriggle out of a contractual obligation voluntarily undertaken. That can never be taken as the intent of the exclusion clause in Article 13.

77. Upon careful consideration of the facts presented, we are not persuaded to accept the averment that the appellant holds a monopolistic or dominant position vis-à-vis RLNG business in the region. There is sufficient material to show that BPCL is not the only supplier of RLNG, it sharing comparatively a small portion of business of supply amongst numerous other players operating in the same field. The share of BPCL in RNLG from the PLL Dahej Terminal is about 10% only. The other stakeholders in PLL (IOCL and GAIL) admittedly control much larger share of gas quantities not only from the Dahej Terminal but also from other sources of gas. It cannot be denied that SGL had the liberty to approach any of the other shareholders for purchase of gas, particularly if it found the terms indicated by BPCL to be onerous, unfair, unjust, unconscionable or financially unviable. It is shown by the averments of SGL itself that while negotiating the terms of GSAs which were eventually entered into with BPCL, SGL had also been in contact for

similar arrangement with GSPL. Indisputably, SGLs negotiations with the other entity did not work out, assumably it finding the terms settled with BPCL more lucrative or advantageous, it (SGL) not broaching the possibility of such procurement from any other player in the field which included its own business associate GSPL besides IOCL and GAIL, present in the same region as other shareholders of gas supply in PLL. On these facts, and in the circumstances, it is difficult to assume, it not even being the case set up in the complaint, that SGL was forced or coerced to sign the contracts with BPCL, or that it had no other option but to sign on the dotted lines, as was the impression sought to be created at the hearing.

78. It is not even open to seek alteration of the terms and conditions of a contract (such as Delivery Point, Change in Transmission/ Transportation Rate etc.) which has been freely negotiated on the ground that the same are unfair or unreasonable. It is a well settled principle of law that the same is not permissible. In *Assistant Excise Commissioner Vs. Issac Peter* (1994) 4 SCC 104, albeit in the context of contracts involving State as a party, the Supreme Court stated the general principle, which applies here, as under:

> "*We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to the contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or*

by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits".

79. It is also apt to add here that in *Atmiya Chemicals Versus Gas Authority of India Limited*, 2011 Volume 2 Apex Decisions (Del) 317, the High Court of Delhi has held that it is not within the domain of a Court to go into the reasonableness of a particular clause in a contract.

80. We are unable to find any good ground to endorse the majority opinion of PNGRB to the effect of the appellant having indulged in restrictive trade practice in settling the terms of GSAs with the second respondent SGL. That cannot be an inference drawn just because SGL is paying transportation charges higher than what would be incurred if it were to take the delivery through GSPCL pipeline. The appellant had made it clear even before the GSAs were executed that it was unable to agree to such other arrangement vis-à-vis its share in RNLG sourced from PLL because of its prior contractual commitment with GAIL. There was complete transparency in dealing on part of BPCL. The second respondent SGL entered into the contracts with BPCL knowingly. It cannot now turn around and cry wolf on account of additional cost (tariff fixed by PNGRB) it has to bear, a condition which it had accepted to bear of

own volition, such financial burden hardly a ground to bring home charge of restrictive trade practice.

THE ORDER

81. For the foregoing reasons, we find the impugned order of the first respondent PNGRB to be wholly erroneous, arbitrary, unfair, unjust and lopsided and, therefore, unsustainable. It is accordingly set aside. The complaint of the first respondent SGL alleging indulgence in restrictive trade practices by the appellant BPCL and second respondent GAIL, in the context of the two SGAs of SGL with BPCL, being devoid of substance, is dismissed.

82. The appeal stands allowed accordingly. The pending applications are rendered infructuous and disposed of accordingly.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCE ON THIS 10th DAY OF MARCH, 2021

(Dr. Ashutosh Karnatak)
Technical Member (P&NG)

(Justice R.K. Gauba)
Judicial Member