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

APPEAL NO. 292 OF 2014 &
IA NOS. 25 OF 2015, IA NO. 216 OF 2016
IA NO. 419 OF 2017 & IA NOS. 547 & 548 OF 2018

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

Gujarat Gas Company Limited
Through its Managing Director
2, Near Parimal Garden,
Shantisadan Society, Ellis Bridge,
Ahmadabad – 380006 **(Gujarat)** **..... Appellant**

VERSUS

1. **Petroleum and Natural Gas Regulatory Board**
First Floor, World Trade Centre
Babar Road,
New Delhi – 110 001

2. **United Phosphorus Limited**
Through its Vice President Corporate Affairs
A-2/1, G.I.D.C., Vapi – 396195 **(Gujarat)**

..... Respondents

Counsel for the Appellant … **Mr. Ramji Srinivasan, Sr. Adv.**
Ms. Raveena Dhamija
Mr. Yashaswi Kant
Mr. Ajit Pal Singh

Counsel for the Respondent(s)… **Ms. Sonali Malhotra**
Ms. Pinki Mehra for R-1/P&NGRB

Mr. Gopal Jain, Sr. Adv.
Ms. Iti Agarwal
Mr. Pulkit Malhotra

J U D G M E N T

This judgment is based on two separate opinions – first one (penned by Technical Member) set out hereinafter and the other (authored by Judicial

Member) immediately thereafter (from page 27 onwards) followed by common order of the bench on the appeal and pending applications.

PER HON'BLE MR.ASHUTOSH KARNATAK, TECHNICAL MEMBER

BACKGROUND

1.0 The Appellant/ GGCL has filed an appeal under Section 33(1) of the Petroleum and Natural Gas Regulatory Board Act, 2006 ("***PNGRB Act***") challenging the majority order dated 20.10.2014 (Impugned order) passed by the Ld. Petroleum and Natural Gas Regulatory Board ("***PNGRB***") directing the Appellant *inter alia* to:

(a) *Approach PNGRB within 15 days for modification of Authorisations granted in its favour by PNGRB for its natural gas pipeline network and CGD network.*

(b) *Charge tariff from UPL, as determined by PNGRB for its HAPI pipeline (w.e.f. date of grant of authorization and to make adjustments accordingly and also to abide by the provisions of Regulation 11 (4) of the Natural Gas Pipeline Authorizing Regulations regarding Compression of Gas.*

(c) *Pay a penalty of Rs. 1,00,000 (Rupees One Lakh only) in terms of Section 28 of the PNGRB Act for involvement in restrictive trade practice and for violation of the terms and conditions of Authorisation. ("**Impugned judgment**")*

2.0 In the Present Appeal GGCL has prayed to:-

(a) *Grant* stay of the impugned judgment dated 20.10.2014 passed by the Ld. Petroleum and Natural Gas Regulatory Board till the pendency of the present appeal in terms of the present application; and/or

(b) Pass *such* further order (s), as this Hon'ble Tribunal may deem just and proper in the circumstances of the case.

3.0 Facts of the Case

3.1 Gujarat Gas Company Ltd. ("***GGCL/the Appellant***") is a company incorporated under the Companies Act 1956 engaged in the business of city gas distribution and marketing of natural gas. The Appellant owns and operates City Gas Distribution ("***CGD***") Network pipeline facilities and a Transmission Pipeline in the State of Gujarat. It has laid and built various pipelines including a 73.2 Km Natural Gas pipeline from Hazira to Ankleshwar namely, Hazira – Ankleshwar Natural Gas Pipeline ("***HAPI***") which was commissioned on 10.05.1999.

3.2 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. UPL is a company incorporated under the Companies Act, 1956 engaged in the business of manufacturing pesticides and chemicals and has a captive power plant situated at Jhagadia, Gujarat.

3.4 UPL entered into a Gas Supply Contract ("***GSC***") with GGCL for supply and transportation of natural gas in 2001 in order to get the gas to its Jhagadia power plant through the Appellant’s facilities. GGCL had laid a 23 Km long pipeline from Amboli to Jhagadia ("***AMJH* pipeline**") connecting one end to GGCL’s HAPI pipeline at Amboli and other end at UPL’s plant at Jhagadia unit. GGCL was supplying gas to the UPL’s plant in Jhagadia from the year 2002 to 2008. The GSC between the UPL & GGCL was valid till 31.03.2008.

3.5 Since 2005, this pipeline has been catering to multiple customers of Jhagadia namely Birla Century, Lanxess, DCM Sriram, Oberoi Chemicals and Jhagadia Copper etc.

3.6 In the meantime, the following regulations were enacted by the PNGRB:

i) 19.03.2008 - PNGRB (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations 2008 (“***CGD Networks Authorizing Regulations***”).

(ii) 06.05.2008 - PNGRB (Authorizing Entities to Lay, Build, Operate Expand Natural Gas Pipelines) Regulations 2008 (“***Pipeline Authorizing Regulations***”).

iii) 20.11.2008 - PNGRB (Determination of Natural Gas Pipeline Tariff Regulations), 2008 ("***Pipeline Tariff Regulations***").

3.7 PNGRB vide letter dated 31.03.2008 directed GGCL to make an application for authorization as per the notified CGD Authorizing Regulations, as the Board contended that GGCL was not an entity authorized by the Central Government in respect of CGD projects for Ankleshwar, Bharuch, Surat and Valsad Distt. GGCL made an application as per Regulation 18 of the CGD Authorizing Regulations vide

letter dated 21.07.2008 for the districts of Surat and Bharuch in the state of Gujarat.

3.8 Further, PNGRB vide letter dated 03.10.2008 directed GGCL to make an application in terms of the Pipeline Authorizing Regulations as applicable to GGCL.

GGCL made an application vide letter dated 24.10.2008 for authorization of its natural gas pipeline from Hazira to Ankleshwar (HAPI) in the State of Gujarat. Subsequently, Board uploaded on its website the details of the application made by the Appellant for its natural gas pipeline inviting comments in terms of regulation 18(5) of the above-mentioned regulations.

3.9 With effect from 01 April 2008, the Ministry of Petroleum and Natural Gas ("***MoPNG***") reduced the Panna-Mukta-Tapti ("***PMT***") supplies to GGCL from 3.05 MMSCMD to 2.13 MMSCMD with a mandate to supply PMT to CNG, Domestic, Commercial and SME's consuming less than 50,000 SCMD, thereby inhibiting GGCL to supply to UPL's plant from its currently allocated sources of Gas.

However, GGCL arranged for gas supplies to the UPL's plant at market determined prices from April 2008 onwards ensuring uninterrupted gas supplies to UPL's plant. Accordingly, short term gas sales contracts were signed between UPL and GGCL valid till November 2008.

3.10 UPL entered into an agreement with GAIL India Limited on 27.11.2008 for supply of 0.2 MMSCMD gas. In pursuance thereof, as an interim arrangement, UPL and GGCL entered into a Gas Transport Agreement ("***GTA***") on 4.12.2008 for a short-term period till 15.12.2008.

The gas to UPL's plant is supplied by GAIL through GGCL's pipeline network at two delivery points being Surat CGS and Ankleshwar CGS. Thereafter, few more short term GTAs were executed between the parties (GGCL & UPL) till March 2009 with a transportation charge of $ 2.0 / MMBTU.

3.11 On 03.04.2009, GGCL & UPL entered into a City Gas Network Distribution Agreement ("***CGNDA***") for redelivery of gas to UPL's plant. The CGNDA provided for a fixed charge (Rs. 67.69/ MMBTU) for the purpose of redelivery of gas to UPL's plant. Thereafter, several short terms CGNDAs were executed between the parties.

3.12 On 13.02.2009, UPL wrote to MoPNG alleging that GGCL was charging an exorbitant transportation cost under the agreement entered between them for transportation of gas procured from GAIL. MoPNG sought clarification from GGCL on 23.02.2009, whether the tariff charged from UPL was in accordance with PNGRB regulations notified on 20.11.2008.

3.13 GGCL in its reply dated 27.02.2009 stated:-

(i) It was awaiting authorization and tariff determination for HAPI pipeline.

(ii) It was not offering gas redelivery service to any other industry except for UPL.

(iii) For supplying gas to UPL, both the distribution as well as the transmission infrastructure of GGCL was being utilized.

(iv) Services to UPL had been initially provided on a short-term basis and extended from time to time upon specific requests of UPL.

3.14 After applications of GGCL for authorisation of the HAPI pipeline and the CGD network, public comments were invited by PNGRB by webhosting the application, to which no comments were received by PNGRB.

3.15 On 14.05.2009, PNGRB sought certain clarifications regarding grant of authorisation for HAPI pipeline, of which one was to provide details of spurline/ branchline/ dedicated pipeline along with technical parameters, to which GGCL replied vide letter dated 12.06.2009 stating *inter alia* that various spurlines laid by them were mainly for supply to GGCL's existing CGD network and hence a part of the distribution network.

3.16 On 27.05.2009, UPL wrote to the PNGRB again reiterating the same grievance and requested it to intervene in the matter. On 01.06.2009, PNGRB forwarded the letter to GGCL for their comments within 10 days. On 12.06.2009, GGCL replied to the said letter categorically stating that in the delivery of gas to UPL, GGCL was utilizing both its CGD Network as well as its transmission pipelines.

3.17 On 27.07.2009, PNGRB wrote a letter to GGCL specifically asking it to explain why the steel pipeline off shoot from main Transmission pipeline (HAPI pipeline) was being taken as a part of the CGD network by GGCL, to which GGCL vide letter dated **11.08.2009** provided a list of spurlines forming a part of GGCL's CGD application stating that in terms of Regulation 2(d) of Petroleum and Natural Gas Regulatory Board (Technical Standards and Specifications including Safety Standards for City or Local Natural Gas Distribution Network) Regulations, 2008, the listed pipelines were a part of the GGCL's interconnected network and were being utilised for transporting natural gas from high pressure transmission mains and thus have been included in GGCL's CGD application.

3.18 On 19.02.2010, PNGRB convened a meeting between GGCL and UPL regarding the issue and on 26.02.2010, PNGRB suggested that the parties discuss the issues and arrive at a mutually acceptable solution. Various correspondences were exchanged between the parties from Feb 2010 to Dec 2011. In the meantime, the facilitation arrangements under CGNDA were continued for re-delivery of Gas to UPL.

3.19 On 02.02.2012, UPL wrote an email to the Appellant agreeing not to pursue the matters pertaining to the complaints any further. Pursuant to the same, GGCL claimed that it was under the belief that there were no further disputes which were unresolved between the parties.

3.20 On 05.07.2012, the HAPI pipeline of GGCL received authorization from the PNGRB in terms of the Pipeline Authorizing Regulations.

3.21 On 08.11.2012, the PNGRB granted authorization to GGCL for CGD network development of the Surat- Bharuch- Ankleshwar GA in terms of the CGD Networks Authorizing Regulations.

3.22 Subsequently, GGCL and UPL again executed a CGNDA on 24.07.2013 with the facilitation charge agreed in terms of this agreement as Rs. 81/MMBTU as against Rs. 94/ MMBTU that was originally proposed by GGCL.

3.23 Further, UPL again raised the complaints with respect to exorbitant charges to PNGRB on 28.08.2013 stating that since April 2009, agreement format has been changed to CGNDA though the quantity was 1,75,000 SCMD which is much higher than the recommended quantity specified for CGNDA.

3.24 Thereafter, on 04.09.2013, PNGRB passed a tariff order fixing the “Provisional” initial unit natural gas pipeline tariff for the HAPI pipeline of Rs. 4.92 per MMBTU in terms of Pipeline Tariff Regulations applicable w.e.f. 20.11.2008 (i.e. date of enactment of tariff regulations by PNGRB).

3.25 UPL made a complaint dated 30.05.2014 under Section 25 read with Sections 11 (a), 11 (e), 11 (f) (iii), 12 (1) (a), 12 (1) (b), 12 (2) and Section 48 and 50 of the Petroleum and Natural Gas Regulatory Board Act, 2006 ("***PNGRB Act***") alleging:

a) Violations of various statutory provisions and Regulations framed there under by imposing arbitrary, exorbitant and unjustified transportation charges by GGCL and requested PNGRB to issue direction to GGCL to charge Rs. 4.92/ MMBTU for transportation of Natural Gas as has been fixed by PNGRB for HAPI and AMJH pipeline.

b) It further requested for conducting an enquiry regarding status of AMJH pipeline and to determine the extent of excess amount of transportation charges which has been collected / recovered by GGCL from various consumers under the pretext of commercial arrangements.

c) It further requested to issue a direction to GGCL for refund of amount along with 12% interest thereon from Dec 2008 that has been recovered from it in excess.

3.26 PNGRB passed a majority order dated 20.10.2014 (signed by Chairman and two other members including Member (Legal), out of 5 member bench, directing GGCL *inter alia* to:

a) Approach PNGRB within 15 days for modification of Authorisations granted in its favour by PNGRB for its natural gas pipeline network and CGD network.

b) Charge tariff from UPL, as determined by PNGRB for its HAPI pipeline (w.e.f. date of grant of authorization and to make adjustments accordingly and also to abide by the provisions of Regulation 11 (4) of the Natural Gas Pipeline Authorizing Regulations regarding Compression of Gas.

c) Pay a penalty of Rs. 1,00,000 (Rupees One Lakh only) in terms of Section 28 of the PNGRB Act for involvement in restrictive trade practice and for violation of the terms and conditions of Authorisation.

("***Impugned judgment***")

However, one of the Member (PNGRB), Sh. B Mohanty, vide order dated 20.10.2014 opined differently and stated that:

' …. The present case appears to be a "hybrid" straddling between the existing regulatory framework for natural gas pipelines and CGD networks. At present, while the provisional tariff for HA-PL has been fixed by PNGRB, that for CGD network is yet to be finalized. Until the later is decided and this hybrid variety of activity is duly addressed in either of the regulations, it may not be in the fitness of things to arrive at a conclusion regarding violation of law by GGCL'.

Further, another Member (PNGRB), Sh. K K Jha did not find any merit on the claim of M/s UPL for applying HAPI pipeline tariff and hence dismissed the appeal stating:

"….*2. AMJH pipeline is a part of CGD network of Surat–Bharuch–Ankleshwar GA as authorized by the Board.*

1. *The prayer to take cognizance under section 26 & 48 of the Act is dismissed.*

2. *GGCL to charge UPL summation of unit rate tariff approved by the Board in respect of HAPI pipeline, CGD network tariff of Surat–Bharuch–Ankleshwar GA and mutually agreed compression charge towards providing compression facilities at UPL premises w.e.f.08.11.2012. The compression charges are to be worked out by taking reasonable rate of return on capital employed, equal to fourteen percent post tax".*

4.0 Aggrieved by the PNGRB order dated 20.10.2014, GGCL approached the Tribunal in November 2014.

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.

4.1.1 Appellant (GGCL)

In its final written submission dated 14th Jan 2021, GGCL has submitted:

1. Amboli- Jhadagia Pipeline (AMJH) is covered within the purview of CGD Network of "sub transmission pipeline" (Surat- Baruch-Ankleshwar- SBA) as it is used for transporting natural gas from a bulk supply high pressure transmission main (HAPI) to the medium pressure distribution grid (AMJH) and subsequently to the service pipes in the CGD Network(GGCL has referred Section 2(q) of the PNGRB (Technical Standards and Specifications including Safety Standards for **City or Local Natural Gas Distribution Networks**) Regulations, 2008 [Act & Regulation Compilation, and Regulation 2(3)(q) PNGRB (Technical Standards and Specifications including Safety Standards for **Natural Gas Pipelines**) Regulations, 2009 [Act & Regulation Compilation).

   AMJH cannot be considered as a "spur line" of HAPI since any pipeline having a separate compressor shall not be treated as a spur-line (Regulation 2(o) of the PNGRB (Determining capacity of Petroleum, Petroleum products and Natural Gas Pipeline) Regulations, 2010 (Act & Regulation Compilation).

   GGCL has stated that once the determination has been done by PNGRB pursuant to the materials produced and in person site inspection by the PNGRB, it has to be taken as conclusive and binding, which in this case is that CGD Network authorised by PNGRB includes the AMJH Pipeline.

2. GGCL did not misrepresent to the PNGRB since while granting authorisation for the CGD Network and HAPI Pipeline, PNGRB had relied on specific clarification by GGCL regarding inclusion of AMJH Pipeline in the CGD Network.

   GGCL had specifically clarified to PNGRB prior to grant of authorization for HAPI Pipeline and the CGD Network that AMJH pipeline was included in GGCL's CGD application as it was a part of an interconnected network and was being utilised for transporting natural gas from high pressure transmission mains and did not misrepresent to the PNGRB.

   Further, PNGRB was aware of the transaction and the dispute between the parties as evident from the PNGRB letter dated 26.02.2010 directing the parties to arrive at a mutually acceptable commercial solution. GGCL has stated that during pendency of the CGD Authorization Application and HAPI Authorization Application, PNGRB was fully aware of the transaction between GGCL and UPL and also the quantity and the tariff

charged by GGCL. UPL had been writing to PNGRB from 27.05.2009 to 11.10.2013 with respect to arrangement between the parties.

3. Regarding charges of Restrictive trade practice, (RTP), GGCL stated it as erroneous as the same ignored the following:-

(i) UPL took a conscious commercial decision to enter into various agreements from 04.12.2008 till March 2009 and several City Gas Network Distribution Agreement ("CGNDA") from 03.04.2009 up to 24.07.2013 with GGCL after evaluating available options.

(ii) Negotiations with GAIL and subsequent agreement with GGCL establish that UPL opted for GGCL offer as the offer by GAIL was on a higher side (GGCL has submitted a comparative cost sheet comparing GAIL's charges and GGCL's charges to UPL).

GGCL has stated that since, option of other pipeline network (GAIL pipeline) was available to UPL, it cannot be said that there was abuse of alleged dominant/monopolistic position by GGCL.

4. The arrangement for re-delivery of gas facilitated by GGCL was unique, sui-generis and hybrid in nature and not squarely covered by any regulation. The Contractual path requires use of following for re-delivery of natural gas to the UPL Plant.

i. CGS of Surat and SBA CGD Network at Surat.
ii. CGS of Ankleshwar and SBA CGD Network at Ankleshwar.
iii. Dedicated compressor installed to meet the pressure required at UPL's plant.
iv. AMJH sub transmission pipeline; and
v. HAPI Natural Gas Pipeline.

Accordingly, the rate agreed between the parties was an interplay of the above elements involved in re-delivery of the natural gas.

Without prejudice, HAPI Pipeline tariff cannot be applied as:-

a) The cost of the AMJH Pipeline was not considered while determining tariff for HAPI Pipeline; and
b) GGCL would have to be compensated for utilizing various components of its CGD Network, as mentioned above from i to iv, for facilitating re-delivery of natural gas to UPL plant.

5. There was no change in nature of AMJH Pipeline as held by PNGRB. The character of AMJH Pipeline has remained the same since the Appointed Day. Further, the PNGRB Act and regulations framed thereunder do not envisage automatic conversion of a pipeline to a common carrier pipeline.

6. There was judicial overreach by the majority members of PNGRB in as much as AMJH was part of the CGD network and PNGRB does not have the power to determine tariff for a CGD Network including compression charges as held by Hon'ble Supreme Court in PNGRB v. IGL & Ors., reported as (2015) 9 SCC 209.

7. UPL's complaint was not maintainable on account of lack of power of PNGRB to determine network tariff and also commercial agreement between the parties wherein arbitration was stipulated as dispute resolution mechanism.

4.1.2 Respondent No. 1 (PNGRB)

PNGRB in its final submissions dated 05th January 2021 contended that order dated 20.10.2014 is perfectly in consonance with the principles enunciated in the Act and Regulations framed there under.

1. Though GGCL laid 23 Km long dedicated pipeline from Amboli to Jagadia (AMJH) to connect the M/s UPL's power plant to HAPI pipeline at Amboli, but by the year 2005, GGCL has started catering to the needs of other consumers in addition to M/s UPL and therefore lost its character of dedicated pipeline.

2. GGCL has unilaterally converted the GTA into CGD Agreement.

   GGCL executed short duration contract with M/s UPL during December 2008 to April 2009 and after the gas transmission agreement dated 06.03.2009, the City Gas Distribution Network Agreement was executed between the parties on 03.04.2009 in utter disregard of the provisions of Regulations 3(2)(c) of the CGD authorizing Regulations.

   Further, GGCL has admitted the fact of supplying above 1,71,000 SCMD to M/s UPL, which is much more than 1,00,000 SCMD that can be supplied through a pipeline forming part of the CGD network and thus is in contravention to provisions of Regulations 3(2)(c) of the CGD authorizing Regulations.

3. Moreover, GGCL vide letter dated 11.11.2013 has categorically stated that M/s UPL is not a CGD customer of GGCL and is being charged HAPI tariff along with charges for the dedicated facility of the compressor being utilized continuously for re-delivery of natural gas at 43 -45 bar pressure and other allied infrastructure.

4. GGCL has deliberately misrepresented the AMJH pipeline as part of its CGD network, though GGCL itself has been treating UPL as a shipper of its Natural Gas Pipeline on the appointed day and even thereafter till various regulations were framed / notified by the PNGRB.

   PNGRB has further stated that even for the sake of argument, GGCL's submission with regard to compression charge falls to the ground as no

specific approval from PNGRB under Regulation 11 (g) (v) of the Access Code Regulations was ever sought which is required for any kind of compression charge.

5. GGCL is erroneous in recovering transportation tariff under the garb of contractual agreement when there is a regulatory regime and that the tariff cannot be a subject matter of bilateral agreement.

6. GGCL exercised its dominant position and coerced UPL to enter into such agreement, because UPL did not have any other source of transmission of gas except AMJH pipeline, for its power plant at Jhagadia. Thus, GGCL used monopolistic power and was also involved in restrictive trade practice.

7. GGCL devised a new concept of facilitation charge that finds no mention in the PNGRB act or any of the regulations and same is impermissible in law. GGCL made a strategy to represent AMJH pipeline as a part of its CGD network to escape from the regulatory framework.

   AMJH pipeline was originally laid as a dedicated pipeline for transmission of natural gas to the UPL's power plant but it was being used on and before the 'appointed day' for transmission of gas to other consumers. As such, the original character of AMJH pipeline stand converted from a dedicated pipeline to a spur line of common carrier HAPI.

   Spurline is included within the meaning and definition of natural gas pipeline (Ref. 2 (f) of Authorizing Regulations). Thus, 23 Km long AMJH pipeline was to be added / included with 73.2 km. natural gas pipeline (HAPI). But GGCL, in Contravention of the existing legal provisions, excluded the AMJH pipeline from the natural gas pipeline and approached PNGRB for authorization only for 73.2 Km HAPl pipeline and included 23 Km long AMJH natural gas pipeline as a part of its CGD network.

   The change of character of AMJH pipeline from dedicated pipeline to spur line of HAPI was not brought to the notice of the PNGRB and authorizations were obtained by GGCL by suppressing or misrepresenting the material facts for which a separate action may be initiated by the Board. GGCL approached PNGRB regarding authorization of its network after the passage of about a year and converted the existing gas transmission Agreement (GTA) into CGD Network Agreement in order to enable itself to impose arbitrary charges.

8. GGCL has failed to produce any evidence to rebut the contention of M/s UPL that AMJH Pipeline was originally laid as a dedicated pipeline to Supply Natural Gas to M/s UPL power plant by incurring expenditure of approx. Rs. 25 - 30 crores, and has recovered Rs.159 crores for transmission of gas through this AMJH pipeline from M/s UPL and at later stage was also used to transit gas of various other customers.

GGCL, after ensuring multi-time recovery of the expenditure of AMJH pipeline represented it before the PNGRB as a part of its CGD network, and by adopting such strategy; **it imposed un-regulated charges for transmission and compression etc.**

It, thus took undue advantage of its monopolistic position and imposed charges @ Rs. 81 per MMBTU, whereas the Respondent No. 1 has determined the tariff @ Rs. 4.92 per MMBTU, vide order dated 04.09.2013 for HAPI Natural Gas Pipeline. Thus, tariff charged is more than 16 times of the tariff fixed by Respondent No.1.

9. While processing the application of grant of authorization of 73.2 km (HAPI) under regulation 18 of the PNGRB Authorization Regulations, 2008, PNGRB sought the details of spur lines/branch lines/dedicated pipeline emanation from HAPI pipeline.

   GGCL vide letter dated 12.06.2009 stated that the various spur lines laid by GGCL are mainly for supply of Appellant's existing CGD network and hence are part of distribution network. Meanwhile, GGCL also applied to PNGRB for grant of authorization of Surat, Bharuch and Ankleshwar GA, which included spur pipelines emanating from HAPI pipeline as part of its CGD network.

   To an observation by PNGRB dated 27.07.2009 that steel pipeline off shoot from HAPI pipeline was being taken as a part of the CGD network by GGCL, whereas major part of this pipeline is before CGS and between main transmission pipeline, GGCL vide letter dated 11.08.09 clarified that total of 78.9 Km steel spur from HAPI to various city gate stations and forming part of its CGD network have been included in Appellant's CGD application including include AMJH pipeline stating that the above mentioned pipelines have been included in CGD application as they form part of an inter connected network and are utilized for transporting natural gas from high pressure transmission main.

   Considering the submissions made by GGCL as truthful, PNGRB granted authorization for HAPI pipeline per GGCL's application. It was only when the complaints such as the one made by the M/s UPL **that the misrepresentation on part of the GGCL came to light.**

4.1.3 Respondent No. 2 (UPL)

In its final written submission dated 14th January 2021, UPL has submitted:

UPL's contended that AMJH pipeline has been rightly held by the Ld. PNGRB to be a part of HAPI pipeline being natural gas pipeline.

1. GGCL originally had laid AMJH Pipeline as a dedicated pipeline for supply of natural gas to UPL Power Plant and ceased to be a dedicated pipeline as, since the year 2005, the said pipeline began to cater to

multiple customers of GGCL at Jhagadia much before the notification of PNGRB Act & Regulation. In order to cater multiple customers in Jhagadia through AMJH pipeline, GGCL shifted the dedicated compressors (installed for UPL power plant) from Amboli to Jhagadia in October, 2005.

The submission by GGCL that AMJH was never laid as a dedicated pipeline and UPL was merely an anchor load on AMJH Pipeline is frivolous and unfounded for the reason that UPL alone had paid the entire capital cost of construction of Rs. 25-30 crores towards laying and building AMJH Pipeline.

Further, as soon as AMJH Pipeline ceased to be a dedicated pipeline, by way of the conduct of GGCL and by virtue of law, it became a part of natural gas pipeline i.e. HAPI Pipeline of GGCL.

2. It was wrong on the part of the GGCL to include AMJH pipeline as a part of its CGD Network for the reason it being a sub transmission pipeline and owned by CGD Entity.

GGCL continued to supply the quantity of 1,71,000 SCMD of the natural gas pipeline even after notification of Regulation 3(2)(c) of the CGD Authorisation Regulations on 19.03.2008 which categorically bars supply of gas of more than 1,00,000 SCMD through a pipeline forming a part of CGD Network operated by CGD entity.

Despite being fully aware of the extant law, GGCL erroneously proceeded to include AMJH Pipeline as a part of CGD Network and concealed the material information that the supply to UPL is beyond the limit prescribed under Regulation 3(2)(c) of CGD Authorising Regulations.

GGCL itself has admitted that UPL is not a CGD customer and is in fact a natural gas pipeline customer and is thus being charged HAPI Pipeline tariff along with other charges.

3. AMJH pipeline fulfils all the pre requisite to qualify “spur line” of HAPI pipeline as per Regulation 2 (O) of the NG Pipeline capacity declaration Regulations as under:

a) It should branch/originate from a truck line or transmission pipeline or sub-transmission pipeline or from terminal station on existing transmission or trunk pipeline;
b) Capacity should not be greater than truck or transmission pipeline;
c) There should not be any compression facility for supply of natural gas;
d) Spur-line should use capacity of trunk pipeline in order to transport gas.

On the appointed day, AMJH pipeline had no compressor facility, as admittedly the dedicated compressor was shifted from Amboli to Jhagadia.

Further, GGCL included volume booked by UPL in AMJH Pipeline in tariff filing of HAPI Pipeline.

4. The assertion by GGCL that AMJH Pipeline is included in CGD Network because of it being a sub-transmission pipeline does not support the case of GGCL.

   UPL has submitted that the assertion by GGCL that AMJH Pipeline is included in CGD Network because of it being a sub-transmission pipeline is not correct and the reliance placed by GGCL on Regulation 2(q) of NG Pipeline Technical Regulations to contend that AMJH Pipeline is a part of its CGD Network, is misplaced and erroneous.

   UPL has contended that the sub–transmission pipeline is also a part of the common carrier pipeline though it may connect the main natural gas pipeline to city gas stations. UPL has brought out that the transmission pipeline and sub-transmission pipeline form parts of natural gas pipeline and has referred Regulation 4(2) of NG Pipeline Technical Regulations, 2 (1)(f) and 2 (1) (o) of NG Pipeline Capacity Regulations and Regulation 4(c) of the CGD Technical Regulations in this regard.

   UPL has stated that by reading Regulation 2(1)(q) Natural gas Technical Regulations in an isolated manner, GGCL is yet again trying to escape from the regulatory framework to contend that AMJH Pipeline cannot be a spurline of the HAPI and can only be a part of CGD Network.

5. Power to declare and authorise a pipeline as a common carrier or part of the CGD Network is in the exclusive domain of PNGRB being the regulator under the PNGRB Act.

   The Ld. PNGRB has after analysing all the documents and Regulations framed by it on a Natural gas pipeline and CGD Network concluded that the AMJH pipeline was wrongly authorized as a part of CGD Network and has rightly taken corrective measures by holding that AMJH Pipeline is a part of HAPI Pipeline as GGCL was supplying an impermissible quantity of natural gas by increasing the pressure for UPL.

6. The PNGRB, by passing the impugned order has acted in accordance with the provisions of the act and regulations framed therein.

   UPL has referred section 11 of the Act defining the functions of the Board to:

   11 (a) protect the interest of consumers by fostering fair trade and competition amongst the entities;
   11 (f) (iii) **monitor prices and take corrective measures to prevent restrictive trade practice by the entities;**
   11 (f) (vi) monitor transportation rates and **take corrective action to prevent restrictive trade practice** by the entities;

Further, it has referred to Section 12 and 13 of the Act to adjudicate and pass orders with respect to settlement/resolution of disputes and complaints received under Section 25 of the Act and that the Board has all the powers to review its decision provided while doing so it is to be guided by the principles of natural justice.

UPL has stated that the PNGRB **has all the Powers to modify** the authorisation granted by the Board. In this regard UPL has drawn the attention to the following legal provision:

a) Section 11 sub-section (f) clause 3 and 6 of the PNGRB Act.
b) Section 12 (2) of the PNGRB Act 20
c) Section 13 (1) (h) of the PNGRB Act.
d) Section 52 (1) (e) of the PNGRB Act.
e) Schedule J clause 1 (b) of Natural Gas Pipeline Authorizing Regulation 2008.
f) Regulation 50 of Code of Conduct of Business Regulation, 2007.

Hence, the terms and conditions of authorization once granted by PNGRB can be reviewed and modified later by Board and accordingly, the Impugned judgment is not liable to be interfered with by this Hon'ble Tribunal in the present facts and circumstances of the case.

7. The Impugned Order is in accordance with Section 25 of the Act and that the PNGRB had discretionary jurisdiction that cases where the facts and evidence on record are so clear and specific that it does not demand any further enquiry or investigation, the LD. PNGRB may pass orders or directions as it deems fit in order to discharge its functions under the Act effectively.

8. PNGRB has rightly held that GGCL has misrepresented the PNGRB during process of authorisation of HAPI pipeline and Surat-Bharuch CGD network.

The same is evident from the following facts and events and judicial pronouncements;

a) GGCL failed to bring to the notice of PNGRB about the change in character/usage of AMJH Pipeline from dedicated Pipeline to Spurline of HAPI Pipeline.

b) GGCL nowhere had intimated the Ld. PNGRB that the compressor unit facility installed for UPL's Power plant was shifted from Amboli to Jhagadia in order to cater to other customers.

c) GGCL did not inform that cost of building AMJH Pipeline of Rs. 25-30 crores have been paid by UPL alone.

d) GGCL had supplied natural gas to UPL (being a non CGD Customer on CGD Network) in utter disregard of Regulation 3(2)(c) of CGD Authorization Regulations and therefore GGCL had suppressed material facts and misrepresented the Ld. PNGRB regarding the status of AMJH Pipeline while seeking authorization

e) The volume of "AMJH Pipeline" has been added by GGCL in the volume of "HAPI Pipeline" as well as "Surat- Ankleshwar" CGD Pipeline Network contrary to the provision Clause 6 to Schedule A of the CGD Tariff Regulations and Clause 6 to Schedule A of the Natural Gas Pipeline Tariff Regulations.

f) GGCL acted totally in contravention of provisions of the Act and Regulations framed thereunder, in unilaterally charging so called facilitation charges from UPL under contractual arrangements.

9. GGCL has abused its dominant and monopolistic position and had indulged into restrictive trade practices as had been rightly held by PNGRB in the impugned judgment.

In view of the above submissions, UPL has sought to:

(a) Dismiss the present Appeal and uphold the Impugned Judgment dated 20.10.2014 passed by PNGRB in Case No. 98 of 0214 filed by GGCL.

(b) pass any other order which the Hon'ble Tribunal may deem fit and just in the facts and circumstances of the case.

5.0 Deliberations:

After hearing counsels and submissions from Appellant and both the Respondents, the following issues need to be decided by this Tribunal**:-**

1) Whether Respondent R1 (PNGRB) can direct Appellant (GGCL) to approach for modification of the authorizations (to review AMJH as part of CGD network). Does PNGRB has the power to suo motu review its own order and can review authorizations once granted?

2) Whether the Appellant (GGCL) misled Respondent R1 (PNGRB) at the time of seeking authorizations of HAPI pipeline / CGD network?

3) Whether Appellant (GGCL) has exercised its monopolistic status and indulged into restrictive trade practices (RTP) by charging exorbitant rates to Respondent R2 (UPL)?

5.1 <u>Whether AMJH is a CGD or Natural Gas pipeline</u>

5.1.1 PNGRB in its impugned order dated 20.10.2014 has stated that the entities having no authorisation from the Central Govt. on the Appointed day are deemed as authorised subject to provisions of Chapter V of the Act. However, any change in the purpose or usage required separate authorization from the Board under Regulation 18 of the said regulations.

Considering the same, PNGRB has concluded that on the appointed day, HAPI pipeline including AMJH pipeline and the CGD network (excluding AMJH Pipeline) shall also be deemed to have been authorized accordingly on the appointed day i.e., on 1.10.2007. Here, AMJH has been considered as a spurline of HAPI by PNGRB by virtue of it supplying gas to other consumers apart from UPL from 2005 onwards and as such on the appointed day, the original character of AMJH pipeline stood converted to a spur line from dedicated pipeline.

Thus, PNGRB has opined that deemed authorization of 73.2 Km natural gas pipeline (HAPI) shall also include authorization of 23 Km long AMJH pipeline as a natural gas pipeline since it comes under the purview of spurline of HAPI (referring 2 (f) of Authorizing Regulation). However, GGCL, in contravention of the existing legal provisions, excluded the AMJH pipeline from the natural gas pipeline and approached the Board for authorization only for 73.2 km HAPI pipeline and included 23 km long AMJH natural gas pipeline as a part of CGD Network, considering it as a sub transmission pipeline.

5.1.2 GGCL has contended that "the Ld. Board has on a wrong interpretation of Section 16, 17 & 18 of the PNGRB Act held that AMJH is a spurline of HAPI being a deemed pipeline at the time of commencement of the Act, therefore could not be part of Appellant's CGD network". Further, GGCL has contended that PNGRB in its impugned order dated 20.10.2014 has **erred** in holding that Amboli-Jhagadia Pipeline (AMJH) was to be added / included with 73.2 KM natural gas pipeline (HAPI) as its spurline since any pipeline having **a separate compressor** shall not be treated as a spur-line as per (Regulation 2 (o) of the PNGRB (Determining capacity of Petroleum, Petroleum products and Natural Gas Pipeline) Regulations, 2010 [Act & Regulation Compilation) which states that:

..."spur-line" means a pipeline necessarily originating or branching out from the trunk or transmission pipeline or sub-transmission line or another spur line or from a terminal station on the existing transmission or trunk pipeline with diameter and capacity not greater than the trunk or transmission pipeline but having no compression facility for supply of natural gas to one or more consumers. ***Any pipeline having a separate gas source or a compressor shall not be treated as a spur-line.*** *The length of spur-line may not depend upon the length of the trunk pipeline. A spur-line must use the capacity of trunk pipeline in order to transport gas. Spur line includes branch line also;*

5.1.3 Further, GGCL has stated that AMJH is within the purview of CGD Network of "Sub transmission pipeline" (Surat Bharuch Ankleshwar - SBA) as it is used for transporting natural gas from a bulk supply high pressure transmission main (HAPI) to the medium pressure distribution grid (AMJH) and subsequently to the service pipes in the CGD Network (referring Section 2(q) of the PNGRB Technical Standards and Specifications including Safety Standards for City or Local Natural Gas

Distribution Networks) Regulations, 2008 [Act & Regulation Compilation, and Regulation 2(3)(q) PNGRB (Technical Standards and Specifications including Safety Standards for Natural Gas Pipelines) Regulations, 2009 [Act & Regulation Compilation), which states as follows:

"sub-transmission pipeline" means a high pressure pipeline connecting the main transmission pipeline to the city gate station but is owned by the CGD entity;

5.1.4 This tribunal is of the opinion that Section 16 of the PNGRB Act gives statutory power to PNGRB to issue authorizations for pipelines either existing prior to appointed day or after the appointed day. Further, any entity has to procedurally apply in accordance with Regulation 18 of the respective regulations (Natural Gas or CGD) for authorizations of deemed pipeline not authorized by the Central Government before the appointed day.

GGCL has stated that, as per the PNGRB Act and regulations, it did apply under Section 18 of the CGD regulations for Surat – Bharuch-Ankleshwar network, of which AMJH pipeline was considered a part.

However, PNGRB in its impugned order has stated that GGCL ought to have applied under relevant regulation of Natural Gas pipeline considering 23 Km AMJH natural gas pipeline as a spurline of HAPI pipeline and instead have suppressed material fact and mis-represented Board regarding status of AMJH pipeline while seeking authorisation and that the PNGRB granted authorization for AMJH pipeline as part of CGD network relying on the information provided by GGCL while seeking respective authorizations for HAPI and AMJH pipelines,

On the other hand, GGCL has contended there was no misrepresentation to PNGRB, since while processing applications for above stated authorizations, PNGRB vide letters dated 14.05.2009 and 27.07.2009 to GGCL, had sought details with respect to grant of authorisation for HAPI P/l regarding spur line/ branch line/dedicated P/l along with technical parameters and that why the steel pipeline off shoot from main Transmission pipeline (HAPI pipeline) was being taken as a part of the CGD network by GGCL.

5.1.5 PNGRB had relied on specific clarifications by GGCL in response to above communications regarding inclusion of AMJH Pipeline in the CGD Network.

Since the authorisation was granted after seeking such explanation, whether or not the authorization was obtained erroneously is a question, that will have to be decided in appropriate proceedings, as and when the board embarks upon an enquiry for reviewing the character of AMJH pipeline.

5.1.6 Both PNGRB and UPL have pointed out that even after grant of authorization, GGCL admitted in its letter dated 13.11.2013 that UPL is not a CGD customer but a natural gas pipeline customer and is being charged HAPI pipeline tariff along with charges for the dedicated facilities

of the compressor (being specifically utilised for re delivery of natural gas to UPL at 43-45 bar).

Further, in its written submission filed before the Tribunal, GGCL at para 47, has submitted that UPL is neither a CGD customer nor a HAPI customer, but a legacy customer, being serviced through a combination of HAPI pipeline, GGCL's CGD network and the dedicated compressor installed specifically for UPL's need.

Therefore, GGCL has contended that tariff determined for HAPI pipeline cannot be the sole tariff that can be charged from UPL and has taken the tariff of HAPI p\L, CGD network tariff (of which AMJH is a part), Compression charges (in terms of proviso to Regulation 11 (4) of Natural Gas pipeline Authorizing Regulations, wherein an authorized Natural Gas pipeline entity is permitted to charge an additional compression charge towards compression of natural gas to the extent not included in the natural gas pipeline tariff), facilitation charges etc. into consideration.

Regulation 11 (4) of **Natural Gas pipeline Authorizing** Regulations states that:

"…. provided that the authorized entity may separately charge additional compression charge towards compression of natural gas to the extent not included in the natural gas pipeline tariff as specified under sub-regulation (1) from such customer, to whom the supply of natural gas is required at a specific deliverable pressure as defined in the contract and beyond the operating pressure profile of the natural gas pipeline as envisaged in the DFR".

From the above, it may be construed that above compression charges are applicable for Natural Gas pipeline. However, in this case, the compressor is placed on AMJH pipeline. This aspect will have to be borne in mind as and when the character of AMJH pipeline is revisited.

5.1.7 Further, in both GGCL & UPL's written submissions, Jhagadia (the end point of AMJH pipeline) has been mentioned as the "City Gate Station". As per CGD Authorizing regulations 2 (1) (e),

"City Gate Station" (hereinafter referred as CGS) means the point where custody transfer of natural gas from natural gas pipeline to the CGD network takes place;

From the above, it is evident that the battery limit for CGD starts from Jhagadia and not from Amboli.

5.1.8 Moreover, as per Regulation 3 (2) (c) of the CGD Authorisationregulation, any entity can supply gas upto 1,00,000 SCMD through a pipeline forming a part of CGD network. PNGRB has contended that since UPL is being supplied more than 1,71,000 SCMD gas through AMJH pipeline, same cannot be a part of CGD network. GGCL also has admitted that UPL is not a CGD customer and is in fact a natural gas customer and is thus charging HAPI pipeline tariff along with other charges.

5.2 Whether PNGRB is overreaching its judicial powers:

Now, as to the question where GGCL has contended that PNGRB is overreaching its judicial powers by directing GGCL to seek modifications of authorizations granted to HAPI pipeline and CGD network and trying to suo-moto review its own order, the following sections and regulations of PNGRB Act are relevant.

5.2.1 PNGRB Act has been enacted by the Parliament by establishing the Board, inter alia, with the objective **to protect the interest of consumers and entities** engaged in specified activities including transportation of gas and to provide competitive market.

As per Section 11 of the PNGRB Act, which lays down the function of the PNGRB:-

"...The Board shall-

*(a) **protect the interest of consumers** by fostering fair trade and competition amongst the entities;*
(b) ……
(c) authorize entities to-
(i) lay, build, operate or expand a common carrier or contract carrier;
(ii) lay, build, operate or expand city or local natural gas distribution network;

5.2.2 Further, Section 16 of the PNGRB Act gives statutory power to PNGRB to issue authorizations for pipelines either existing prior to appointed day or after the appointed day.

5.2.3 Further Section 12 and 25 of the PNGRB Act grants power to the Board related to **complaints and resolutions of disputes.**

"12. (1) The Board shall have jurisdiction to-

(a) ….

(b) receive any complaint from any person and conduct any inquiry and investigation connected with the activities relating to petroleum, petroleum products and natural gas on contravention of-

(i) …….
(ii) …..
(iii) …..

(iv) terms and conditions subject to which a pipeline has been declared as common carrier or contract carrier or access for other entities was allowed to a city or local natural gas distribution network, or authorisation has been granted to an entity for laying, building, expanding or operating a pipeline as common carrier or contract carrier or authorisation has been granted to an entity for laying, building, expanding or operating a city or local natural gas distribution network;

(v) any other provision of this Act or the rules or the regulations or orders made there under.

(2) While deciding a complaint under sub-section (1), the Board may pass such orders and issue such directions as it deems fit or refer the matter for investigation according to the provisions of Chapter V

Section 25

Filing of complaints.*- (3) On receipt of a complaint under sub-section (1), the Board shall decide within thirty days whether there is a prima facie case against the entity or entities concerned and may either conduct enquiry on its own or refer the matter for investigation under this Chapter, to an Investigating Officer having jurisdiction; and, where the matter is referred to such Investigating Officer, on receipt of a report from such Investigating Officer, the Board may, hear and dispose of the complaint as a dispute if it falls under sub-section (2) of section 27 and in any other case, it may pass such orders and issue such directions as it deems fit.*

5.2.4 Further, regarding the contention of GGCL that PNGRB had to mandatorily conduct an enquiry itself or to have referred the matter for investigation, PNGRB has stated that in terms of Section 12 (2) and Section 25 (3), there is no mandatory requirement to refer a complaint to an Investigation Officer for enquiry.

It is only when the matter is referred to an Investigation Officer, at the discretion of the Board, that the question of a report being submitted by the Investigation Officer arises.

Section 25 (3) has used both the words “shall” and “may” in the same provision and as held by Hon’ble Supreme Court in **Smt. Bachahan Devi and Anr. Vs Nagar Nigam Gorakhpur and Anr. Hon’ble** that when both the expression are used in the same provision, the legislature manifested its intent to make one part directory and another mandatory. But that by itself is not decisive. The power of Court to find out whether the provision is directory or mandatory remains unimpaired.

5.2.5 Thus, from the above Sections 12 (2) and Section 25 (3) of the PNGRB Act, it is amply clear that the Board has the power to pass such orders and issue such directions as it deems fit and that the PNGRB, appointed as a regulator by the Parliament has the authority to decide on any complaint on breach of / or against any act which is contrary to the provisions of PNGRB Act or the rules or the regulations defined there under. Here, PNGRB has acted on the complaint of UPL against the unregulated charges being levied by GGCL and hence the action by PNGRB cannot be termed as taken suo-moto.

5.2.7 Further, Section 13 of the Procedure of the Board enables PNGRB to review its decision:

13. Procedure of the Board:-
(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:-

(a) …

…

(h) reviewing its decision; and

(i) any other matter which may be prescribed.

Also, Section 13 (3) of the Act stipulates:

".. The Board shall be guided by the principles of natural justice and subject to other provisions of this Act and of any rules made there under, shall have powers to regulate its own procedure including the places at which it shall conduct its business".

Thus, BOARD has all the powers to review its decision as long as it is guided by the principles of Natural Justice.

5.3 Deliberations with respect to Restrictive Trade Practice (RTP) charges on GGCL

5.3.1 In its Impugned order by PNGRB has alleged that GGCL, in order to gain undue pecuniary advantage, violated the terms and conditions of the Authorization and also violated the statutory provisions and the Regulations framed under the Act.

5.3.2 It has been stated by both PNGRB and UPL that by virtue of its monopolistic position (since AMJH pipeline owned by the GGCL, is the only pipeline for transmission of gas to the UPL's power plant), GGCL coerced UPL to enter into gas agreements levying arbitrary and exorbitant charges, thereby completely usurping jurisdiction of PNGRB and charging tariffs without regulatory approval by PNGRB.

5.3.3 On GGCL's contention that all the agreements with UPL were mutual without any coercion, PNGRB has stated that any agreement contrary to law would have no effect even if both the parties concur there-to and RTP is applicable when a party had potential to compel the other to accede to his whims, leaving no option for the other but to accept, which GGCL was in a position in the instant case.

5.3.4 Further, GGCL has stated that UPL could have built a dedicated line from GAIL's network (which was passing close to UPL's plant and was already supplying gas to other industrial users such as Gujarat Borosil etc.) and option of another pipeline network (GAIL pipeline) was available to UPL. Hence, GGCL has contended that there was no abuse of alleged dominant/monopolistic position by GGCL.

To the above, it has emerged that UPL did approach GAIL to avoid exorbitant charges by GGCL but could not be worked out for the following reasons:

a) Since UPL was in need of lean gas, GAIL's existing pipeline could not be utilized (which was supplying rich gas).

b) Option of laying another pipeline was explored with GAIL (41 Km from GAIL's DUPL pipeline to UPL Plant) which would have taken 12 to 18 months period for completion.

c) Meanwhile, GTA dated 27.11.2012 was also signed with GAIL but due to very high RLNG/ Natural Gas prices owing to high crude prices and fall in PMT quantities, agreement could not be materialized with GAIL.

Thus, PNGRB and UPL have contended that UPL had no feasible commercial option for another pipeline for its plant.

5.3.5 PNGRB has also mentioned that exorbitant charges were being levied by GGL because there was no scope of laying or building another dedicated pipeline from GAIL's network for Jhagadia Power Plant as it would cause a huge financial burden and also could lead to the complete shutdown of Plant for the period of one year which was known to GGL.

5.3.6 As per clause 2 (zi) of the PNGRB Act, RTP means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular:

a) Which tends to obstruct the flow of capital or resources into the stream of production, or

b) 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 consumer unjustified costs or restrictions."

The definition of "restrictive trade practice" in the now repealed MRTP Act of "restrictive trade practice" is practically the same as under the PNGRB Act except that for the words "goods" in the MRTP Act, the words "petroleum, petroleum products or natural gas" have been used in the Act.

The similarity of the definition under the repealed MRTP Act and the Act, implies that judgments given by various Courts under the MRTP Act would be equally applicable to the PNGRB Act and Board, in so far as the broad interpretation of "restrictive trade practice" by the Courts is concerned.

In support of the interpretation of the concept of "restrictive trade practice" by the Board, the following judgments are referred to:

Tata Engineering & amp; Locomotive Co. Ltd., Bombay Vs. The Registrar of the Restrictive Trade Agreement, New Delhi – 1977 SCC (2) 55; 1977 AIR 973 at Page 63 Para 29 wherein is has been held as under:

> "*The definition of restrictive trade practice is an exhaustive and not an inclusive one. The decision whether trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on that doctrine that any restriction as to area or price will per se be a restrictive trade practice. Every trade agreement restrains or binds persons or places or prices. The question is whether the restraint is such as regulates and thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine this question three matters are to be considered. First, what facts are peculiar to the business to which the restraint is applied. Second, what was the condition before and after the restraint is imposed. Third, what is the nature of the restraint and what is its actual and probable effect"*.

Pawan Hans Ltd. Vs. Union of India – (2003) 5 SCC 75 at Page 77 para 9 wherein it has been held as under:

> *"……From the definition quoted above it is evident that the conduct of the party complained against should be such which may have the effect of preventing, distorting or restricting, competition in any manner which may tend to obstruct flow of capital into the stream of production or may bring about manipulation of prices or conditions of delivery resulting in imposition on the consumers unjustified costs or restrictions. Any conduct or violation of a condition of a contract between two parties not resulting in the consequences enumerated above, obviously cannot amount to restrictive trade practice".*

Haridas Exports Vs. All India Float Glass Manufacturer's Assn. - (2002) 6 SCC 600 at Para 42 on pages 622-623 wherein it has been held as under:

> "*42. Section 2(u) does state that 'trade practice' means any practice relating to the carrying on of any trade then it adds that such a trade practice would include anything done by any person which controls or affects the price charged by, or the method of trading of, any trader or any class of traders. The Act and the aforesaid section, in particular, is, therefore, concerned specifically with the incidence of the restrictive trade practice within India which in Section 2(o)(i) refers to the obstruction to the flow of capital or resources into the stream of production, while Section 2(o)(ii) talks of manipulation of*

prices or conditions of delivery or to affect the flow of supplies in the market but which must be such as to impose on the consumers unjustified costs or restrictions. To put it differently, mere manipulation of prices or conditions of delivery would not be a restrictive trade practice under Section 2(o)(ii) unless it is done in such a manner so as to impose on the consumers unjustified costs or restrictions. Lowering of prices cannot be regarded as imposing on the consumers unjustified costs or restrictions."

In the Supreme Court's order in **Rajasthan Housing Board Vs. Parvati Devi (Smt) (2000) 6 SCC 104** which in turn refers to the judgment in **Mahindra and Mahindra Ltd. Vs. Union of India (1979) 2 SCC 529**, which has unambiguously stated:

"*It is now settled law as a result of the decision of this Court in the Telco case that every trade practice which is in restraint of trade is not necessarily a restrictive trade practice. The definition of restrictive trade practice given in section 2(o) is a pragmatic and result oriented definition. It defines 'restrictive trade practice' to mean a trade practice which has or may have the effect of preventing, distorting or restricting competition in any manner and in clauses (i) and (ii) particularizes two specific instances of trade practices which fall within the category of restrictive trade practice. It is clear from the definition that it is only where a trade practice has the effect, actual or probable, of restricting, lessening or destroying competition that it is liable to be regarded as a restrictive trade practice. If a trade practice merely regulates and thereby promote competition, it would not fall within the definition of restrictive trade practice, even though it may be some extent in restraints of trade……."*

5.3.7 The various decisions quoted earlier given by the Hon'ble Supreme Court could be summarized as follows:

(a) Rule of Reason is to applied to decide whether Trade Practice is restrictive or not (and not on the principles that any restrictions as to area or price will per se be a RTP).

(b) It has to be looked into whether the restraint arising out of any trade agreement regulates and thereby promotes competition or whether it is such as may suppress or destroy competition.

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

Where a trade practice has the effect, actual or probable, of restricting, lessening or destroying competition, it is liable to be regarded as a Restrictive Trade Practice.

(c) Whenever a question arises before the Court as to whether a certain trade practice is restrictive or not, it has to be decided not on any theoretical reasoning, but by inquiring whether the trade practice may have the effect of preventing, distorting or restricting competition.
So, comprehensive facts have got to be considered to decide the issue and need to consider whether facts and circumstances in the instant case for which GGCL is accountable has any actual or probable effect of diminishing or preventing competition.

5.3.8 From the facts in the present case, there is no evidence of GGCL being restricting competition and GGCL has not obstructed the flow of capital or resources into the stream of production. The fact that UPL could not take gas from another alternative i.e. GAIL's pipeline is no way attributable to GGCL. Saying that there was no scope of laying another pipeline due to commercial unviability is not correct and GGCL has no role in the same.

5.3.9 Further, it is matter of fact that GGCL had levied charges as part of CGD network as per available authorization of AMJH pipeline as part of CGD network from PNGRB. It may be noted that CGD tariff is not regulated by PNGRB (Hon'ble Supreme Court in PNGRB v. IGL & Ors., reported as (2015) 9 SCC 209). Hence, it may not be correct to say that GGCL was levying unregulated chares for supply to UPL.

5.3.10 GGCL was supplying gas to UPL on mutually agreed contractual terms and PNGRB was aware of the transaction and dispute between the parties as evident from the PNGRB letter dated 26.02.2010 directing the parties to arrive at a mutually acceptable solution.

Hence, it may be construed that charges of RTP are not maintainable on GGCL.

ORDER

Having regard to the factual and legal aspects of the matter as stated above, I am of the considered opinion that:

Involvement in restrictive trade practice by GGCL could not be substantiated and hence dismissed. It is clarified that the result of the complaint of Restrictive Trade Practice will not come in the way of PNGRB to initiate action, if so required, for revisiting the issue of character of AMJH pipeline in accordance with law.

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

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

1. An authorised entity, owning and operating a natural gas pipeline, has been accused, and found guilty, of indulgence in restrictive trade practices qua the said infrastructure detrimental to the interests of a party which had contracted with the former for its utilization, on commercial terms, for transportation of natural gas purchased from a third party. The dispute essentially involves determination of the nature of the pipeline and its permissible use under the extant regulatory regime vis-à-vis such facilities.
2. I have had the advantage of reading the opinion penned by my learned colleague on the bench (Dr. Ashutosh Karnatak, Technical Member). While generally agreeing with his conclusions particularly concerning allegations of restrictive trade practice, I deem it necessary to write a separate opinion on the various issues required to be determined for decision on the appeal at hand. This opinion has been shared with my colleague before being made part of the judgment.
3. The appellant Gujarat Gas Company Ltd. (hereinafter referred to as "the appellant" or "GGL") is a company incorporated under the Companies Act 1956 engaged in the business of city gas distribution and marketing of natural gas. It owns and operates City Gas Distribution ("CGD") Network pipeline facilities and a Transmission Pipeline in the State of Gujarat. It has laid and built various pipelines including a 73.2 Kms Natural Gas pipeline from Hazira to Ankleshwar named and known as the Hazira – Ankleshwar Natural Gas Pipeline (in short, "*HAPI*") which was commissioned on 10.05.1999. By the

appeal at hand, it has assailed the order dated 20.10.2014 passed by the Petroleum and Natural Gas Regulatory Board ("the *PNGRB" or "the Board*") exercising jurisdiction under the Petroleum and Natural Gas Regulatory Board Act, 2006 ("*the PNGRB Act*") on the complaint of the second respondent United Phosphorous Ltd. (hereinafter referred to as "the second respondent" or "UPL"), a company incorporated under the Companies Act, 1956 engaged in the business of manufacturing pesticides and chemicals having a captive power plant situated at Jhagadia, Gujarat.

4. The disputants – appellant GGL and second respondent UPL - had entered into a Gas Supply Contract ("*GSC*") for supply and transportation of natural gas in 2001, renewed from time to time, in terms of which the appellant through its facilities was facilitating supply of gas to the Jhagadia power plant of second respondent. The appellant had laid a 23 Km long pipeline from Amboli to Jhagadia ("*AMJH* pipeline") connecting one end to its HAPI pipeline at Amboli and other end at Jhagadia unit of UPL, the said pipeline catering to multiple customers of Jhagadia since 2005.

5. By the impugned decision, rendered on basis of majority opinion (two Members dissenting), the Board has found the appellant GGL guilty of involvement in restrictive trade practice and for violation of the terms and conditions of Authorisation directing it, *inter alia*, to pay a penalty of Rs. 1,00,000/- (Rupees One Lakh only) in terms of Section 28 of the PNGRB Act, requiring it to approach the Board within fifteen days for modification of Authorisations granted in its favour for its natural gas pipeline network and CGD network and mandating that it charge tariff from the second respondent, as determined by the Board for its HAPI pipeline and to make adjustments accordingly.

6. The appellant challenges the impugned decision on the grounds that it is rendered on incorrect appreciation of facts, law and regulations, it being perverse, material documents showing full disclosures by GGL having been glossed over, the Board having granted the authorisations earlier after gathering all facts, being conscious of the utilization of AMJH and having made at that stage due inquiry as to the contractual arrangement between the parties.

7. The respondents – the Board and UPL – seek to defend the majority view on which impugned order is based arguing that the appellant is raising contentions which are unmerited.

PRELUDE

8. There is no dispute as to the fact that the pipelines and the contractual arrangement between the parties are of vintage that precedes the onset of regulatory law. The dispute as to financial terms in the contract was raised after the legal regime had come in. The events in the run-up occurred almost on parallel tracks thereafter. It is necessary to take note of the background facts in which respect there is not much dispute.

9. As mentioned earlier, GGL had built the Hazira-Ankleshwar Pipeline ("HAPI") which was commissioned on 10.05.1999. The length of HAPI is 73.2 Kms. Gas can be fed at both the ends of the pipeline i.e. Hazira and Ankleshwar. On 15.10.2001, UPL entered into an agreement with GGL for supply and transportation of natural gas to UPL's plant at Jhagadia. For this, GGL statedly laid the pipeline of 23 km commencing from Amboli to Jhagadia ("*AMJH Pipeline*") for captive power plant of UPL at Jhagadia, also installing a dedicated compressor for UPL near Panoli tapping point.

10. It is stated that by 2005, AMJH Pipeline was catering to many consumers engaged in variety of industrial processes and businesses admittedly including entities named Birla Century, Lanxess, DCM Shriram, Huber Chemical, Jhagadia Copper. It is the case of appellant GGL that the AMJH Pipeline was never laid as a dedicated pipeline, the second respondent UPL being an anchor load, it being pointed out that the concept of a dedicated pipeline came up only post 2007 after coming into force of the PNGRB Act, constitution of the PNGRB and framing of regulations, the nature of AMJH Pipeline having not undergone any change, it having remained the same anterior to or post-grant the authorisation of AMJH Pipeline as part of the CGD Network by PNGRB. *Per contra*, UPL contends that AMJH pipeline was a dedicated pipeline but ceased to so since many other such consumers as mentioned above were being catered through the said pipeline in 2005, the compressor unit installed at Amboli having concededly been shifted in October, 2005 to Jhagadia.

11. The PNGRB Act was enacted on 31.03.2006. The Board was constituted, in accordance with PNGRB Act, with the Central Government issuing Notification to that effect on 01.10.2007, it being known as the "Appointed Day" signifying the coming in force of the statute (the PNGRB Act) except Section 16 which came into force later on 15.07.2010.

12. In due course, the Board exercising its statutory powers framed and notified certain Regulations they including the PNGRB (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations 2008 ("*CGD Networks Authorizing Regulations*"), notified on 19.03.2008; the PNGRB (Authorizing Entities to Lay, Build, Operate Expand Natural Gas

Pipelines) Regulations 2008 (“*Pipeline Authorizing Regulations*”), notified on 06.05.2008; the PNGRB (Determination of Natural Gas Pipeline Tariff Regulations), 2008 ("*Pipeline Tariff Regulations*"), notified on 20.11.2008; and *Petroleum and Natural gas Regulatory Board (Technical Standards and Specifications including Safety Standards for City or Local Natural gas Distribution network) Regulations, 2009* (“*CGD Network Technical & Safety Regulations*"), notified on 11.11.2009.

13. After the promulgation of *CGD Networks Authorizing Regulations* on 19.03.2008, the Board by a formal communication issued on 31.03.2008 directed GGL to make an application for authorization as per the said Regulations since it (GGL) was admittedly not an entity authorized by the Central Government prior to the enactment of the special law.

14. On 01.04.2008, the Ministry of Petroleum and Natural Gas ("MoPNG") of Government of India (GoI) reduced the Panna-Mukta-Tapti (“PMT”) supplies to GGL from 3.05 mmscmd to 2.13 mmscmd with a mandate to supply PMT to CNG, Domestic, Commercial and SME's consuming less than 50,000 scmd, thereby inhibiting GGL to supply to UPL from its currently allocated sources of Gas. In view of this, short term gas sales contracts were signed between UPL and GGL which were valid till November 2008.

15. Meanwhile, on 21.07.2008, GGL applied to the PNGRB for grant of authorization and tariff determination of the CGD network stating, *inter alia*, that the 23 Km AMJH pipeline is a part of the GGL's City Gas Network ("CGD network") and not a spur line of the HAPI pipeline. On 03.10.2008, the Board directed GGL to make an application in terms of the Natural Gas Authorizing Regulations within 30 days of the date

of issue of the letter. The application was submitted by GGL on 24.10.2008 to PNGRB for grant of authorisation to the HAPI pipeline under the Section 18(1) of the Natural Gas Authorisation Regulations. PNGRB addressed a communication on 14.05.2009 to GGL referring to the said application for grant of authorization for HAPI pipeline seeking certain clarifications with respect to the preliminary examination including submission of details of spur-line / branch line / dedicated pipeline along with technical parameters. In response, GGL wrote to PNGRB on 12.06.2009 furnishing details of spur-lines / branch-lines along with technical specifications qua GGL's HAPI Pipeline Application, *inter alia*, stating that the various spur-lines laid by GGL are mainly for supply to GGCL's existing CGD network and hence are part of distribution network.

16. During 2008-09, Gas Transportation Agreements (GTAs) of short durations were entered into between UPL and the GGL for transportation of gas for running Jhagadia power plant.

17. On 13.11.2008, UPL requested GGL to put in place an arrangement by 01.12.2008 for the redelivery / transportation of gas obtained from another supplier operating in the same geographical area viz. GAIL India Limited ("GAIL"). After the *Natural Gas Tariff Regulations* had been notified by PNGRB on 20.11.2008, UPL entered into an Agreement with GAIL on 27.11.2008 for supply of 0.2 MMSCMD of gas, this being followed by execution of a Gas Transportation Agreement ("GTA") by UPL with GGL on 04.12.2008 for transmission of the gas received from GAIL, the terms of said agreement including liability to pay the capacity charges as per Clause 6 and Exhibit-C.

18. On 13.02.2009, UPL wrote to MoPNG in GoI stating that GGL was charging an exorbitant transportation cost under the GTA entered between them for transportation of gas procured from GAIL. The MoPNG, in turn, by its letter dated 23.02.2009, called upon GGL to clarify if the tariff charged from UPL was in accordance with the PNGRB Regulations. GGL responded by reply dated 27.02.2009 informing MoPNG, *inter alia*, that it was awaiting authorisation of its CGD network and transmission pipeline from PNGRB, clarifying that it was not offering gas transportation to any other industry except for UPL and further that the transportation arrangements for UPL were initially provided on short term basis which were extended from time to time upon specific requests made by UPL.

19. On 01.03.2009, two agreements with UPL - GTA signed on 04.12.2008 and STA signed on 10.12.2008 respectively - expired. No gas supplies were made to UPL till 05.03.2009. On 05.03.2009, UPL entered into fresh GTA with GGL for 0.125 MMSCMD at USD 2/MMBTU capacity charge expiring on 09.03.2009, this being followed by GTA executed on 09.03.2009 for 0.18 MMSCMD at Rs 67.69/MMBTU capacity charge expiring on 01.04.2009.

20. On 06.03.2009, GGL wrote to UPL asking it to enter into a City Gas Network Distribution Agreement ("CGNDA") for supply of gas to the Jhagadia power plant. On 03.04.2009, UPL and GGL entered into CGNDA wherein the capacity charge to be paid by UPL was fixed at Rs. 67.69 per MMBTU as per Exhibit C of the CGNDA with quantity at 1,75,000 sm^3 per day. After a meeting held on 22.04.2009 between UPL and GGL on subject of extension of the CGNDA and rationalisation of the penalty clauses, CGNDA for May 2009 was executed between the parties on 22.04.2009. It may be added here

that during the period 03.04.2009 to 24.07.2013, several CGNDAs and amendments to the existing CGNDAs were executed between UPL and GGL.

21. On 27.05.2009, UPL submitted a letter to PNGRB stating that the estimated cost of piping and compressors and O&M of compressors would have already been recovered by GGL and, therefore, it (GGL) should reduce the transportation rates as per new guidelines. The Board called for comments from GGL on 01.06.2009. The appellant GGL submitted its response on 12.06.2009 to PNGRB denying the averments of the UPL explaining, *inter alia*, that (i) the transportation facilities were initially provided for on a short-term basis commencing from 05.12.2008 and subsequently extended from time to time for short periods of time upon specific requests from UPL; (ii) UPL had not been willing to make long term gas delivery commitments and so such arrangements had to be renewed again and again; (iii) GGL is a CGD entity and its prime responsibility is towards customers that are accorded priority by MoPNG and PNGRB; and (iv) that the spur-lines laid by GGL are mainly for supply to GGL's existing CGD Network and hence are part of distribution Network.

22. On 27.07.2009, the Board by a formal communication asked the GGL to explain within specified time (fifteen days) as to why the steel pipeline off shoot from main Transmission pipeline (HAPI pipeline) was being taken as a part of the CGD network by GGL - major part of the said pipeline being before City Gate Station (CGS) and between main transmission pipelines. The appellant (GGL) responded by reply dated 11.08.2009, *inter alia*, explaining that *"the spurlines from HAPI pipeline to GGL's various City Gas stations forming part of GGL's CGD application"* and that as provided in Regulation 2(d) of the *Petroleum*

and Natural gas Regulatory Board (Technical Standards and Specifications including Safety Standards for City or Local Natural gas Distribution network) Regulations, 2008, the Amboli-Jhagadia pipelines had been "*included in the GGL's CGD application as they form part of an interconnected network and are utilized for transporting natural gas from high pressure transmission mains.*"

23. On 26.11.2009, UPL by a communication referring to its letter dated 07.09.2009 expressed gratitude to GAIL for agreeing to consider its request to establish direct pipeline to UPL's Plant and, *inter alia*, stated that it (UPL) would bear transmission charges, requesting GAIL to furnish techno-commercial proposal in order to proceed in the matter.

24. On 19.02.2010, the Board held a meeting in which UPL, GGL and GAIL were duly represented. In the wake of the said meeting, on 26.02.2010, PNGRB issued a communication, referring to a presentation made by GGL, directing both GGL and UPL to arrive at a mutually acceptable solution, giving liberty at the same time to UPL to approach the Board with a formal complaint, in case it was not satisfied with the outcome, in accordance with law and relevant regulations. A formal meeting of representatives of both sides – GGL and UPL – took place on 16.03.2010. On 19.03.2010, by a communication GGL informed UPL that charges were being levied as per contractual terms and arrangement and so the UPL could not claim reimbursement of the amounts thus paid.

25. On 11.06.2010, GAIL addressed a letter to UPL referring to its (GAIL's) letter dated 07.09.2009, *inter alia*, stating that based on the techno-commercial study, the FMTC had been worked out (with a construction period of 12 months) at Rs. 86,89,138/- per month for 15

years, indicating that the DUPL Trunk pipeline charges will also be additionally applicable, requesting UPL to give consent to the revised FMTC. On 01.12.2010, GAIL wrote to UPL, *inter alia*, stating that UPL by its letter dated 11.08.2010 had granted consent for Rs. 86,89,138/- per month for 15 years towards connectivity towards GAIL's DUPL Trunk Pipeline through 8"x41 kms spur-pipeline; FMTC had been earlier revised to Rs. 1,03,68,398/- per month for 15 years, DUPL Trunk-line charges to be applicable additionally; such FMTC and DUPL charges liable to be amended from time to time; requesting UPL to convey its consent to the revised charges. On 02.12.2010, UPL responded back to GAIL regarding revision in FMTC for the pipeline for UPL stating that the FMTC was being revised again and again, progress made not having been conveyed. UPL also stated that it had agreed to Rs. 71,31,319/- per month as charges which were later revised to Rs. 86,89,138/- and had been further revised to Rs. 1,03,68,398/- asking GAIL to furnish guidelines/calculations for UPL's reference qua such revisions. In the wake of communications sent by UPL on 10.12.2010 and 04.01.2011, referring to discussions held at GAIL Office on 09.12.2010 and giving consent for FMTC at Rs. 1,03,68398/- and stating that FMTC and DUPL trunkline tariff shall be amended as required for confirming to guidelines of PNGRB from time to time and also requesting that next steps qua piping for the UPL Project be sent to UPL including the terms and conditions to be signed, GAIL, in its response to UPL on 04.01.2011, *inter alia*, stated that a Side-Letter Agreement would have to be executed between UPL and GAIL for spur-line connectivity to UPL's Project at Jhagadia.

26. On 15.09.2010, the second respondent UPL formally raised a grievance before PNGRB stating that the Transportation Tariff being

charged by the GGL at Rs. 68/MMBTU was extremely high and exorbitant and was beyond the applicable tariff at that point of time. On 20.10.2011, UPL again wrote to the GGL stating, *inter alia*, that the tariff of Rs.67.69 per MMBTU charged by the GGL was very high and not compliant with industry norms. GGL responded on 28.11.2011 to UPL's letter dated 20.10.2011 and said that the capacity charges had been invoiced as per the contractual arrangements between the parties and therefore UPL could not claim reimbursement of the same. UPL replied on 06.12.2011 to the GGL stating that the capacity charges were exorbitant and did not seem to have the approval from PNGRB, asking GGL to share the details of such capacity charges adding that in the event of default in reply it (UPL) would approach the PNGRB for redressal. On 21.12.2011, GGL by its reply reiterated that the capacity charges levied were in accordance with the provisions of the Agreement which had been mutually agreed between the Respondent and the GGL.

27. Eventually, the parties held discussions through their representatives on 19.01.2012 and UPL by its communication dated 02.02.2012 assured GGL that it will not pursue the matter any further.

28. Meanwhile, on 23.05.2011, the PNGRB had passed a clarification order bearing no. PNGRB/M (D)/QOS/IMP/2011 dated 23.05.2011 to all the CGD Entities regarding implementation of PNGRB (Code of Practice for Quality of Service for city or Local natural Gas Distribution Networks) Regulation, 2010 stating, *inter alia*, that (i) the entities shall raise bills for domestic consumers with a bimonthly billing cycle as per the regulation 7 (1) (a); the Bills so raised should contain breakup of network tariff, compression charges for CNG, charges for last mile connectivity if applicable etc.; and that (iii) all

entities shall raise provisional invoices which, in the absence of Network Tariff and compression charges fixed by the Board, shall be indicated as provisional Network Tariff and Compression Charges as proposed by them to PNGRB or in accordance with relevant Regulations if such a proposal was yet to be submitted.

29. On 05.07.2012, PNGRB granted authorisation to the HAPI pipeline for use as common carrier by any third party on open access and non-discriminatory basis under Regulation 18(1) of the Natural Gas Authorization Regulations. On 03.10.2012, GGL filed petition for transportation tariff for HAPI pipeline at a proposed tariff rate of 7.01/MMBTU w.e.f 01.01.2009 and 7.20/MMBTU w.e.f. 05.07.2012.

30. On 08.11.2012, PNGRB issued grant of Authorisation for CGD Network development under Regulation 18(1) of the Natural Gas Authorizing Regulations for the geographical area of Surat-Bharuch-Ankleshwar.

31. On 27.11.2012, GAIL wrote to UPL referring to GTA dated 27.11.2012 executed between GAIL and UPL ("GAIL-UPL GTA") from Delivery Point at DUPL Offtake Point at Dahej and Re-Delivery at GAIL's Terminal at UPL's Project at Jhagadia, *inter alia*, stating that the Target Date under the GAIL-UPL GTA would be read as a date between 27.11.2013 to 27.11.2015 or an earlier date by which time pipeline connectivity from Delivery Point to Re-Delivery Point would be ready.

32. It appears that UPL wrote on 06.06.2013 to GAIL referring to discussions at GAIL's office on 05.06.2013, *inter alia*, stating that power constituted approximately 70% of UPL's cost of production of chemicals; UPL had an existing agreement with GAIL for mid-term NG supplies till December 2014; the rising cost of natural gas had resulted

in operations at the Project becoming unviable; and that UPL's management had reviewed the entire arrangement/process and had decided that it would not be prudent to increase commitments on natural gas beyond December 2014 and, accordingly, UPL would be unable to take advantage of the pipeline connectivity from DUPL to Jhagadia. GAIL responded by communication dated 27.06.2013 taking exception to UPL's decision for not continuing with the GAIL-UPL GTA dated 27.11.2012 at such stage and requested for an early meeting on the subject informing UPL, *inter alia*, that GAIL had already made efforts to connect UPL's Project at Jhagadia with GAIL's DUPL-DPPL network.

33. On 24.07.2013, UPL and the GGL entered into a CGNDA with capacity charges of Rs 81/MMBTU.

34. On 28.08.2013, UPL addressed a letter to PNGRB informing it about the transportation tariff issue and requested it to intervene in the matter stating that GGL had been charging $ 2.00 per MMBTU (during 04.12.2008 – 31.03.2009), Rs. 67.69 per MMBTU (during 01.03.2009 – July 2013) and Rs. 81.00 per MMBTU (August 2013 onwards). It was contended that the said rates were much above the normal rates of PNGRB Guidelines and further that UPL had been discussing the matter with GGL regarding exorbitant charges of transportation (more than Rs 3 per sm3 at the time of communication) for the past four years. On 11.10.2013, the Board forwarded the said letter to GGL asking it to examine the contentions raised and submit a detailed response within the period specified. Meanwhile, PNGRB had passed an order on 04.09.2013 fixing the initial unit tariff for HAPI pipeline at Rs. 4.92/MMBTU with effect from 20.11.2008.

35. GGL responded by its communication dated 11.11.2013, *inter alia*, stating that (i) UPL is not its CGD customer since GGL had been facilitating UPL for re-delivery of gas c. 1,71,000 scmd contracted by UPL with GAIL at UPL's premises at specifications of UPL in the bilaterally agreed contract, which is different from GGL's CGD requirement and also different from the specifications at which GGL receives the gas from GAIL, at a commercially negotiated rate; (ii) the Board had provided GGL the exclusivity from the purview of common carrier or contract carrier for a period of three years from the date of authorization of GGL's CGD Network and as per PNGRB (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008 read along with the clause on the exclusivity from the purview of common carrier or contract carrier GGL had the right of refusal to UPL for capacity booking in the CGD Network of GGL under such situation as had been mentioned under the said Regulation; (iii) UPL being a natural gas pipeline customer and not a CGD customer was being charged HAPI tariff along with Charges for the dedicated facilities of the Compressor (being specifically utilized for re-delivery of natural Gas to UPL at 43-45 bar pressure) and other allied infrastructure; (iv) the facilitation charges of US $ 2.00 per mmbtu was applicable from December, 04, 2008 till March, 08, 2009 and the facilitation charges of Rs. 67.69 MMBTU on net caloric value (NHV) was charged by GGL from 09.03.2009 till 31.07.2013; and that (v) in order to meet the specific requirements of UPL, the GGL had to install compressors to maintain the pipeline pressure and also specified the revised tariff as Rs. 81/MMBTU.

36. On 30.05.2014, UPL lodged a complaint (Case No. 98 of 2014) with the PNGRB against GGL under Section 25 read with Sections 11(a), 11(e), 11(f)(iii), 12(1)(a), 12(1)(b), 12(2), 48 and 50 of the PNGRB Act. In the wake of the Board finding on 25.06.2014 a *prima facie* case made out, GGL filed its response on 28.07.2014, *inter alia*, challenging the maintainability of the complaint on the ground of lack of jurisdiction of the PNGRB as well as on account of delay and laches as indeed referring to arbitration clause under the agreement.

37. It is pointed out that during the course of hearing by the Board, besides presenting written submissions or documents giving such clarifications as were sought, GGL had also filed an affidavit placing on record developments subsequent to filing and hearing of UPL's complaint, namely emails dated 14.07.2014, 24.07.2014, 25.07.2014, 08.08.2014, 11.08.2014, 22.08.2014, 25.08.2014, 30.08.2014, 11.09.2014, 12.09.2014 and 16.09.2014. It is the submission of the appellant GGL that the said e-mails clearly indicate malice on the part of UPL which, on one hand, had made allegations of coercion, arbitrariness and monopolistic and restrictive trade practices against GGL while, on the other hand, had been persuading GGL to enter into similar arrangements for its CS2 Plant located in the same premises as the Power Plant.

38. It is conceded that UPL filed a reply to the said affidavit filed by GGL seeking to refute. It is the contention of UPL that the communications referred to by GGL pertained to supply of 35 MMBTU (approx. equal to 100 scmd at NHV 8900 kcal/scm) of natural gas by GGL with provision for increase upto 2303 MMBTU (approx. equal to 65000 SCMD at NHV 8900 Kcal/scm) to UPL's CS2 plant located at 750, GIDC, Jhagadia, Bharuch, Gujarat at 10 Kg/CM2 pressure, the

gas being supplied to CS2 plant from AMJH pipeline with tapping before the dedicated compressors installed for UPL for another plant at Jhagadia.

39. It appears that GGL by letter dated 12.09.2014 conveyed that it was not willing to amend the agreement for diversion/redirection of 700 mmbtu per day to CS2 plant and was willing to review the situation only after the decision in the complaint case (no. 98 of 2014) had been rendered by the PNGRB. It is the contention of UPL that GGL compared arrangement of supply of PMT gas to CS2 plant with that of CGNDA dated 24.07.2013 in order to circumvent proceedings before the Board. UPL would explain that it had sent the email dated 16.09.2014 without prejudice to its rights available under law and in the circumstances that had arisen, thereafter not insisting on reduction in DCQ or the supply of PMT gas to CS2 plant considering that the matter was *sub judice*, also expressing that the decision of the Board shall be awaited.

THE IMPUGNED ORDER

40. On 20.10.2014, the impugned order was passed by PNGRB, it being based on the majority opinion (recorded by three members) directing the GGL to charge tariff from UPL as determined by the Board for HAPI w.e.f. the date of grant of authorisation and to make adjustments accordingly, and also to abide by the provisions of Regulation 11(4) of the Natural Gas Pipeline Authorising Regulations regarding compression of gas, it being further held that GGL had misled the Board at the time of grant of authorizations, it being thus also directed to approach the Board within fifteen days, penalty of Rs.

1 lakh having been levied on the GGL for indulging in unfair trade practices.

41. The dissent (minority view) was recorded by two Members, one (Mr. B. Mohanty) holding that since the arrangement of transportation and re-delivery between the parties was of a hybrid nature, it would not be correct to arrive at the conclusion that the GGL had violated the law, the other (Mr. K.K. Jha) by separate opinion for similar reasons recommending dismissal of the complaint filed by UPL.

42. The GGL filed the appeal at hand on 05.11.2014 under Section 33(1) of PNGRB Act challenging the order dated 20.10.2014. The impugned decision was stayed by this tribunal by order dated 20.03.2015.

43. As noted earlier, the complaint (registered as Case no. 98 of 2014) leading to the impugned order was filed by the second respondent UPL before PNGRB under Section 25 read with Sections 11 (a), 11 (e), 11 (f) (iii), 12 (1) (a), 12 (1) (b), 12 (2), 48 and 50 of PNGRB Act raising primarily the plea that the appellant GGL was imposing arbitrary, exorbitant and unjustified transportation charges by Gujarat Gas Ltd. By the impugned order (founded on majority opinion of three members as against dissenting views of two), rendered on 20.10.2014, the directions under challenge have been issued. The key findings reflected in the three separate opinions may now be noted.

Minority View

44. As noted above, two Members of PMGRB were not impressed with the case of second respondent (UPL). Their dissent (minority view) may be taken note of first since the appellant relies upon it,

45. One of the Members (Mr. K.K. Jha), in minority, noted that UPL had entered into the Gas Supply Contract with GGL in 2001 which fact, in his view, showed that there is a legacy arrangement attached to the supply of gas to Jhagadia plant of UPL prior to the enactment of the PNGRB Act. He held that Deemed Authorization of pipelines under Section 16 of the PNGRB Act is only applicable to pipelines authorized prior to the enactment of the PNGRB Act by the Central Government and, therefore, the AMJH pipeline was not a deemed pipeline and could be a part of GGL's CGD network. In his opinion, PNGRB had already accepted AMJH pipeline as a part of the CGD network. He noted that AMJH pipeline from Amboli to Jhagadia was being operated at a low pressure and compressors at UPL's plant had been specifically provided by GGL to pressurize the gas to 40~45 kg cm square to meet the requirement of UPL which fact is to be seen in contrast to the fact that low pressure gas was being supplied to other customers of GGL's CGD network, this reflecting that gas was being redelivered to UPL to meet its specific requirement. He observed that AMJH pipeline is part of CGD network of Surat-Bharuch- Ankleshwar Geographical Area (GA) as authorized by PNGRB. Noting that the entire length of HAPI is 72.3 kms, he observed that the tariff zone along the HAPI would be 7.23 kms in terms of Regulation 2h(ii) of the PNGRB (Authorizing entities to lay, build, operate or expand natural gas pipeline) Regulations 2008. As per his conclusion, the length of the AMJH pipeline being 23 kms, the Jhagadia plant of UPL would not fall under the tariff zone of HAPI. He would highlight the fact that HAPI gas can be fed at both Mora terminals at Hazira and Amoti terminal at Ankleshwar or at a designated entry/exit points of HAPI. However, UPL does not get the gas delivered from GAIL into HAPI. The gas intended

for UPL's plant is delivered at the city gas station located at Surat, Ankleshwar/Bharuch which is integral part of GGL's CGD network. His conclusions, thus, are that UPL had failed to make a case of suppression of facts/information by GGL pertaining to inclusion of AMJH pipeline in its CGD network, the charge of coercion not having been substantiated, UPL having entered into the CGNDA on its own volition. He opined that the redelivery of gas by GGL to plant of UPL involved various facets of transportation and redelivery activities and no definite standalone applicability of Regulations on such type of arrangements had been provided. He would add that Gas to UPL was being supplied through CGD infrastructure, HAPI Natural Gas pipeline and compression facility installed at UPL's Jhagadia premises such activity attracts tariff of HAPI pipeline tariff of CGD network and compression charges being incurred at premises of UPL.

46. The second dissent by another Member (Mr. B. Mohanty), forming minority, follows almost similar lines. He held that once the AMJH pipeline had become a part of GGL's CGD network, it cannot be simultaneously considered a part of HAPI under the existing regulatory framework. In his opinion, this appears to be a case of "hybrid" straddling between existing regulatory framework for pipelines and CGD networks. He opined that until the tariff for GGL's CGD network was decided and the hybrid variety was duly addressed in either of the regulations, it would not be in the fitness of things to hold that GGL had violated the law. He noted that over the years, the nature of the AMJH Pipeline had undergone change, more customers having been connected to it, at the instance of a Gujarat State Government agency, it having assumed the character of a common carrier/contract carrier. But he joined the other minority view in observing that there was no

statutory regulation in place to address the issues and, in such a scenario, transactions were made on the basis of contractual agreements as per parties' commercial considerations. He would point out that the PNGRB Act had come into force in 2007 and the Board had notified regulations for authorization of natural gas pipelines and CGD networks in 2008, GGL having applied to PNGRB on 21.07.2008 for authorization of CGD network for the Surat-Bharuch area, its application showing the pipeline design structure including AMJH, the Board having granted such authorization of the CGD network to GGL on 08.11.2012 and yet the tariff for the CGD network was yet to be finalised by PNGRB in which situation the existing contractual arrangements between GGL and UPL would continue. In his opinion, the demand of UPL for gas at around 1,71,000 scmd made it ineligible to draw gas from CGD network as per the present PNGRB regulations. At the same time, he was of the view that UPL as a major customer should continue to avail gas through the contractual arrangements, as before, with GGL. Absolving GGL of misdemeanour, he underscored the fact that UPL had been availing services of GGL since 2002, no complaint having been made by any one, not even UPL, until the provisional tariff for HAPI was fixed.

Majority Opinion

47. The majority opinion, in sharp contrast, found GGL to be guilty of having indulged in restrictive trade practice.

48. Dealing with the objection to the jurisdiction, by majority view the Board has concluded that Section 12 (1) (a) corresponds to Section 24 whereas Section 12 (1) (b) substantially corresponds to Section 25 of

the PNGRB Act and that involvement of an entity into restrictive trade practice and violation of the terms and conditions of Authorization attracts the provision of Section 11 (a) read with Section 12 (1) (b) (v) and Section 12 (1) (b) (iv) of the PNGRB Act, the appellant mid-course the hearing having conceded to the maintainability of the complaint under Section 25. The objection of bar of limitation was rejected. The argument of the appellant based on doctrine of estoppel with reference to the assurance of UPL not to pursue the dispute was held to be co-related with the issue of involvement of GGL into restrictive trade practice, it being observed that such plea will not help if the contention of UPL with regard to involvement of GGL in restrictive trade practice was established.

49. The Board held that GGL had unilaterally decided to convert the GTA into City Gas Network Distribution Agreement in utter dis-regard of Regulation 3 (2) (c) of the CGD Authorizing Regulations, it being observed that, on one hand, GGL would deny the status of UPL as a CGD customer and, on the other, it had “compelled” it to enter into a CGNDA in place of GTA. It is concluded that GGL had failed to explain as to under which provision of law it had agreed to transmit 171,000 SCMD to UPL which was a party to the CGD Network Agreement. It noted that GGL had in letter dated 11.11.2013 admitted that UPL is a natural gas pipeline customer and not a CGD customer.

50. Observing that GGL relies upon the proviso to Regulation 11 (4) of the Pipeline Authorizing Regulations to suggest that PNGRB can allow the authorized entity to charge an additional compression charge towards compression of natural gas to the extent not included in the Natural Gas Pipeline Tariff, the Board inferred that the GGL acknowledges UPL as a shipper of natural gas pipeline.

51. It is a finding of fact returned that GGL had included the volume utilized by UPL in its tariff filing made to PNGRB for the HAPI pipeline and also for its CGD network. It is also concluded that GGL has been treating UPL as a shipper of its natural gas pipeline on the appointed day and even thereafter till various Regulations were framed or notified by PNGRB. In the view of the Board, GGL had adopted a strategy to represent AMJH pipeline as a part of its CGD network and proceeded for authorization of its natural gas pipeline and the CGD network so that a new concept of facilitation charges could be invented to escape from the regulatory framework.

52. The PNGRB has accepted that AMJH pipeline was originally laid as a dedicated pipeline for transmission of natural gas to power plant of UPL power plant but held that it was being used on and before the 'appointed day' for transmission of gas to other consumers and, thus, the original character of the said pipeline (AMJH) stood converted from dedicated pipeline to a spur-line. Observing that the definition of natural gas pipeline includes a spur-line, the AMJH pipeline has been found to be part of HAPI. and accordingly, on the appointed day, AMJH was a natural gas pipeline and was deemed authorized.

53. The PNGRB has inferred that the appellant GGL had made misrepresentation before it on the basis of conclusion that, in contravention of the existing legal provisions, the latter (GGL) had excluded the AMJH pipeline from the natural gas pipeline while approaching PNGRB for authorization of HAPI. It is also held that GGL did not inform PNGRB about the change of character of AMJH pipeline from dedicated pipeline to spur-line of HAPI and obtained authorizations by suppressing material facts for which a separate action is indicated to be initiated.

54. The majority opinion on which impugned decision is rendered by the Board holds that AMJH pipeline, owned by the GGL, is the only pipeline for transmission of gas to the plant of UPL. It has been concluded that GGL took advantage of this situation and got the GTA converted into CGNDA in the year 2009 and recovered more than five times the cost of this pipeline and transmitted 171,000 SCMD gas per day, in utter disregard of Regulation 3 (2) (c) of the CGD Authorizing Regulations, it (GGL) not having furnished the details or bifurcation of the charges being levied on the UPL during the proceedings or prior there to. It has been concluded that despite executing the CGNDA, GGL had abstained from recognizing UPL as its CGD customer and even though it was admitted that UPL is its natural gas pipeline customer after the grant of authorization, GGL had declined to levy the regulated tariff / compression charges and by such acts GGL had taken undue advantage of its monopolistic position and imposed charges @ Rs. 81 per MMBTU instead of Rs. 4.92 per MMBTU tariff that had been determined by PNGRB by its order dated 4.9.2013 for HAPI natural gas pipeline.

55. The sum and substance of the above conclusions reached by the majority members of PNGRB is that UPL has been found to be a shipper of HAPI natural gas pipeline which is found to be inclusive of the AMJH spur-line of GGL, the latter (GGL) having abused its monopolistic status and indulged in restrictive trade practice.

56. The appellant has assailed the judgement of PNGRB on basis primarily of the views expressed by minority and, quite expectedly, the second respondent has argued in defence of the impugned order

adopting the reasoning given by the majority opinion, this also being the attempt of respondent Board.

OBJECTION TO JURISDICTION

57. The issue of jurisdiction must be taken up first.

58. It has been the contention of GGL that since the contracts between the parties against the backdrop of which the dispute arises contain an arbitration clause, the PNGRB could not have exercised the jurisdiction on the complaint of UPL under Section 25 of the PNGRB Act, by reading the said provision along with Section 12(1)(b) of the PNGRB Act, it also not being equipped with power to determine tariff for CGD network.

59. The provisions contained in Sections 12, 24 and 25 of PNGRB Act, to the extent relevant read thus:

> *"12. Powers regarding complaints and resolutions of disputes by the Board :-*
> *(1) The Board shall have jurisdiction to-*
> *(a) adjudicate upon and decide any dispute or matter arising amongst entities or between an entity and any other person on issues relating to refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas according to the provisions of Chapter V, unless the parties have agreed for arbitration.*
> *(b) receive any complaint from any person and conduct any inquiry and investigation connected with the activities relating to petroleum, petroleum products and natural gas on contravention of-*
> *(i) retail service obligations;*
> *(ii) marketing service obligations;*
> *(iii) display of retail price at retail outlets;*
> *(iv) terms and conditions subject to which a pipeline has been declared as common carrier or contract carrier or access for other entities was allowed to a city or local natural gas distribution network, or authorisation has been granted to an entity for laying, building, expanding or operating a pipeline as common carrier or contract carrier or authorisation has been granted to an entity for laying,*

building, expanding or operating a city or local natural gas distribution network;
(v) any other provision of this Act or the rules or the regulations or orders made there under.

(2) While deciding a complaint under sub-section (1), the Board may pass such orders and issue such directions as it deems fit or refer the matter for investigation according to the provisions of Chapter V.

24. Board to settle disputes :-
(1) 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: Provided that if the members of the Bench differ on any point or points, they shall state the point or points on which they differ and refer the same to a member other than a member of the Bench for hearing on such point or points and such point or points shall be decided according to the opinion of that member.

(2) 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;
(b) marketing and sale of petroleum, petroleum products and natural gas including the quality of service and security of supply to the consumers by the entities; and
(c) registration or authorisation issued by the Board under section 15 or section 19.

"25. Filing of complaints: -
(1) A complaint may be filed before the Board by any person in respect of matters relating to entities or between entities on any matter arising out of the provisions of this Act: Provided that the complaints of individual consumers maintainable before a consumer disputes redress forum under the Consumer Protection Act, 1986 (68 of 1986) shall not be taken up by the Board but shall be heard and disposed of by such forum.

Explanation.- For the purposes of this sub-section, the expression "consumer disputes redress forum" shall mean the district forum, State Commission or, the National Commission, as the case may be, constituted under the provisions of the Consumer Protection Act, 1986 (68 of 1986)

(2) Every complaint made under sub-section (1) shall be filed within sixty days from the date on which any act or conduct

constituting a contravention took place and shall be in such form and shall be accompanied by such fee as may be provided by regulations: Provided that the Board may entertain a complaint after the expiry of the said period if it is satisfied that there was sufficient cause for not filing the complaint within that period.

(3) On receipt of a complaint under sub-section (1), the Board shall decide within thirty days whether there is a prima facie case against the entity or entities concerned and may either conduct enquiry on its own or refer the matter for investigation under this Chapter, to an Investigating Officer having jurisdiction; and, where the matter is referred to such Investigating Officer, on receipt of a report from such Investigating Officer, the Board may, hear and dispose of the complaint as a dispute if it falls under subsection (2) of section 27 and in any other case, it may pass such orders and issue such directions as it deems fit.

(4) Where the Central Government considers that a matter arising out of the provisions of this Act is required to be investigated, it shall make a reference to the Board and the provisions of this Act shall apply as if such reference were a complaint made to the Board."

(emphasis supplied)

60. It is plain that the jurisdiction conferred upon PNGRB is very wide and includes all grievances relating to non-compliance with or contravention of law and regulations, the dispute or allegation of infraction of law submitted as complaint requiring an inquiry or investigation (excluding only the cases of disputes of individual consumers), the subjects covered including issues relating to transportation of natural gas. Action upon an allegation of restrictive trade practice would be governed by the jurisdiction thus conferred upon the Board.

61. It is the submission of the appellant that Section 25 is a procedural section and cannot be interpreted harmoniously in such a manner so as to provide substantive rights to parties. It is argued that a settled principle of law that a procedural provision cannot narrow down the scope or expand the scope of a substantive provision in a statute. In this regard, reliance is placed on *Saiyad Mohammad Bakar*

El-Edroos v. Abdulhabib Hasan Arab (1998) 4 SCC 343 and *Kode Kutumab Rao v. Kode Sesharatnamamba* AIR 1967 AP 323.

62. In our considered opinion, nothing turns on the above-suggested interpretation of Section 25. The fact remains that there is a contractual arrangement between the parties and one of them has alleged coercion and abuse of dominant position. The complaint was bound to be and thus rightly entertained by the Board for scrutiny. Upon reaching a *prima facie* view (may be erroneously) that the allegations made had some substance, the Board was expected to hold a proper inquiry (or investigation) and at the conclusion of such process would have the jurisdiction and power to issue correctional directions.

63. It is pointed out that Clause 16 of the CGNDA dated 24.07.2013 provided for 'Dispute Resolution' and stipulated that all disputes, controversies etc. arising out of the CGNDA shall be referred to arbitration. GGL argues that the present dispute raised by UPL pertains to tariff and ought to have been referred to arbitration. The provision of Section 12 of the PNGRB Act dealing with jurisdiction of the PNGRB is referred to submit that PNGRB has the jurisdiction to adjudicate upon any dispute or matter "*unless parties have agreed for arbitration*"**,** this position being also supported by Section 24 of the PNGRB Act. It is stated that PNGRB has incorrectly recorded that during the course of the final hearing, both the parties in response to the query by the Board had conceded the correctness of the maintainability of the complaint under Section 25 of the PNGRB Act.

64. We assume the facts relevant to the jurisdictional issue with reference to the arbitration clause, as presented by the appellant, to be correct. But we are unable to agree with the plea of ouster of jurisdiction of the PNGRB on this account. The complaint of indulgence

in anti-competitive or restrictive trade practices by a party statedly in dominant position is a matter squarely within the domain of statutory regulatory authority particularly because it involves *public interest* and consequently hardly or ever describable as an arbitrable dispute *inter se* the contracting parties.

65. We may add 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 wherein it was held thus:

> *"37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary.)*
>
> *38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all*

disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable."

66. As regards the argument that PNGRB did not have jurisdiction to apply HAPI Tariff for GGL's CGD Network and, therefore, should have refrained from exercising jurisdiction in the matter, reliance being placed in this context on decision of High Court of Delhi as upheld by the Supreme court in appeal - *PNGRB v. IGL & Ors.*, reported as (2015) 9 SCC 209 - holding that the PNGRB Act does not empower the PNGRB to determine the tariff for a CGD Network including compression charges, we only say at this stage that for same reasons as above on the effect of arbitration clause, we are not ready to accept that the jurisdiction of PNGRB to examine the complaint was ousted. At the cost of repetition, we note that the allegation of restrictive trade practice was a matter of concern for the Board and it was duty bound to inquire, this observation by us not to be construed as accepting the correctness of such imputations. We reserve our comments on the effect of decision in case of *IGL* (supra) on merits of the case for later.

NATURE OF AMJH PIPELINE

67. This, we feel, is the core issue.

68. The second respondent concedes that AMJH was laid as a dedicated pipeline by GGL but contends that over the period, due to its use and by conduct of the parties, its nature changed, particularly around 2005, and it turned into a spur-line, part of HAPI. The appellant, on the other hand, submits that AMJH has been a sub-transmission

line and part of its CGD Network, there being no occasion for change of its nature, such change being not automatic, PNGRB having not declared it as spur-line of HAPI till date. It is in this context that the majority opinion of the Board holds the appellant guilty of misrepresentation at the stage of authorisation, which finding is contested.

Statutory Scheme

69. The broad chronology of events leading to formation of contract between the disputants – before promulgation of the law (PNGRB Act) and Regulatory framework introduced thereunder, as indeed thereafter - and to the dispute has been noticed earlier. Some more meat would need to be added in context. However, before we do so, we may remind ourselves of the public policy reflected in the legislation governing the field.

70. 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 so as to protect the interests of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas and to ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country and to promote competitive markets and for matters connected therewith or incidental thereto*". In the matter at hand, we are concerned with the regulatory control over "*transportation*" of "*natural gas*" with a view to "*protect the interests of consumers and entities engaged in specified activities relating to*" such

product and connected to this being the objective to "*promote competitive markets*".

71. The law has established the PNGRB ("the Board") vesting it with various responsibilities that include delegated power to frame, notify and enforce regulations (subordinate legislation), administrative duties such as granting authorisations and adjudicatory role for resolving disputes or dealing with such complaints as of restrictive trade practice which is anti-competitive. As already noted, the Board has framed and notified various regulations, some of which would need application here they having the force of law, even the Board being bound by the regulatory framework.

72. We may also extract the statutory definitions of various relevant expressions as given in Section 2 of PNGRB Act. They are as under:

> (e) "auto liquefied petroleum gas" means a mixture of certain light hydrocarbons derived from petroleum, which are gaseous at normal ambient temperature and atmospheric pressure but may be condensed to the liquid state at normal ambient temperature by the application of
> moderate pressure, and which conform to such specifications for use as fuel in vehicles, as the Central Government may, in consultation with the Bureau of Indian Standards, notify from time to time;
>
> (i) "city or local natural gas distribution network" means an interconnected network of gas pipelines and the associated equipment used for transporting natural gas from a bulk supply high pressure transmission main to the medium pressure distribution grid and subsequently to the service pipes supplying natural gas to domestic, industrial or commercial premises and CNG stations situated in a specified geographical area.
>
> Explanation:- For the purposes of this clause, the expressions "high pressure" and "medium pressure" shall mean such pressure as the Central Government may, by notification, specify to be high pressure or, as the case may be, medium pressure;
>
> (j) "common carrier" means such pipelines for transportation of petroleum, petroleum products and natural gas by more than one entity as the Board may declare or authorise from time to

time on a nondiscriminatory open access basis under sub-section (3) of section 20, but does not include pipelines laid to supply-

(i) petroleum products or natural gas to a specific consumer; or

(ii) crude oil;

Explanation.- For the purposes of this clause, a contract carrier shall be treated as a common carrier, if –

(a) such contract carrier has surplus capacity over and above the firm

contracts entered into; or

(b) the firm contract period has expired.

(l) "compressed natural gas or CNG" means natural gas used as fuel for vehicles, typically compressed to the pressure ranging from 200 to 250 bars in the gaseous state;

(m) "contract carrier" means such pipelines for transportation of petroleum, petroleum products and natural gas by more than one entity pursuant to firm contracts for at least one year as may be declared or authorised by the Board from time to time under sub-section (3) of section 20;

(p) "entity" means a person, association of persons, firm, company or cooperative society, by whatsoever name called or referred to, other than a dealer or distributor, and engaged or intending to be engaged in refining, processing, storage, transportation, distribution, marketing, import and export of petroleum, petroleum products and natural gas including laying of pipelines for transportation of petroleum, petroleum products and natural gas, or laying, building, operating or expanding city or local natural gas distribution network or establishing and operating a liquefied natural gas terminal;

(t) "liquefied natural gas terminal" means the facilities and infrastructure required to-

(i) receive liquefied natural gas;

(ii) store liquefied natural gas;

(iii) enable degasification of liquefied natural gas; and

(iv) transport degasified liquefied natural gas till the outside boundaries of the facility;

(u) "liquefied petroleum gas" means a mixture of light hydrocarbons containing propane, isobutene, normal butane, butylenes, or such other substance which is gaseous at normal ambient temperature and atmospheric pressure but may be condensed to liquid state at normal ambient temperature by the application of pressure and conforms to such specifications, as the Central Government may, in consultation with the Bureau of Indian Standards, notify from time to time;

(v) "local distribution entity" means an entity authorised by the Board under section 20 to lay, build, operate or expand a city or local natural gas distribution network;

(w) "marketing service obligations" means obligations-

(i) to set up marketing infrastructure and retail outlets in remote areas in respect of notified petroleum and petroleum products;

(ii) to maintain minimum stock of notified petroleum and petroleum products;

(iii) of a local distribution entity to supply natural gas to consumers; and

(iv) such other obligations as may be specified by regulations;

(za)"natural gas" means gas obtained from bore-holes and consisting primarily of hydrocarbons and includes-

(i) gas in liquid state, namely, liquefied natural gas and degasified liquefied natural gas,

(ii) compressed natural gas,

(iii) gas imported through transnational pipe lines, including CNG or liquefied natural gas,

(iv) gas recovered from gas hydrates as natural gas,

(v) methane obtained from coal seams, namely, coal bed methane, but does not include helium occurring in association with such hydrocarbons;

(zf)"pipeline access code" means the code to establish a framework for third party access to pipelines under sub-clause (i) of clause (ze) of section 11;

(zi) "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;

(zn) "transportation rate", in relation to common carrier or contract carrier or a city or local natural gas distribution network, means such rate for moving each unit of petroleum, petroleum products or natural gas as may be fixed by regulations.

73. The power to declare a pipeline to be a common carrier or contract carrier lies with the Board and is controlled, *inter alia*, by PNGRB (Guiding Principles for Declaring or Authorizing Natural Gas Pipeline as Common Carrier or Contract Carrier) Regulations, 2009,

Regulation 10 being the specific clause respecting the procedure to be followed, the opinion of the Board that "*it is necessary or expedient to*" so "*declare an existing pipeline for transportation of natural gas*", whether on its own motion or on request of the concerned entity, being the pre-requisite, giving of "*wide publicity*" and "*inviting objections and suggestions"* and affording "*opportunity of being heard"* making the process transparent and compliant with rules of natural justice.

74. It is undisputed case of all sides that the appellant GGL had developed HAPI (with a length of 73.2 Kms.) which has since been declared as common carrier for transportation of liquified natural gas (LNG) within the meaning of expressions defined as above, tariff for purposes of such use having been determined by the Board in exercise of its statutory functions.

75. It is admitted fact that the appellant is an entity which has been granted authorisation for operating a CGD Network by the board in respect of geographical area (GA) within the bounds of which the second respondent UPL has a premises wherein it is is engaged in a business involving industrial process that requires use of LNG. For such purposes, the appellant had developed and laid and has been operating and maintaining AMJH which has a length of 23 Kms, the said pipeline (AMJH) taking the feed from HAPI. As the authorised entity respecting CGD Network for the said GA, GGL has to cater for the needs of retail consumers through, *inter alia*, AMJH and infrastructure connected thereto. It may be added here itself that as per the prescribed standards and specifications, in terms, *inter alia*, of the PNGRB (Authorizing Entities to Lay, Build, Operate or Expand City or

Local Natural Gas Distribution Networks) Regulations, 2008 ("*CGD Networks Authorizing Regulations*"), the CNG supplied to domestic consumers is carried and released at a very low pressure, the needs of UPL for industrial processes requiring higher pressure to be maintained. And for such specific purposes of UPL, at its special request, GGL had concededly established compressors enroute connectivity with HAPI and delivery point of UPL.

Regulatory Framework

76. Some definitions and provisions provided by Regulations are required to be kept in mind.

77. The PNGRB (Authorizing Entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations, 2008 ("*Pipeline Authorizing Regulations*"), by Regulation 2(1)(f), defines the expression "*natural gas pipeline*" as under:

> *"(f) "natural gas pipeline" means any pipeline including spur lines for transport of natural gas and includes all connected equipments and facilities, such as, compressors, storage facilities, metering units, etc. but excludes-*
> *(i) dedicated pipeline laid to transport natural gas to a specific customer to meet his requirement and not for resale;*
> *(ii) pipelines in a city or local natural gas distribution network which are regulated by the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008."*

78. It is clear that the legal meaning of the expression *"natural gas pipeline"* connotes "*any pipeline*", and that might include "*spur lines*" and, crucially, "*all connected equipments and facilities, such as, compressors, storage facilities, metering units, etc.*", the purpose whereof is "*for transport of natural gas*". However, from the said expression for purposes of mandatory authorization "*dedicated*

pipeline laid to transport natural gas to a specific customer to meet his requirement and not for resale" or "*pipelines in a city or local natural gas distribution network which are regulated by the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008"* are expressly excluded.

79. It may be noted here itself that the *Pipeline Authorizing Regulations*, by Regulation 2(1)(h), also define "tariff zone" which was amended on 18.11.2008, post amendment it reading thus:

> **"***tariff zone" means the zone-*
> *(i) Of a length of three hundred kilometers each along the route of the natural gas pipeline from the point of origin till the end point:*
> *Provided that the last zone of the natural gas pipeline may be of a length of three hundred kilometers or less;*
>
> *(ii) a corridor along the natural gas pipeline with a width of up to ten percent of the total length of the natural gas pipeline without including the length of the spur lines or fifty kilometers measured from the nearest point on the surface of the natural gas pipeline on both sides, and including the point of origin and the end point of the natural gas pipeline, whichever is less, and-*
> *(a) the first tariff zone shall be counted with reference to any zone in which the point of injection of natural gas into the natural gas pipeline falls; and*
> *(b) the subsequent tariff zone or tariff zones, as the case may be, shall be counted separately on either side along the contractual path for delivery of natural gas in the natural gas pipeline:*
> *Provided that the natural gas pipeline tariff for transport of natural gas from the same source shall be uniform for all the customers located within the zone:*
> *Provided further that the entity shall supply natural gas to any customer located in the zone subject to the techno-commercial feasibility of laying, building, operation or expanding a new spur line from the natural gas pipeline.*
> *Explanation:-*
> *For the purposes of this clause, the point of origin and the end point in the natural gas pipeline as also the sequential numbering of the tariff zone or tariff zones, as the case may be, shall be as indicated in the letter of authorization or fixation of the natural gas pipeline tariff by the Board.***"**
>
> (emphasis supplied)

80. Prior to the amendment, as enforced from 06.05.2008, the provision had almost similar flavour with regard to the width of the zone parallel to the main line.

81. It is plain that the tariff zone of HAPI, for application of the transportation tariff determined in its respect, cannot go beyond the width of 7.32 kms on either side.

82. The expression "spur-line" is defined by Regulation 2(1)(o) of the PNGRB (Determining capacity of Petroleum, Petroleum products and Natural Gas Pipelines), Regulations, 2010 ("Pipelines Capacity Determination Regulations") as under:

> *"spur-line" means a pipeline necessarily originating or branching out from the trunk or transmission pipeline or sub-transmission line or another spur line or from a terminal station on the existing transmission or trunk pipeline with diameter and capacity not greater than the trunk or transmission pipeline but having no compression facility for supply of natural gas to one or more consumers. Any pipeline having a separate gas source or a compressor shall not be treated as a spur-line. The length of spur-line may not depend upon the length of the trunk pipeline. A spur-line must use the capacity of trunk pipeline in order to transport gas. Spur line includes branch line also"*

83. A plain reading of the definition shows that a "*spur-line*" might include a "*branch line*". It (*spur-line*) means "*a pipeline necessarily originating or branching out from the trunk or transmission pipeline or sub-transmission line or another spur line or from a terminal station on the existing transmission or trunk pipeline*", it not being larger in capacity than the main-line from which it branches out. What is significant, however, is that such line in order to qualify as a *spur-line* must not have any "*compression facility*" or "*a separate gas source*", it being essential that the spur-line "*must use the capacity of trunk pipeline in order to transport gas*". Clearly, by this definition, existence

of a "*separate gas source*" or "*a compressor*" renders a pipeline ineligible to be treated as a "*spur-line*".

84. For present context, it may be noted that the *Pipeline Authorizing Regulations* clarify by Regulation 21(3) that "(n)*o separate authorization is required for laying spur-lines originating from the authorized natural gas pipelines within its tariff zone as per clause (h) of sub-regulation (1) of regulation (2) and during its economic life, so long as the usage or purpose of the pipeline already authorized is not changed subject to the spur-lines meeting all requirements provided in clause (o) of regulation 2 of the Petroleum and Natural Gas Regulatory Board (Determining Capacity of Petroleum, Petroleum Products and Natural Gas Pipeline) Regulations, 2010, defining spur-line*".

85. The expression "*sub transmission pipeline*" is defined by Regulation 2(3)(q) of PNGRB (Technical Standards and Specifications including Safety Standards for Natural Gas Pipelines), Regulations, 2009 ("*CGD Network Technical & Safety Regulations*") as under:

> *"(q) "sub transmission pipeline" means a high-pressure pipeline connecting the main natural gas pipeline to the city gate station but is owned by the CGD entity;"*

86. Clearly, a pipeline meant to provide connectivity from main natural gas pipeline (which may be common carrier or contract carrier) to transport gas, using high-pressure, to the city gas station for retail supply to its consumers by the authorised entity controlling CGD Network is not intended to be or available for use as a common carrier or contract carrier, it being part of the infrastructure at the disposal of such authorised entity for such restrictive purposes only and hence described as a "*sub transmission pipeline*".

87. The Board had notified on 19.03.2008 the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008 ("*CGD Networks Authorizing Regulations*"), the applicability of which is prescribed by Regulation 3 as under:

> *3. Application.*
> *(1) These regulations shall apply to an entity which is laying, building, operating or expanding, or which proposes to lay, build, operate or expand a CGD network.*
> *(2) A CGD network shall be designed to operate at pressure as specified in the relevant regulations for technical standards and specifications, including safety standards for maintaining the volumes of supply of natural gas on a sustained basis to meet the following requirements, namely: -*
> *(a) customers having requirement of natural gas upto 50,000 SCMD shall be supplied through the CGD network;*
> *Provided that until CGD Network is ready to supply natural gas to a customer (other than domestic PNG and CNG), such customers shall have right to get the supply of natural gas from any other alternate source or supplier, with prior permission of the Board, and if, once CGD Network is ready to supply natural gas to such customer, then, such customer shall cease to get supply of natural gas from such alternate source or supplier after 30 days of receipt of notice of readiness from the CGD network.*
> *(b) customers having requirement of natural gas more than 50,000 SCMD and upto 100,000 SCMD shall be supplied, at the discretion of customer (i) through the CGD network; or (ii) through a pipeline not forming part of the CGD network;*
> *(c) customers having requirement of natural gas more than 100,000 SCMD shall be supplied through a pipeline not forming part of the CGD network.*
>
> (emphasis supplied)

88. It is clear that the norms prescribed by the above quoted regulations apply to entity authorized to operate the CGD network in the area and to its customers. If the needs of a customer are for supply of natural gas in quantity more than 100,000 SCMD such requirements may be catered to but not through a pipeline that is part of CGD network. This has to be done through a pipeline which is separately arranged.

89. It also needs to be noted that PNGRB (Access Code for City or Local Natural Gas Distribution Networks) Regulations, 2011 ("for short "*CGD Access Code*"), *inter alia*, permits access to, and use of, the CGD Network of the authorised entity by third parties – described as "*shipper*" - for transportation of natural gas for their purposes (i.e. other than that of distribution to retail consumers of the authorised entity), specifying the nature of charges payable for such access or use by Regulation 11(1)(g) providing as under:

> *"11. Charges.*
> *(1) The shipper shall pay to the authorised entity the following charges for using its city or local natural gas distribution network as specified on the invoice generated by the authorised entity, namely: -*
> *(a) network tariff which includes gas transportation in CGD network, odourisation, gas metering, gas reconciliation and system use gas;*
> *(b) compression charges;*
> *(c) overrun charges, if applicable;*
> *(d) system imbalance charges, if applicable;*
> *(e) off-spec gas charges, as agreed in access arrangement;*
> *(f) applicable taxes;*
> *(g) any other charges mutually agreed in the access arrangement such as –*
> *(i) ship or pay;*
> *(ii) transport or pay;*
> *(iii)technical up gradation of system;*
> *(iv)R&D;*
> *(v) any other charges with the approval of the Board."*

90. Noticeably, for availing access to and use of the CGD Network the third parties are liable to pay charges for facilitation that might include provision of not only pipelines and metering systems but also compressors for change of pressure as per specific needs.

Spur-line or Sub-transmission line

91. Seeking to join issue with GGL as to its plea that UPL was merely an anchor load on AMJH Pipeline it has been the case of UPL that AMJH Pipeline had been laid by GGL as a dedicated pipeline for the

supply of natural gas to its (UPL's) Power plant and in support it refers to the facts that this 23 Km long pipeline was laid for connecting UPL's Plant at Jhagadia unit to HAPI Pipeline at Amboli. The second respondent (UPL) argues that what was initially a dedicated pipeline ceased to be one since it began to cater to multiple customers of GGL at Jhagadia, before the notification of the PNGRB Act and Regulations, the dedicated compressors (installed for UPL Power Plant) having been shifted from Amboli to Jhagadia in October, 2005, many other customers having been added through this pipeline since 2005.

92. The appellant, however, argues, and in our opinion rightly so, that AMJH was developed as a sub-transmission pipeline, being part of CGD network and has been used as such throughout, this explaining the presence of other customers being thereby catered. The impugned decision turns on the conclusion that AMJH is a spur-line of HAPI which inference itself is erroneous. The definitions of "natural gas pipeline", "spur-line" and "sub-transmission pipeline" have been quoted earlier. A Spur-line cannot have a compression facility. Concededly, the AMJH Pipeline includes a dedicated compressor. Accordingly, AMJH cannot be treated as a spur-line. These facts had been explained to the PNGRB, as shall be noticed later in context of accusation of misrepresentation, even at the time of authorisation of HAPI and CGD network. It was demonstrated by documents and drawings/presentations that AMJH Pipeline qualified as a "sub-transmission pipeline" and, thus, is part of the CGD Network, it being owned by the authorised entity which had developed it and was using it for its CGD business, it admittedly being a high-pressure pipeline connecting the main natural gas pipeline, HAPI, with the city gas station at Jhagadia. Pertinent to add that the definition of "natural gas

pipeline" given in Regulation 2(1)(f) of the Pipeline Authorizing Regulations exclude pipelines in a CGD network. The contention that AMJH Pipeline is a spur-line would bring it in conflict with the definition of the sub-transmission Pipeline.

93. The second respondent has urged that legislative intent reflected by unambiguous provisions must be given effect, relying upon rulings in *B. Premanand and Ors. Vs. Mohan Koikal and Ors*, (2011) 4 SCC 266; *Pandian Chemicals Ltd. vs. C.I.T. 2003(5) SCC 590;* Rajiv Chowdhrie HUF Vs UOI (AIR 2015 SC 614; and Dr. Ganga Prasad Verma and Ors. v. State of Bihar and Ors. (1995) Supp. (1) SCC 192. There can be no quarrel with this proposition of law. But we find that it is the second respondent which is attempting to selectively read the regulations. To illustrate this, we may refer to the definition of "*spur-line*" which expressly does not permit a compression facility to be part thereof. The existence of such facility on AMJH is sought to be side-lined to press home the argument that it is virtually a branch-out of HAPI.

94. It is an admitted fact that PNGRB had granted in favour of GGL HAPI Natural Gas Pipeline vide authorization dated 05.07.2012 and CGD business of Surat Bharuch Ankleshwar Geographical Area vide authorization dated 08.11.2012. In each said authorization AMJH pipeline and other steel pipelines (emanating from HAPI to transport natural gas to downstream City Gate Stations) were excluded from HAPI Pipeline and included in GGL's CGD Network.

95. The determination of the issue as to whether a pipeline is a spur line or a sub-transmission pipeline pertains to the jurisdiction of the Board under the PNGRB Act and Regulations. This and ancillary issues had come up before the Board at the stage when it was

exercising its power to grant authorisations for HAPI and the CGD network on applications of GGL. Once that determination was done by PNGRB pursuant to the materials produced and even a site inspection carried out by the PNGRB, such determination took a conclusive and binding effect. It is not disputed that the mechanism for re-delivery of gas to UPL, as has been the subject matter of this litigation, ended in June 2016. The appellant is right in submitting that the status of the AMJH Pipeline cannot be determined based on one transaction.

96. The statutory definition of the expression “common carrier” has been quoted earlier. It is clear from the statutory scheme that the status of “common carrier” is a matter of determination and declaration by PNGRB and such character cannot be assumed save for exceptions which do not apply here. For the Board to declare a CGD network or part thereof as a common carrier, it has to follow the procedure specified under Section 20 of the PNGRB Act which concededly has never been initiated much less concluded in respect of AMJH.

97. The appellant rightly refers to Regulation 19 of the Pipeline Authorizing Regulations whereunder a dedicated pipeline (as is the case of UPL) existing prior to the commencement of the PNGRB Act can be converted into a common carrier / Natural Gas pipeline but only upon a declaration in this regard by PNGRB, *suo-motu* or on a proposal of the entity owning the dedicated pipeline. Likewise, Regulation 10 of the PNGRB (Guiding Principles for Declaring or Authorizing Natural Gas Pipeline as a Common Carrier or Contract Carrier) Regulations 2009 read with Section 20 of the PNGRB Act stipulate formal declaration by the Board of a natural gas transmission pipeline as a common carrier or contract carrier which has not been done qua AMJH till date. It is pointed out that PNGRB itself had taken such view by its

order dated 17.05.2015 in another case titled *Saint Gobain Pvt. Ltd. v. Gujarat Gas Limited* (case no. Legal/156/2015) holding that the nature of CGD network does not change unless it is declared as common carrier after following the procedure as laid down in Section 20 of the PNGRB Act.

98. Picking up from the above, the Board has till date not declared AMJH as a common carrier or part of HAPI, admittedly a common carrier, nor initiated any such process. As observed above, there cannot be an automatic conversion of a pipeline to the status of common carrier. PNGRB has fallen into error by relying on Section 16 of the PNGRB Act to hold that the original character of the AMJH pipeline stood converted from a dedicated pipeline to a spur-line of the HAPI Pipeline. The deemed authorization of pipelines under Section 16 of the PNGRB Act is only applicable to pipelines authorized prior to the enactment of the PNGRB Act by the Central Government. This not being a fact concerning AMJH pipeline it can never be claimed to be a deemed pipeline. As pointed out by GGL, for this very reason the PNGRB had not accorded any deemed authorization for HAPI Pipeline and by letter dated 03.10.2008 had instead insisted on an application to be made for authorization under Section 17.

99. There is no basis to the claim that AMJH Pipeline was intended to be laid as a dedicated pipeline to plant of UPL. The earlier contracts of these parties referred to UPL as an anchor load. The very admission of the fact that by 2005, AMJH was catering to several other customers (e.g. Birla Century, Lanxes, DCM Shriram, Oberoi Chemical and Jhagadia Copper etc.) confirms that at the time of commencement of the regulatory legislation (PNGRB Act) on 01.10.2007, the character of the AMJH pipeline was that of a sub-transmission pipeline of the CGD

network it having remained the same all along. As noted earlier, PNGRB had granted on 08.11.2012 authorisation to the CGD Network, as applied for by GGL, inclusive of the AMJH Pipeline. Since the usage has remained the same, there has been no occasion for GGL to seek approval of PNGRB for any change in authorisation or usage.

100. From the chronology of events prior to formation of the contracts between these parties, it is clear that it was re-delivery arrangement which was entered between UPL and GGL on the request of UPL. The arrangement agreed upon would use elements of both the HAPI Natural Gas Pipeline and GGL's CGD Network. Crucially, the CGD network, as authorised in favour of GGL by the Board in due course after promulgation of PNGRB Act and regulatory framework thereunder, includes *inter alia* the AMJH Pipeline as a "sub-transmission pipeline" of the CGD networks at Surat and Ankaleshwar – not a spur-line of HAPI – the intendment being to carry the natural gas procured by UPL from GAIL for re-delivery to its Plant in Jhagadia, GGL having installed dedicated compressor to meet the pressure required at UPL's Plant. This arrangement provided by GGL is correctly described as a legacy arrangement from prior to enactment of the PNGRB Act and Regulations framed thereunder, it being unique in nature and not governed by any standalone regulations, this reinforcing the case of GGL as to its entitlement to levy the negotiated charges from UPL.

101. The respondents – UPL as well as the Board – refer to Regulation 3(2) of the CGD Authorising Regulations. It is argued that UPL is a "shipper" within the meaning of the expression defined by CGD Access Code Regulations, it being inclusive of a consumer, marketer or any authorised entity utilising the CGD Network.

102. We do not find merit in this argument for the reasons that the status of 'shipper' does not confer on UPL the position of a CGD customer of GGL not the least so as to entitle it to be subjected to HAPI Tariff determined as common carrier, the services provided under the CGNDA being primarily through the CGD network with add-ons of exclusive compressor facility and use of AMJH, a sub-transmission pipeline. The second respondent UPL seeks the benefit of HAPI Tariff on the logic that AMJH Pipeline qualifies as a spur-line of the HAPI Pipeline which reasoning is flawed. As observed elsewhere, AMJH cannot be considered as a spur-line due to presence of dedicated compressor at the relevant period of time, the compressor having been shifted from Amboli to a location ahead of Jhagadia CGS and having remained in exclusive use for the UPL during the relevant period.

103. The second respondent UPL is admittedly not a CGD customer. It is availing of redelivery of more than 1,00,000 SCMD through GGL's CGD network which arrangement is not even claimed or found to be illegal, nor shown to be violative of safety norms, it only resulting in excess capacity of AMJH and CGD network being utilized. It is wrong to argue to the contrary on the basis of limits prescribed under the CGD Authorising Regulations because such Regulations do not apply to UPL it not being a CGD Customer of GGL.

104. The second respondent UPL has argued that GGL had unilaterally converted the Gas Transportation Agreement (GTA) into the City Gas Distribution Network Agreement (CGDNA) to circumvent the Regulations. We accept the counter-argument that the nomenclature accorded to an agreement is not relevant to determine the legal nature of the transaction. Under all the agreements executed by these parties, GGL was re-delivering natural gas to UPL at its

specific request for such an arrangement it having approached GGL of its own volition to facilitate the arrangement which UPL had entered into with GAIL for re-delivery of natural gas to its plant at Jaghadia.

105. The fact, thus, remains that the contract between the parties labelled as City Gas Network Distribution Agreement ("CGNDA") between GGL and UPL was not for delivery of gas but for re-delivery of gas procured from GAIL. At cost of repetition, we say that re-delivery of gas to UPL has always involved utilization of elements belonging to HAPI Pipeline and CGD Network of GGL. UPL would purchase gas from GAIL, have it arranged to be fed into city gas stations of GGL at Surat and Ankleshwar actually meant for distribution to CGD customers in Surat and Ankleshwar, and draw back (take re-delivery) of corresponding (equivalent) quantity from out of the GGL's own supply transported through HAPI Pipeline from Hazira to Amboli (CGD Network through the AMJH Pipeline) and thereafter take it to UPL factory at Jhagadia. Since the gas delivered by GAIL into GGL's CGD Network would be at a low pressure, it being meant for distribution to CGD consumers, dedicated compressor was set up expressly for re-delivery of GAIL gas to UPL since the gas required by it was at high pressure. These special features of the contract show that it was more in the nature of a facilitation arrangement for re-delivery of gas at UPL's unique specifications and for which the components of transmission, distribution and dedicated compression, that cannot be cross subsidized to the disadvantage of other customers, were being put to use.

106. The appellant, thus, is justified in urging that there is nothing illegal or improper in the contracts between the parties stipulating liability on the part of UPL to pay to GGL, the service provider, the

"facilitation charge" since UPL is neither a CGD network customer nor a HAPI Pipeline customer. It was in fact treated by GGL as a legacy customer who was to be serviced through the HAPI pipeline, CGD network and the dedicated compressors installed specifically as per its needs, all infrastructure under the control of GGL, it merely utilizing the spare capacity of the pipeline and the CGD network in terms permissible even under clarificatory dispensation (dated 28.06.2014 qua CGD bidding Round 4) given by PNGRB itself allowing concerned entities to enter into commercial arrangements for optimum utilization of the pipeline infrastructure of CGD networks to the extent of spare capacity.

107. We, thus, conclude that the majority opinion upholding the contention of the second respondent as to the nature of AMJH being spur-line or part of HAPI is flawed. It (AMJH) has remained part of CGD infrastructure and thus is a sub-transmission pipeline.

CHARGE OF MISREPRESENTATION BY GGL

108. The facts culled out from the documents presented, as mentioned briefly earlier, show that in the wake of directions of PNGRB, by letters dated 31.03.2008 and 03.10.2008, GGL had made applications seeking authorisation for HAPI Pipeline on 24.10.2008 and CGD Networks for Surat and Bharuch on 21.07.2008. The CGD Authorisation Application specifically included the AMJH Pipeline as part of the CGD Network and was supported by requisite documents. On 27.07.2009, PNGRB asked GGL to explain with reference to its CGD Authorisation Application as to why pipelines including the AMJH Pipeline was being considered as part of the CGD Network. On 11.08.2009, GGL replied stating that the AMJH Pipeline has been

included as part of the CGD Network since it forms part of an interconnected network and was being utilised for transporting natural gas from high-pressure transmission mains.

109. The expression *"city or local natural gas distribution network"* or *"CGD network"* is defined by Regulation 2(d) of the *CGD Network Technical & Safety Regulations* on same lines as given in Section 2 of PNGRB Act as under:

> "*"city or local natural gas distribution network" (hereinafter referred to as CGD network) means an interconnected network of gas pipelines and the associated equipments used for transporting natural gas from a bulk supply high pressure transmission main to the medium pressure distribution grid and subsequently to the service pipes supplying natural gas to domestic, industrial or commercial premises and CNG stations situated in a specified geographical area;"*

110. As in the context of CGD authorisation application, PNGRB also raised query on HAPI Pipeline Application, on 14.05.2009**,** asking GGL to provide details of spur-lines**.** On 12.06.2009, GGL replied to PNGRB explaining that "*various spur-lines laid by GGCL are mainly for supply to GGCL's existing CGD network and hence are part of distribution network"*, thereby clarifying prior to grant of authorization for HAPI Pipeline and the CGD Network that AMJH pipeline was included in GGL's CGD application as it was a part of an interconnected network and was being utilised for transporting natural gas from high pressure transmission mains. The records reveal that a team of PNGRB comprising of Member (Legal), Member (Infrastructure), Member (Distribution) and a few other officials inspected the site in January 2011 before granting authorization in respect of HAPI pipeline and CGD network in favour of GGL, such authorization in respect of CGD Network for Surat-Bharuch-Ankleshwar issued on 08.11.2012 showing

AMJH as part of CGD Network and in respect of HAPI Pipeline issued on 05.07.2012 not including said AMJH Pipeline.

111. It needs to be added that UPL had been writing to PNGRB from 27.05.2009 onwards with respect to arrangement between the parties. Also, GGL had informed it of the hybrid arrangement facilitated by it for the re-delivery of gas to UPL by its letter dated 12.06.2010 to the Board specifically communicating that re-delivery of gas to UPL necessitated utilisation both of CGD network and the HAPI Pipeline. This was followed by a meeting convened by PNGRB on 19.02.2010 wherein representatives of both sides (UPL and GGL) participated to discuss various issues pertaining to the contractual arrangement between them. The Board was of the view, as expressed by its formal communication dated 26.02.2010, that the matter was such wherein the parties ought to make efforts to arrive at a mutually acceptable "*commercial solution*". It is vivid that PNGRB at the time of considering applications for CGD Authorization and HAPI Authorization had gathered all facts, made due inquiries and had become fully aware of the transaction between GGL and UPL as indeed the quantity and the charges levied qua services provided to UPL.

112. The second respondent UPL places reliance on Regulation 11 of the CGD Access Code Regulations 2008 to argue that GGL ought to have provided break up of cost in its invoice. But, Regulation 3 of said Access Code Regulations clarifies that they apply only to CGD Networks wherein exclusivity period allowed by PNGRB has ended. During the relevant period, the marketing exclusivity granted to GGL was very much valid and subsisting. As noted in another context, it has been a view expressed (in *Saint Gobain* case) by PNGRB itself that there cannot be automatic conversion of CGD Network into a common

carrier upon expiry of exclusivity, such conversion required to be formally declared. It is rightly pointed out by GGL that such being the position has been further clarified by the PNGRB (Determination of Transportation Rate for CGD and Transportation Rate for CNG) Regulations, 2020 ("CGD Tariff Regulations 2020") which have been recently framed and state that they apply only for CGD networks which have been "*declared*" as a common carrier.

113. With the above factual matrix, and the position of regulatory framework, there is no substance in the allegation that the appellant had misled the Board by any misrepresentation of facts. The finding to this effect recorded by the majority opinion is groundless and unsustainable.

DOMINANT POSITION? ABUSE?

114. Upon careful consideration of the submissions of the parties, we are of the opinion that PGNRB has erred by holding that GGL has violated its dominant position or had engaged in restrictive trade practice.

115. There is no substance in the claim that AMJH pipeline is a common carrier, At the time of entering into the contractual arrangements with GGL this was not even the standpoint of UPL. It has never been the case that UPL was persuaded by GGL to enter into the special arrangement. The fact of the matter is that transmission of gas through GAIL pipeline would have been costlier for UPL and the contractual terms, including financial, were always negotiated.

116. In our view, it is the second respondent which has been unfair and unconscionable in conduct by raising the unfounded issues of indulgence in restrictive trade practices against GGL. A look at the correspondence exchanged on one hand between GAIL and UPL and

on the other between UPL and GGL, as indeed the recitals in the contract(s) executed by UPL with GGL, demonstrates that the mechanism for re-delivery of GAIL gas to UPL was at request of the latter just as the use of infrastructure (HAPI, AMJH, CGD network, compressors *et al*) of GGL for purposes of such transportation and re-delivery at the plant of UPL was at the entreaties of UPL only. It is UPL which had approached GGL on 13.11.2008, of its own volition, requesting it to put in place an arrangement by 01.12.2008 for the re-delivery of gas obtained from GAIL. A number of Gas Transport Agreement ("*GTAs*") were entered into by UPL with GGL for re-delivery of gas beginning with Agreement dated 04.12.2008 which was for a short-term (till 15.12.2008) followed by similar short-term GTAs for subsequent periods (till March 2009). Then, from 03.04.2009 onwards, agreements named and styled as City Gas Network Distribution Agreement (CNGDA) were executed their recitals and terms & conditions showing each to be an agreement providing a mechanism for re-delivery, this having continued up to July 2013. Though the correspondence would show that GGL would always express preference for medium-term arrangement, UPL while agreeing to the draft at the stage of each novation would opt for continuance of short-term, GGL having agreed to reduce the transportation charges accommodating the request of UPL, the terms as to charges being invariably negotiated. Further, though UPL did address some communications to PNGRB alleging that it was being subjected to levy of higher transportation tariff, there was no whisper of averment that the arrangement with GGL was illegal or contrary to the PNGRB Regulations. We find such posture adopted by UPL during these proceedings to be unfair and unacceptable, particularly because UPL

has been entering into the contractual arrangements with GGL of its own free will, for its own special needs and at its own request, it always having the alternative choice to route its gas supplies through pipelines which GAIL was ready to arrange, again at request of UPL but abandoned by it due to higher costs involved.

117. The correspondence exchanged by the parties during the relevant period leaves us in no doubt that it was always the understanding between GGL and UPL that the arrangement was commercial in nature. Clearly, the PNGRB also took this view since it advised the parties, as mentioned earlier, on 26.02.2010, to work out a mutually acceptable solution, no illegality much less a case of restrictive trade practice having been found. It is against such backdrop that UPL assured GGL on 02.02.2012 by a formal communication that it would not pursue the matter pertaining to the complaints any further.

118. We, thus, unhesitatingly conclude that UPL had entered into the series of contracts with GGL based on negotiated tariff without any demur or protest, there being no duress or undue influence applied nor there being any elements of GGL being in a dominant position or having abused it to create the environment anti-competitive. Since no new circumstances are shown to have supervened till the filing of impugned complaint on 30.05.2014, we find the said complaint itself to be an abuse of process of law.

PROPRIETY OF IMUGNED DIRECTIONS

119. By the Impugned Order, PNGRB, *inter-alia*, directed GGL to charge the tariff fixed for the HAPI Pipeline from the date of authorization and make adjustments accordingly. By so formulating the directions, PNGRB has in effect determined the tariff to be paid by UPL

to GGL. This, we agree, is impermissible and beyond the powers available to the Board at the relevant point of time.

120. The definition of "tariff zone" as given in Regulation 2(h) of the Pipeline Authorising Regulations has been noted earlier. As already mentioned, AMJH is a pipeline with length of 23 kms in contrast to the common carrier HAPI with length of 72.3 kms. Regulation 2(h)(ii) of the Pipeline Authorising Regulations specifies that the tariff zone, a corridor along and with the natural gas pipeline, cannot go beyond the width up to 10% of the total length of natural gas pipeline or 50 kms, whichever is lower. By this reckoning, the AMJH Pipeline cannot fall within the tariff zone of the HAPI Pipeline, not the least to be part of HAPI pipeline. The invocation of HAPI tariff for purposes of the negotiated arrangement between the parties is not only against the letter and spirit of regulations defining tariff zone but also tantamount to rewriting of contract which indisputably is not allowable.

121. As observed earlier, the contract between GGL and UPL was not one for simpliciter transportation of gas through GGL's HAPI Pipeline which acts as a common carrier or contract carrier and for which PNGRB can determine the tariff. As already highlighted, the mechanism for re-delivery included utilization of the components of CGD network as well. Thus, while directing GGL to charge HAPI tariff, PNGRB effectively determined the price of the elements forming part of CGD Network, namely, utilization of the Surat and Ankleshwar portions of GGL's infrastructure and AMJH Pipeline. The tariff chosen to be applied would necessarily be deemed to include the cost attributable to dedicated compressors installed by GGL specifically for UPL. The addition of the volume of gas transported through HAPI for

purposes of second respondent is not same as computing the capital cost incurred for laying or maintaining HAPI as a common carrier.

122. Given the state of law as contained in PNGRB Act and the regulatory framework as in force during the relevant time, PNGRB cannot exercise power to determine tariff for such use of CGD Network of GGL. It is apt to refer to the judgment dated 01.06.2012 passed by Delhi High Court in the case of *Indraprastha Gas Ltd. vs PNGRB* (W.P. No. (c) No. 2034 of 2012) wherein the challenge, *inter alia*, was to the legality of the PNGRB (Determination of Network Tariff for City or Local Natural Gas Distribution Networks and Compression Charge for CNG) Regulations, 2008. It was held that the Board is neither empowered to fix or regulate MRP of gas sold to consumers nor fixing of any component of network tariff or compression charge for an entity having its own distribution network. This decision was upheld by Supreme Court in ruling reported as *PNGRB v. IGL & Ors*. (2015) 9 SCC 209 observing thus:

> *"53. […] On a scanning of the entire Act and applying various principles, we find that the Act does not confer any such power on the Board and the expression "subject to" used in Section 22 makes it a conditional one. It has to yield to other provisions of the Act. The power to fix the tariff has not been given to the Board. In view of that the Board cannot frame a Regulation which will cover the area pertaining to determination of network tariff for city or local gas distribution network and compression charge for CNG. As the entire Regulation centres around the said subject, the said Regulation deserves to be declared ultra vires, and we do so."*
>
> (emphasis supplied)

123. The Regulations on the subject having been struck down as *ultra vires*, the PNGRB could not have determined tariff for the re-delivery mechanism put in place by GGL at the request of UPL.

124. The Board has also directed GGL to apply for modification of authorizations. By doing so, the PNGRB has exceeded the power

granted to it by the PNGRB Act since by this it embarks upon a course wherein it would determine tariff payable by retail consumers supplied through GGD Network which is not permissible. It is well settled that what is prohibited from being done directly cannot be permitted to be done indirectly [*Rashmi Rekha Thatoi vs. State of Odisha*, reported as (2012) 5 SCC 690 and *Abdul Basit vs. Mohammed Abdul Kadir* (2014) 10 SCC 754].

125. As was conceded at the hearing, the Board has recently framed and notified the PNGRB (Guiding Principles for Declaring City or Local Natural Gas Distribution Networks as Common Carrier or Contract Carrier) Regulations, 2020 ("Guiding Principles 2020") also notifying alongside the CGD Tariff Regulations 2020. In terms of the said Guiding Principles, the Board has to, after expiry of marketing exclusivity period of an authorised area, issue a public notice of its intention to declare the CGD network of an authorized entity as common carrier or contract carrier or regulate or allow access to such CGD network, and invite objections and suggestions. It is only after the consideration of the objections or suggestions that a declaration of such nature can be made or the applicable terms and conditions can be decided upon. The Board has not followed any such procedure vis-à-vis the CGD Network of GGL.

126. Against the above discussed backdrop, the impugned directions cannot be allowed to hold sway and, therefore, must be set aside.

CONCLUSION

127. For the foregoing reasons, and in the circumstances, the impugned decision of the Petroleum and Natural Gas Regulatory Board, based on majority opinion, is found to be erroneous, unjust and

perverse and consequently set aside. The complaint of the second respondent on which the Board had held inquiry and reached the conclusions which are being hereby vacated accusing the appellant of indulging in restrictive trade practices is held to be groundless and rather itself an abuse of process of law. The said complaint is liable to be dismissed and the appeal deserves to be allowed.

(Justice R.K. Gauba)
Judicial Member

FINAL ORDER

For the reasons set out above in the separate opinions recorded by each of us, the complaint of the second respondent on which the Petroleum and Natural Gas Regulatory Board, by the impugned decision, held the appellant guilty of having indulged in restrictive trade practices is held to be devoid of substance. The said complaint is hereby dismissed. The directions given by the impugned order are found to be unwarranted and, therefore, set aside. The appeal, thus, succeeds and is accordingly allowed. The pending applications are rendered infructuous and disposed of accordingly. The parties are, however, left to bear their own costs.

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