

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

**APPEAL NO. 131 OF 2016 &  
APPEAL NO. 132 OF 2016 &  
APPEAL NO. 133 OF 2016**

**Dated: 27<sup>th</sup> October, 2021**

**Present: Hon'ble Mr. Justice R.K. Gauba, Judicial Member  
Hon'ble Dr. Ashutosh Karnatak, Technical Member**

**APPEAL NO. 131 OF 2016**

**In the matter of:**

**GAIL (India) Limited**

Through its General Manager  
16 Bhikaji Cama Place, New Delhi

...Appellant

VERSUS

**1. M/s Sravanthi Energy Private Limited**

(under liquidation)

Through its Liquidator- '

7<sup>th</sup> Floor, DLF Building Number 9B

DLF Cyber City,

DLF Phase-3, Sector-24,

Gurugram, Haryana -122002

...Respondent No. 1

**2. Petroleum and Natural Gas Regulatory Board**

Through its Secretary

1st Floor, World Trade Center,

Babar Road, New Delhi-110001

...Respondent No. 2

Counsel for the Appellant(s) : Mr. Sacchin Puri, Sr. Adv.  
Mr. Yoginder Handoo  
Mr. Ashwin Kataria  
Mr. Kamil Khan  
Ms. Shweta Arora

Counsel for the Respondent(s) : Mr. Sajan Poovayya, Sr. Adv.  
Mr. Piyush Joshi  
Ms. Sumiti Yadava  
Ms. Parminder Kaur  
Ms. Suhani Chanchlani  
Ms. Vatsala Bhatia  
Ms. Manali Joshi  
Ms. Raksha Agrawal for R-1  
Mr. Raghavendra Shankar  
Ms. Pinki Mehra  
Ms. Arshiya Sharda  
Mr. Mohit Budhiraja  
Ms. Shipra Malhotra for PNGRB

**APPEAL NO. 132 OF 2016**

**In the matter of:**

**GAIL (India) Limited**  
Through its General Manager  
16 Bhikaji Cama Place,  
New Delhi

Appellant

VERSUS

**1. M/s Gama Infraprop Private Limited**

3<sup>rd</sup> Floor, Rider House,  
136, Sector-44  
Gurgaon - 122002

...Respondent No. 1

**2. Petroleum and Natural Gas Regulatory Board (PNGRB)**

1st Floor, World Trade Center,  
Babar Road, New Delhi-110001

...Respondent No. 2

Counsel for the Appellant(s) : Mr. Sacchin Puri, Sr. Adv.  
Mr. Yoginder Handoo  
Mr. Ashwin Kataria  
Mr. Kamil Khan  
Ms. Shweta Arora

Counsel for the Respondent(s) : Mr. Sajan Poovayya, Sr. Adv.  
Mr. Piyush Joshi  
Ms. Sumiti Yadava  
Ms. Parminder Kaur  
Ms. Suhani Chanchlani  
Ms. Vatsala Bhatia  
Ms. Manali Joshi  
Ms. Raksha Agrawal for R-1  
Mr. Raghavendra Shankar  
Ms. Pinki Mehra  
Ms. Arshiya Sharda  
Mr. Mohit Budhiraja  
Ms. Shipra Malhotra for  
PNGRB

**APPEAL NO. 133 OF 2016**

**In the matter of:**

**GAIL (India) Limited**  
Through its General Manager  
GAIL Bhavan,  
16 Bhikaji Cama Place,  
New Delhi

...Appellant

VERSUS

**1. M/s Beta Infratech Private Limited**  
(under liquidation)  
Through its Liquidator- T.S.N. Raja  
3<sup>rd</sup> Floor, Rider House  
136, Sector-44, Gurgaon - 122002

...Respondent No. 1

- Counsel for the Appellant(s) : Mr. Sacchin Puri, Sr. Adv.  
Mr. Yoginder Handoo  
Mr. Ashwin Kataria  
Mr. Kamil Khan  
Ms. Shweta Arora
- Counsel for the Respondent(s) : Mr. Sajan Poovayya, Sr. Adv.  
Mr. Piyush Joshi  
Ms. Sumiti Yadava  
Ms. Parminder Kaur  
Ms. Suhani Chanchlani  
Ms. Vatsala Bhatia  
Ms. Manali Joshi  
Ms. Raksha Agrawal for R-1  
Mr. Raghavendra Shankar  
Ms. Pinki Mehra  
Ms. Arshiya Sharda  
Mr. Mohit Budhiraja  
Ms. Shipra Malhotra for PNGRB

## **J U D G M E N T**

### **PER HON'BLE DR.ASHUTOSH KARNATAK, TECHNICAL MEMBER**

These matters have been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

1. Appeal under Section 33 of the Petroleum and Natural Gas Regulatory Board Act, 2005, (herein referred to as PNGRB Act) has been filed by the Appellant i.e. GAIL (India) Ltd. against the "**Impugned Order**" dated 11.04.2016 of the Petroleum and Natural Gas Regulatory Board (PNGRB) wherein following relief is sought: -

- (a) Allow the appeal filed under section 33 of the PNGRB Act, 2005 and set aside the order dated 11.04.2016 passed by the Board to the extent challenged in the present appeal.

- (b) Pass such order or further Order(s) as this Hon'ble Tribunal may deem just and proper.
2. Complaint was filed by M/s Sravanthi Energy Pvt. Ltd. (herein referred to as Sravanthi) under section 25 r/w section 2(1)(z)(i), section 11(a), section 11(e), section 11(f) (vi), 12(1)(b) (iv), 12(2) and section 13(1)(g) of the Petroleum and Natural Gas Regulatory Board Act, 2006 (the Act) wherein the Impugned order dated 11.04.2016 was passed by majority as under:-
- (a) The Capacity Tranche Agreement #1 (CTA) and the Gas Transmission Agreement (GTA) executed between the Appellant and Sravanthi Energy Pvt. Ltd (Sravanthi) were declared as unenforceable.
- (b) The invoices raised by the Appellant on the Respondent were declared to be restrictive trade practice considering that the Appellant had unilaterally changed the CT Start Date without making any delivery of gas.
- (c) Appellant to cease restrictive trade practice and imposed a penalty of Rs.10.00 lakhs under section 28 of the Act and to pay an amount of Rs.25,000/- per day if continued to indulge in the restrictive trade practices.
- (d) Appellant was desisted from imposing Ship or Pay charges or to invoke the Bank Guarantee (BG) of Sravanthi and to return the BG and security deposit to Sravanthi.
- (e) If Sravanthi is able to source gas from sellers that can be transmitted through the Appellant's pipeline, the transmission charges as per

relevant tariff/regulative provision would be applicable as related to a common carrier.

- (f) Appellant to pay an amount of Rs.2.00 lakhs to each of the Complainant, Sravanthi, Beta and Gama.

The minority order dated 18.04.2016 on the other hand has found the complaints devoid of merit and dismissed the same.

3. It is relevant to mention herein that the complaint was initially lodged by M/s Sravanthi Energy Pvt. Ltd. against GAIL (India) Ltd. and subsequently on 10.03.2015 the complaints were lodged against the GAIL (India) Ltd. (who was the Respondent therein before the Board) by M/s Beta Infratech Pvt. Ltd. and M/s Gama Infraprop Pvt. Ltd. After considering the submissions made during the course of re-hearing, Board observed that the question of facts and law are substantially identical in all these matters and disposed off the complaint by a common judgment by making the facts and documents relating to Sravanthi's complaint as an illustrative and making it as a leading case.
4. Accordingly, this Tribunal is also disposing off all the three Appeals (Appeal No. 131 of 2016; Appeal No. 132 of 2016 & Appeal No. 133 of 2016) filed by GAIL (India) Limited, which are against the common impugned judgment dated 11.04.2016, in matters arising out of Complaints of Sravanthi Energy Pvt. Ltd.; Gama Infraprop Pvt. Ltd & Beta Infratech Pvt. Ltd, by making the facts and documents relating to Sravanthi's complaint as illustrative and making it as the leading case.

## 5. FACTS OF THE CASE

5.1. In the year 2009, the Respondent i.e. Sravanthi along with two other independent companies, viz M/s Gama Infracorp Pvt. Ltd.(herein refer to as Gama) and M/s Beta Infratech Private Ltd. (herein refer to as Beta) set-up Gas-based Power Plant at Kashipur in the State of Uttarakhand. Appellant signed Term Sheet with Sravanthi on 20.07.2009 for supply of natural gas for a quantity of 0.60 MMSCMD on firm basis and 0.30 MMSCMD on Reasonable Endeavour basis from Vasai Gas field of ONGC Western Offshore to the proposed power plant to be constructed by Sravanthi at Kashipur, which was amended and substituted by term sheet dated 22.02.2010. Similar Term Sheets were executed with Gama & Beta on 01.05.2010 and 06.05.2010 respectively by the Appellant.

5.2. There is no dispute with the fact that the said Term Sheet dated 20.07.2009 *inter alia*, was subject to the 'condition precedent' of Appellant concluding and signing the GSA with the upstream supplier ONGC. The Term Sheet also contemplated conversion of the Term Sheet into a detailed agreement / Gas Sale Agreement. The said Term Sheet dated 20.07.2009 was later superseded by the Term sheet dated 22.02.2010 hereby the parties, *inter alia*, agreed to modify Clause-3 of the Term Sheet, which read as under:

*"...Gas: Associated natural gas for sale from Vasai East Field of ONGC in Western Offshore as per the quality provided in attached schedule, subject to availability from Upstream supplier, i.e. ONGC. It is further mutually agreed that in case of Nil/less availability of gas from Vasai Fields or delay in availability of gas from Vasai Fields, or any Government directive the Seller shall offer any other Market Driven Price (MDP) gas to*

*the Buyer subject to availability and mutually agreed terms and conditions including price."*

- 5.3. The parties, thereafter, on 23.02.2010 by way of a side letter inter alia, agreed to further modify Clause-3 of the Term Sheet which was substituted with following terms:

*"...Associated natural gas for sale from Vasai East field of ONGC to Western Offshore as per the quality provided in attached Schedule, subject to availability from Upstream supplier, i.e. ONGC. It is further mutually agreed that in case of Nil/less availability of gas from Vasai Fields or delay in availability of gas from Vasai Fields, or any Government directive the Seller shall offer any other Market Driven Price (MDP) gas to the Buyer including RLNG subject to availability and mutually agreed terms and conditions including price...."*

- 5.4. Pursuant to the communication dated 29.10.2010, whereby Respondent specifically requested for booking capacity in the pipeline of the Appellant of 1.8 MMSCMD for their plant at Kashipur, Appellant (GAIL) and Sravanthi entered into the Gas Transmission Agreement dated 11.11.2010 ("**Sravanthi GTA**"). Further the Gas Transmission Agreement dated 18.11.2010 was executed between GAIL and Gama ("**Gama GTA**") and the Gas Transmission Agreement dated 19.10.2010 was executed between GAIL and Beta ("**Beta GTA**"). This GTA contemplated signing of a Capacity Tranche (CT Agreement) for the purposes of booking capacity and transmission of gas which was signed on 11.11.2010 by Respondent for the period from 01.06.2011 to 31.05.2021. The Capacity Tranche pursuant to the Gama GTA was executed on 18.11.2010 (at the time of execution of the GTA) with the CT Start Date of 25.12.2011. The Capacity Tranche was executed on



19.10.2010 with the Beta, pursuant to signing of GTA, which was also on 19.10.2010) with the CT Start Date of 15.12.2011.

5.5. Pertinently in the Minutes of Meeting dated 11.11.2010 signed between Respondent and the Appellant, it was agreed position that "*SEPL is expecting allocation from domestic/other sources for onward transmission through GAIL's pipeline network and MDQ as mentioned in CT agreement No.#1 dated 11.11.2010 is SEPL's total requirement at Kashipur (UA). GAIL would make a reasonable endeavour to match the shortfall (due to less domestic gas allocation) in gas requirement by supplying gas on the market-determined price, which shall be subject to execution of gas sale agreement with GAIL and SEPL.*" For transportation of gas the parties agreed for a ship or pay CT Agreement. Respondent also submitted security deposit and Bank Guarantees pursuant to GTA/CT Agreements signed between the parties.

5.6. The term sheets for supply of gas were being extended from time to time with mutual agreement between the parties and in one such communication of Appellant categorically informed Respondent vide letter dated 21.03.2011 that:-

*"....MoP&NG Vide letter dated 28.06.2010 has forwarded government approved guidelines for pricing and commercial utilization of non APM gas produced by NOCs from their nominated blocks and has directed that the commercial utilization of natural gas available from such fields shall be in accordance with the approved government guidelines and shall need approval of the MoP&NG. Further, MoP&NG vide letter dated 19.01.2011 has indicated that utilization of Vasai east gas through swap arrangement by ONGC is under consideration.*

*In view of the above position you may please note that supply of gas from Vasai East fields may not be available unless otherwise decided by MoP&NG. Other terms and conditions of the said term sheet remain unchanged."*

- 5.7. It is important to point out that the Term sheet dated 22.02.2010 was extended on 01.06.2010, 03.09.2010, 30.11.2010, 18.03.2011, 01.06.2011 and 19.12.2011 and was valid till March 2012. The Appellant vide various letters to Respondent conveyed acceptance of the Respondent's request for extension subject to the directives and guidelines/ policies of Government of India and subject to clause (3) of the term sheet with regards to availability and the types of Market Driven Price (MDP) gas being supplied.
- 5.8. The Respondent vide letter dated 26.08.2011 requested Appellant to book additional capacity of 0.84 MMSCMD of Gas for their plant from January 2012 / March 2012 and therefore sought to execute the CT Agreement for the same. Appellant on 16.11.2011 informed Respondent the inability to comply with the said request as the existing capacity of Karanpur-Moradabad-Kashipur-Rudrapur pipeline was already tied up and additional capacity could be made available on Reasonable Endeavour (RE) basis and offered to sign RE CT agreement.
- 5.9. The Respondent vide letter dated 02.09.2011 requested the Appellant to amend clause 14 (1) of the Gas Transmission Agreement relating to Capacity Tranche #1 to read as "commissioning period" beginning on CT Start Date of 01.10.2011 and ending at 06:00 hours on 31.12.2011. The Appellant vide letter dated 11.11.2011, requested Respondent to extend the validity and claim

period of Bank Guarantee by a further period of one year which was further extended by Respondent up to 22.05.2011 and again up to 22.11.2012.

- 5.10. Thereafter Respondent vide letter dated 14.12.2011 informed the Appellant that the construction of their plant has been completed and that the same is ready for commissioning. It is contended by the Appellant that the Appellant's pipeline was finally completed up to the tap off to Surya Roshni (date of commissioning being 31.05.2012), which was downstream of the Sravanthi Power, Kashipur tap off. Project Management Consultant of the Appellant's Karanpur-Moradabad-Kashipur pipeline project viz Mecon Ltd. (Govt. of India Enterprise) issued a letter dated 01.06.2012 recording the above fact.
- 5.11. It is noteworthy that the Appellant during the validity and continuity of the GTA dated 11.11.2010 (which was valid for a period of 20 years i.e. from 11.11.2010 to 31.10.2030) had made several offers for supply of MDP Gas to Respondent vide letters dated 29.12.2011, 11.11.2013, 17.11.2014 and 27.01.2015 based on the then-prevailing gas prices.
- 5.12. The Appellant vide letter dated 21.10.2014 informed Respondent that as per GTA dated 11.11.2010, the CT Start Date was 01.06.2011 and Appellant had laid the required pipeline and associated facilities to transport gas to the power plant and has been ready since 01.06.2012. Accordingly, the CT Start Date stood revised to 01.06.2012. In line with clause 8.10 of the GTA, Respondent was also requested to submit a Letter of Credit (LC) for Rs. 9.6 Crores to cover transmission charges for a period of three fortnights as per Exhibit B of GTA and to provide the gas nominations at the Delivery point and Redelivery

point in terms of GTA. It was also categorically noted that the Transmission charges applicable shall be as per Clause 5.3 (c) read with clause 6.1 of GTA.

- 5.13. The Respondent replied vide letter dated 29.10.2014 claiming that the Appellant had never informed the Respondent to agree on the revised Start Date of 01.06.2012 and claimed that they were not aware that Appellant's (GAIL) facilities were ready. Intimation of the revised date by the Appellant's letter dated 21.10.2014 was not acceptable, since neither GTA nor CT agreement provides for unilateral revision of CT dates. It was further claimed that obligations under clause 5.3 (c) 6.1 and 8.10 would start only from the CT Start Date and the Appellant had not been able to fulfil its contractual obligations as on 01.06.2011 and hence in effect none of the terms of the GTA dated 11.11.2010 could be enforced as on date.
- 5.14. The Appellant issued the first invoice dated 31.10.2014 for Rs. 1.99 Crores towards 'transmission charges'. Further vide letter dated 03.11.2011, the Appellant refuted the contention of the Respondent's letter dated 29.10.2014.
- 5.15. The Respondent filed OMP No. 1385 of 2014 before the Hon'ble Delhi High Court under Section 9 of the Arbitration and Conciliation Act, 1996, seeking directions to restrain the Appellant from invoking the Bank Guarantee and security deposit till the issue of termination of the GTA is settled through Arbitration which was dismissed vide order dated 10.11.2015 with the direction to the parties to take recourse to amicable settlement as contemplated under clause 16.1 of the Gas Transmission Agreement.
- 5.16. On 20.02.2015, Respondent filed a complaint before the Board raising Restrictive Trade Practice and abuse of dominant position by the Appellant,

which was opposed by the Appellant seeking the Board's direction to the Respondent to pursue its remedy before a properly constituted Arbitral Tribunal. The Board passed an interim order dated 05.03.2015 admitting the said complaint.

5.17. Arbitration: In terms of the right to have its dispute redressed through Arbitration, the Appellant issued a letter dated 05.05.2015 to the Respondent seeking payment of dues of Rs. 30,65,25,430 payable since October 2014 and reserved their right to claim invoices from 01.06.2012 to 21.10.2014. Appellant nominated Hon'ble Dr. Justice Arijit Pasayat, a former Judge of the Hon'ble Supreme Court of India, as the Appellant's nominee arbitrator and requested the Respondent to nominate its arbitrator within 30 days from receipt of the said letter. However, vide its letter dated 07.05.2015, Respondent denied the claim/request made by the Appellant in its letter dated 05.05.2015 to proceed with Arbitration and requested the Appellant to withdraw the arbitration notice.

5.18. The Appellant filed a petition before the Hon'ble High Court of Delhi seeking appointment of a Sole Arbitrator to adjudicate the claim against the Respondent. The Hon'ble Delhi High Court, disposed off the said petition vide its order dated 23.12.2015 and appointed Hon'ble Mr. Justice R.V. Raveendran (a former Judge of the Hon'ble Supreme Court of India), as the sole Arbitrator to adjudicate the disputes inter-se between the parties. However, the Ld. Sole Arbitrator Mr. Justice R.V. Raveendran expressed his constraints to preside over the Arbitration proceeding and withdrew his consent.

- 5.19. The Appellant accordingly filed Petition under Section 15 of the Arbitration and Conciliation Act before the Hon'ble Delhi High Court seeking appointment of a substitute Arbitrator. The Hon'ble Delhi High Court vide its judgment dated 15.03.2016 appointed Hon'ble Mr. Justice K.S. Radhakrishnan. (a former judge of the Hon'ble Supreme Court of India) as the sole Arbitrator. Meanwhile, the Board passed the Impugned majority order dated 11.04.2016 and the dissenting order dated 18.04.2016. The aforesaid majority order dated 11.04.2016 is challenged by the Appellant in the present Appeal.
- 5.20. It is relevant to mention herein that, it has been brought to the knowledge of this Tribunal by filing IA by the liquidator appointed by National Company Law Tribunal (NCLT) with respect to first respondent Beta Infratech Private Limited vide order dated 14.06.2019 in *Punjab National Bank versus Beta Infratech Private Limited [CP. No.(IB)-117(PB/2019)]*, that the NCLT had initiated Corporate Insolvency Resolution Process (CIRP) of Beta Infratech initially appointing a Resolution Professional (RP), also declaring moratorium under Section 14 of Insolvency and Bankruptcy Code, 2016 (IBC). The Counsel representing the applicant liquidator, has submitted that in terms of the moratorium now under section 33 (5) of IBC filed by Appellant ought not to be heard and it should await the conclusion of the liquidation proceedings.
- 5.21. The said prayer was rejected by this Tribunal vide order Dt 28.07.2021 keeping in view that there is no bar under Section 33 (5) to the continuation of the proceedings which had been instituted prior to such order of liquidation being issued by the adjudicating authority i.e. the NCLT. Since the appeal at hand was instituted in 2016, the direction of NCLT putting in position

moratorium under Section 33 (5) of IBC would not come in the way of this Tribunal hearing and adjudicating upon the present appeal. The core issue involved here is as to whether the acts to which exception is taken by the complaints under Section 25 of PNGRB Act amount to restrictive trade practices, could not have even otherwise been taken to the RP for consideration or adjudication at the stage of CIRP, same being the position vis-à-vis the role expected to be performed by the liquidator appointed by the NCLT.

- 5.22. Accordingly, memo of parties was amended showing the present status of the first respondent with reference to the liquidation process.

## **6. Contentions of the Parties**

- 6.1. Contention of Appellant: The Appellant has challenged the impugned order passed by Board on the ground that Gas Transmission Agreements (GTAs) and Gas Supply Agreements (GSAs) are completely independent agreements and contractual obligations under the GTA cannot be interlinked with the obligations under GSA. Board misled itself by getting into the interpretation of the GTA for the purpose of looking at CT Start Date and completely overlooked it. Board further misled in concluding that Appellant did not make any efforts to offer MDP gas and offered high priced gas to Respondent. Appellant forced Respondent to issue Letter of Credit. The Gas transmission facility was available to the Respondent and was ready for transportation from 01.06.2012, it was the obligation of Respondent to transport gas to its power plant through the pipeline in terms of the GTA from 01.06.2012. However, the Respondent failed to transmit gas and thus became liable to pay "ship or pay"

charges. Moreover, Respondent also was not ready for market driven price being offered by Appellant for the purposes of supply of gas. No efforts were made by Respondent to procure gas from other suppliers as well. The Appellant has raised invoices as per the GTA and not under the Term-sheet and Board holding that invoices were raised under the Term Sheet is factually incorrect. Enforcement of valid GTA can never be termed as RTP.

- 6.2. Contention of Respondent: The main contention of Respondent is that Board is correct in its impugned order in holding that Term Sheets for supply of gas executed in 2009 and 2010 (as well as the Term Sheets executed with Gama and Beta) were binding Term Sheets and GTA executed in 2010 were executed as part of the same transaction. The Gas Transmission Agreements and the corresponding Capacity Tranche Agreement never became effective and no valid invoices could have been issued pursuant to the same. Moreover, no right vested with Appellant to unilaterally change CT Start Date to a self-declared date of completion of pipelines and unilaterally impose, with retrospective effect, ship or pay charges. The Ship or Pay Invoices raised by the Appellant are not in accordance with the terms of the GTA and applicable law and are invalid and void. The practices of the Appellant in respect of the three power plants identified in the Impugned PNGRB Order fall within the scope and meaning of "restrictive trade practice" under s. 2(z) PNGRB Act r.w. s. 25 PNGRB Act.

7. **Issue:-The issue before this Tribunal to decide is whether PNGRB was correct in holding that Appellant i.e. GAIL has indulged in restrictive trade**



**practice in its impugned order dated 11.04.2016, as per PNGRB Act, passed by majority or else liable to be set aside.**

8. **Deliberations** For deciding the issue of RTP on the part of Appellant (GAIL), the following questions were analyzed by this Tribunal :-

8.1. **Whether the term sheet is binding and GTA being Part of Same Transaction never came into effect as the Conditions Precedent stipulated in the GTA were never satisfied.**

8.1.1. Board in its impugned majority order has held that the Appellant was obligated to source, supply and transmit the natural gas for Respondent's power plant and the gas was to be sourced from ONGC Vasai (east) field in addition to other sources and that both Term Sheet and GTA are interlinked. The relevant portions are reproduced hereinafter –

*"Article 31 of the Term Sheet (Annexure-4) is admittedly binding where- under no rights or obligations as set out in it could become effective unless the conditions precedent were satisfied or waived and one of the conditions was that commencement of the gas supply shall be subject to commencement of the same by the upstream supplier and in case of respondent's inability to supply gas from the upstream supplier then the respondent was obliged to supply gas on mutually agreed terms and conditions including price and as such supply of gas by the respondent to the petitioner was also condition precedent to make the petitioner liable under the GTA."*

8.1.2. It is the contention of the Appellant that Gas Transmission Agreements (GTAs) and Gas Supply Agreements (GSAs) are completely independent agreements and contractual obligations under the GTA cannot be interlinked with the obligations of GSA and Board has erred in holding that obligation of

supply of gas by the Appellant was also condition precedent to make Respondent liable under the GTA and the Appellant failed to supply natural gas, as the supply and transmission of gas were its inseparable obligation.

- 8.1.3. Respondent has contended that Board is correct in holding that the Term Sheets for supply of gas executed in 2009 and 2010 (as well as the term sheets executed with Gama and Beta) were binding term sheets and GTA executed in 2010 were executed as part of the same transaction. The development of the pipeline and delivery of gas were both connected pursuant to the term sheets. Without the GSA being executed by Respondent/Shipper, the other obligations of the Shipper/Respondent under the GTA were not to become effective and since no GSA was executed by the Shipper/Respondent the obligations had not come into effect. Respondent has relied on the decision of Hon'ble Supreme Court in the case of Kollipara Sriramulu v. T. Aswatha Narayana AIR 1968 SC 1028 and Dresser Rand S.A v. Bindal Agro Chem Ltd. (2006) 1 SCC 751 to show that Term Sheet is a binding document.
- 8.1.4. It is an undisputed fact that the term sheet was initially executed between Appellant and Respondent (Sravanthi) on 20.07.2009 for supply of 0.60 MMSCMD Natural Gas on firm basis and 0.30 MMSCMD on Reasonable Endeavour basis from Vasai Gas field of ONGC Western Offshore. Similar Term Sheet with Gama and Beta were executed on 01.05.2010 and 06.05.2010 respectively.
- 8.1.5. It is relevant to mention herein that the said term sheet dated 20.7.2009 *inter alia*, was subject to the 'condition precedent' of the Appellant concluding and signing the term sheet with the upstream supplier ONGC. The term sheet also

contemplated conversion of the Term Sheet into a detailed agreement / Gas Sale Agreement.

- 8.1.6. Respondent wrote a Letter dated 09.02.2010, (i.e. before signing the new Term Sheet dated 22.02.2010), which categorically mentions that the discussion was held between the parties and keeping in view of the contingency, it was mutually agreed therein that in case of nil/less availability of gas from Vasai Field or delay in availability of gas from Vasai Fields or any Government directives, Appellant shall offer any other Market Driven Price (MDP) gas to Respondent including RLNG subject to availability and mutually agreed terms and conditions including price.
- 8.1.7. It is relevant to mention herein that, as per clause 7(3) the Term sheet was only for supply of 0.6 MMSCMD gas and the terms of the contract was 7 to 8 years from the date of signing of detailed agreement as per Clause 6 of the Term Sheet.
- 8.1.8. Further Clause 31 of the Term Sheet stipulates "Condition Precedent (CP)" as follows:-

*This term sheet shall be binding upon its execution by parties. None of the rights or obligations set out in this Agreement shall become effective until the date known as CP "Satisfaction Date" in which all of the following conditions has been completed or waived to the reasonable satisfaction of the Seller.*

***Seller's Condition precedent***

- (i) *The seller shall have concluded and signed GSA with upstream supplier ONGC, necessary for the Seller's performance of its obligations under this Agreement.*

- (ii) The quantities agreed under this terms sheet shall be subject to appropriate availability from the upstream supplier and also subject to Seller being in a position to meet quantity requirements of other consumers considered for supply.*
- (iii) The seller shall have completed construction and installation of suitable pipeline and allied infrastructure for supply of gas to the Buyer.*
- (iv) Commencement of gas supply shall be subject to commencement of the same by the upstream supplier.*

*\*" CP Satisfaction Date" means 18 months from the date of signing of this Terms Sheet or such other date as may be decided mutually by the Parties and agreed to in writing.*

*Further the Buyer understands that the terms and conditions contained in this terms sheet are for supply of gas from Vasai fields and in case of inability of Seller to supply gas to the Buyer from Vasai fields, then supply of other MDP gas shall be subject to mutually agreed terms and conditions including price as brought out in Article 3 and 16.7 above.*

Clause 34 stipulates the validity of Term sheet:

*This term sheet shall be valid for a period of three months from the date of signing the same and shall supersede the term sheet signed between Buyer and Seller on 20.07.2009 along with correspondences and extension there under.*

- 8.1.9. Further, on 23.02.2010 by way of a side letter, it was agreed between the parties that all other terms and conditions of the Term Sheet dated 22.02.2010 remained unchanged and binding on the parties except Clause-3 of the Term Sheet which was substituted with following terms :-

*"...Associated natural gas for sale from Vasai East field of ONGC to Western Offshore as per the quality provided in attached Schedule, subject to availability from Upstream supplier, i.e. ONGC. It is further mutually agreed that in case of Nil/less availability of gas from Vasai Fields or delay in availability of gas from Vasai Fields, or any Government directive the Seller shall offer any other Market Driven Price (MDP) gas to the Buyer including RLNG subject to availability and mutually agreed terms and conditions including price...."*

8.1.10. Thus as per clause 31 (ii) of the Term Sheet, it was agreed that for Seller's Condition precedent *"The quantities agreed under the term sheet shall be subject to appropriate availability from the upstream supplier and also subject to Seller being in a position to meet quantity requirement of other consumers considered for supply."* Considering the condition precedent, the Term Sheet dated 22.02.2010 was signed and as mentioned in Clause 34 of the Term Sheet, it superseded the earlier Term Sheet dated 20.07.2009 signed between the parties. One of the reasons for execution of 2<sup>nd</sup> Term Sheet was that the likelihood of gas coming from Vasai field was low which clearly shows that Respondent was aware of the contingency and after discussion had agreed, before and at the time of signing the Term Sheet dated 22.02.2010, that in case of nil/less availability of gas from Vasai Field or delay in availability of gas from Vasai fields or any Government directives, Appellant will offer any other Market Driven Price (MDP) gas to Respondent including RLNG which will again be subject to availability and mutually agreed terms and conditions including price.

8.1.11. Both the parties were aware that the Term Sheet dated 22.02.2010 was subject to availability of Vasai Gas and in case of Nil/ Less availability of gas

from Vasai Field or delay in availability of gas from Vasai fields or any Government directives, any other Market Driven Price (MDP) gas including RLNG would be offered by the Appellant to Respondent including RLNG which was subject to availability and mutually agreed terms and conditions including price.

8.1.12. This shows that the term sheet was not binding on the parties and was also subject to CP upon firstly availability of gas and secondly for signing of GSA with upstream supplier, which admittedly was never signed between the Appellant and upstream Supplier. Further detailed agreement (GSA) between the Appellant and Respondent was also required to be signed as per Term Sheet, which was also never signed. There was clear intention of signing the GSA between the parties, as per the Term Sheet and in view of the said intention, the validity of the said Term Sheet was extended time to time on various occasion i.e. on 01.06.2010, 03.09.2010, 30.11.2010, 18.03.2011, 01.06.2011 and 19.12.2011. It was valid till March, 2012 after which the Term Sheet was never extended and died its own death.

8.1.13. Though the request for signing GSA was repeatedly made by Respondent through various letters while requesting for extension of Term Sheet, however the GSA was never executed and Term Sheet was not extended beyond March, 2012 and got frustrated. These letters of Respondent requesting the Appellant for signing of GSA as per Term Sheet clearly shows the intention of Respondent to convert Term Sheet into GSA.

- 8.1.14. Moreover, extension of Term Sheet on various occasions, on the request of Respondent clearly shows that the Term Sheet had a time limit and expired on end of such time limit.
- 8.1.15. The combined reading of Clause 3, 6, 31 & 34 of Term Sheet makes it very clear that, though it is mentioned that the Term Sheet was binding but none of the right or obligation of the Term Sheet could have become effective unless condition precedent as mentioned in Clause 31 would have been satisfied as there was intention of signing the detailed agreement pursuant to signing of Term Sheet subject to condition precedent. The Term Sheet was not binding between the parties and contemplates conversion of the Term Sheet into a detailed agreement / Gas Sale Agreement, which was admittedly never executed.
- 8.1.16. With respect to GTA, it is undisputed that during the existence of Term Sheet dated 22.02.2010 which was for supply of gas. Both parties executed GTA dated 11.11.2010 which was pursuant to the request of Respondent made vide letter dated 29.10.2010 for booking 1.8 MMSCMD gas capacity in the Appellant's Pipeline for their plant at Kashipur, establishing that Term Sheet and GTA were independent.
- 8.1.17. It is clear that Terms Sheet was signed between the parties for supply of gas subject to condition precedent as mentioned therein and GTA was executed for transportation of gas from the Delivery point to Redelivery point on the Appellant's DVPL-GREP up gradation Pipeline. The GTA signed between the parties did not make any reference to the Term Sheet and did not refer to the two documents at any stage being part of the same transaction.

8.1.18. This brings to the question before us is whether Term Sheet and GTA are interlinked. There is no doubt that Gas Transmission Agreement (GTAs) and Gas Supply Agreements (GSAs) are completely independent agreements subject to their respective conditions precedent as mentioned therein. Under the GTA, the Appellant was to be the transporter and Respondent was to be a shipper. It is relevant to mention herein that the Seller has been defined in Clause 1.77 of the GTA to be an entity with whom Respondent being the shipper would sign the GSA to purchase gas for transmission under this Agreement.

8.1.19. At this juncture, it will be pertinent to understand about the different agreements and their co-relation and inter-dependability, if any.

Both sale of gas and transportation of gas are distinct activities and demand different and distinct agreements, and are not correlated with each other.

**Gas Supply Agreement:**

For sale of gas the parties sign a Gas Sales Agreement (GSA). In a GSA, the Seller like the Appellant herein purchases gas and sells the same to the Buyer/Respondent,

**Gas Transmission Agreement:**

For transportation of gas the parties sign a Gas Transmission Agreement (GTA). Under the GTA, Appellant /Transporter is obligated to transport gas which is purchased by the Respondent/shipper through the Transporter's Pipeline and the responsibility of purchase of gas lies with Respondent / Shipper.



**Capacity Tranche:**

Pursuant to signing of GTA, pipeline capacity of transporting gas in the pipeline as per the terms & conditions of GTA is booked.

**Term Sheet:**

A term sheet usually is a document which sets out certain terms of a transaction agreed in principle between parties, and is typically negotiated and signed at the beginning of a transaction with basic terms and conditions.

**Position of GTA as per PNGRB Regulation:** The concept of independence of Gas Supply Agreement and Gas Transmission Agreement is strengthened by the provisions 6 (b) of the “PNGRB Guiding Principles for declaring or authorizing Natural Gas Pipeline as Common Carrier or Contract Carrier Regulations” which provides that the contract for transportation of natural gas shall be only for transportation of natural gas and without any obligation as to the sourcing of gas.

8.1.20. It clarifies that the purpose of the GTA is to permit the Respondent to transport its sourced gas through the pipeline of the Appellant. The limited obligation of the Appellant under the GTA is only to Transport the Gas sourced by the Respondent.

8.1.21. The obligation of the Appellant under the GTA, being transporter, was to only transport the respondent’s sourced gas to be delivered at its Pipeline’s delivery point for transportation to the re-delivery point.

- 8.1.22. Thus it is amply clear that Gas Transmission Agreements (GTAs) and Term Sheet (which was later required to be converted into Gas Supply Agreement) are completely independent agreements & mutually exclusive
- 8.1.23. Under the Term Sheet signed between the parties, the Respondent was obligated to arrange gas from any source in case it was not inclined to purchase gas from the Appellant on market driven prices, upon there being no gas from Vasai field of ONGC. The Term Sheet was signed between the parties which was required to be converted into GSA but was not subsequently converted into GSA and got expired in 2012. The Parties also signed GTA for transmission of gas, to be sourced by Respondent and accordingly the CT was required to be signed for booking the capacity in the Pipeline
- 8.1.24. Further the Minutes of Meeting dated 11.11.2010 signed between the parties also strengthens our view that the obligation for sourcing of gas was not purely on GAIL but admittedly also on Sravanthi wherein categorically it was mutually agreed position that *".... SEPL is expecting allocation from domestic/other sources for onward transmission through Gail's pipeline network and MDQ as mentioned in CT Agreement no.#1 dated 11.11.2010 is SEPL's total gas required at Kashipur (UA)"*
- 8.1.25. It is also relevant to consider that during the course of oral submission, the Ld. Sr. Counsel appearing for Respondent also conceded that the Term Sheet dated 22.02.2010 was a contingent contract. Respondent has admittedly failed to take any meaningful steps to arrange gas and further the Respondent

never purchased gas for the purpose of transportation through the pipeline of the Appellant and liability cannot be shifted upon the Appellant.

8.1.26. It is also pertinent to mention that Respondent had signed Term Sheet for supply of 0.6 MMSCMD on Firm basis which was only part of their total gas requirement of two plants of around 1.8 MMSCMD (CT dated 11.11.2010 and RE CT dated 17.11.2011 together). This also establishes that Respondent was not solely relying on Gas from Vasai fields but also had some plans for arranging gas from other sources and thus had put up the plants of higher size. The arrangement for supply of gas from the Appellant to the Respondent, as per the term sheet was not an exclusive arrangement and do not debar the Respondent from arranging gas from any other source.

8.1.27. Respondent was obligated to arrange gas from any source in case it was not inclined to purchase gas from the Appellant on market driven prices, upon there being no gas from Vasai field of ONGC. Even during the oral submission on 22.09.2021 in sur-rejoinder, Sr. Counsel of the respondent agreed that the "GTA and Term Sheet were delinked".

8.1.28. Further it is relevant to mention herein that it was only on Respondent's representation that the GTA was executed, as it required 1.8 MMSCMD gas and was expecting to source the same through its own sources.

Thus, this Tribunal is of the view that the Term Sheet was not binding and was subject to condition precedent upon availability of gas and signing of GSA with upstream supplier, which was never signed between Appellant and Upstream supplier and also between Appellant and Respondent. The Term sheet was extended on various occasions up to March 2012 and had a time limit and

eventually died its own death. It is clear that the Term Sheet and GTA are completely independent contract having no co-relation and existence of the Term Sheet did not matter for the purpose of the execution of GTA. It is correct to hold that Respondent was having obligation to source gas under the GTA and has no locus to claim that its obligations under the GTA were void on account of non-availability of gas.

Thus, the Board erred in understanding of linking GSA with GTA as mutually inclusive instead of mutually exclusive and holding that it was the Appellant's obligations of sourcing, supplying and transmission of natural gas for the power plant of Respondent whereas Appellant has never constrained/restricted Respondent to sources Gas from any other sources. It is clear that the regulator could not understand the linkage between GSA and GTA. In our view, no RTP is established on part of Appellant on this ground.

8.2. **Whether GTA never came into effect and was unenforceable as the Condition precedent stipulated in GTA were never satisfied. Whether GTA became voidable at instance of the respondent.**

8.2.1. Board in its Impugned order has held that though the Appellant did not fulfill condition precedent on its own part but required the Respondent to submit letter of credit of more than Rs.9.00 Crores and / to furnish the bank guarantee of more than Rs. 16.00 Crores and the security deposit of Rs. 5.60 Crores. Appellant's demand for 'ship or pay' charges from the Respondent without discharging its own obligations of sourcing and transmission of gas was considered relevant factor w.r.t the issue of RTP on the part of Appellant Despite its failure in fulfilling the conditions precedent which were

very material for proper execution and discharge of the agreement, Appellant raised invoices for "ship or pay" charges, which in fact were linked with delivery of gas to the power plant, but no delivery of natural gas was made by the respondent. Not only this, the gas was not sourced nor the pipeline could be completed by the respondent within the requisite period. This practice of the respondent prevented the petitioner to execute necessary Agreement with any other entity and, therefore, tends to restrict competition. In the Impugned order, Board has also held that Appellant failed to fulfill the CP as described there under:

- a. It failed to execute Gas Supply Agreement.
- b. It failed to complete the gas pipeline infrastructure within the stipulated period.
- c. The capacity tranche was not existing by the CT Start Date.
- d. It failed to supply natural gas, as agreed, despite the fact that the supply and transmission of gas were its inseparable obligations.

Counsel of Respondent has contended that respective GTA and corresponding CTs never became effective and remained unenforceable as the condition precedent stipulated in the GTA were never satisfied. In the alternative, the GTA became voidable at instance of the Shipper hence no valid invoices could have been issued pursuant to the same, when no gas was available for executing GSA or domestic gas being no longer available, and no pipeline being constructed by CT Start Date.

However, it is the contention of the Appellant that a cumulative reading of the GTA and CT Agreement dictates that there was no condition precedent to be fulfilled and the decision of the Board to hold that non fulfillment of certain CP amounts to Restrictive Trade Practices is not only factually incorrect but is also erroneous in the eyes of law.

8.2.2. For analyzing the same this Tribunal has gone into the provisions of the GTA & CT. Clause 3.1 of the GTA which provides for condition precedents as follows:-

*3.1 Conditions Precedent:*

*The Parties agree that except the provisions of Clause 1,3.1, 9, 12, 15 and 16, the rights and obligations pursuant to any CT and this Agreement shall not become effective and that neither Party shall have any duty, obligation or liability hereunder unless and until the conditions specified in Clause 3.1 have been satisfied or waived.*

- i) Condition Precedent required to be complied for effectiveness of Shipper's obligations under this Agreement to the extent of its obligations in relation to any CT:
  - (a) Conditions, if any, in relation to the relevant CT set out in Exhibit for such CT has been satisfied.*
  - (b) Any other broad conditions like execution of GSA by the Shipper for the relevant volume of gas.**
  
- ii) Condition Precedent required to be complied for effectiveness of Transporter's obligations under this Agreement to the extent of its obligations in relation to any CT:
  - (a) Conditions, if any, in relation to the relevant CT set out in Exhibit have been satisfied.*
  - (b) Any other broad conditions, like approval of any new pipeline by Transporter, required for the proposed Gas Transmission.**

8.2.3. Further clause 5.3 provides for obligations upon the start date and 5.3 (c) and (d) specifically provides that a CT Start Date would be when either party is ready to perform its part of the obligation notwithstanding the other party not being ready. Clause 5.3 reads as under:

*[c] If on the CT Start Date and thereafter on any such Day, Transporter is able to take deliveries of the Gas quantities up to the CT Delivery Point MDQ at the Delivery point and allow the off-take of Gas quantities up to the CT Redelivery Point MDQ at the Redelivery Point and the Shipper is unable to deliver gas to the Transporter at the Delivery Point and/ or has not commenced off-takes of gas at such Redelivery Points then the Shipper shall still be required to pay the applicable Transmission Charges.*

*[d] If on the CT Start Date and thereafter on any such Day, Shipper is able to make deliveries of the Gas quantities up to the CT Delivery Point MDQ at the Delivery Point and off take Gas quantities up to the CT Redelivery Point MDQ at the Redelivery Point and the Transporter is unable to accept delivery of such gas at the Delivery Point or deliver such gas to the Redelivery Point then Clauses 7.2 and 7.3 shall apply*

8.2.4. Clause 6 provided for ship or pay charges while clause 7 provides for liquidated damages.

8.2.5. Pursuant to signing of GTA, which contemplated signing of a Capacity Tranche Agreement (CT Agreement-which is for the purposes of booking pipeline capacity and transmission of gas), parties agreed for a ship or pay CT Agreement wherein the CT Delivery Point mentioned was Ankot in Gujarat. It is relevant to mention herein that only Reliance Gas Pipeline connects at Ankot, whereas as per the Schedule B of the Term Sheet 22.02.2010, the delivery of gas from Vasai East Field was to be delivered at delivery points ex-

Hazira which also strengthens the delinking of Term Sheet with GTA. Ankot is the injection point of gas received from East-West pipeline of Reliance Infra, which was required to be sourced by the Respondent as per the CT Agreement, has no correlation with the Vasai gas. This also establishes that CT is independent of Term Sheet.

8.2.6. Further the relevant Clauses of CT Agreement executed under the GTA are:-

*"3. Ship-or-Pay CT Agreement / ~~RE-CT Agreement~~ (strike out any one)*

*Capacity requested on ~~Common-Carrier Basis~~ / Contract Carrier Basis  
(strike our any one)*

4. *"Capacity Tranche" shall mean the capacity reserved (in the case of Ship-or-Pay CT Agreement) for the Shipper in the DVPL-GREP Upgradation pipeline system from the outlet of the downstream flange of Shipper's upstream transporter at Ankot in the state of Gujarat (the "Delivery Point") to the outlet of the downstream flange of the metering facilities of Transporter at the power plant unit of Shipper located at Khaikhera Village, Kashipur Tehsil, Udham Singh Nagar (Uttaranchal) (the "Re-Delivery Point") under the CT Agreement. Further the pipeline system mentioned above have following AHAs and CV Bands relative to the Delivery Point and Redelivery Point (which shall be intimated in due course):*

- a. To be intimated in due course*
- b. To be intimated in due course*

5. *CT Delivery Point MDQ and CT Redelivery Point MDQ*

<i>Delivery Point at Ankot in Gujarat</i>	<i>CT Delivery Point MDQ, MMBTU/Day-GCV</i>	<i>29970</i>
<i>Redelivery point at Kashipur, Uttaranchal</i>	<i>CT Redelivery Point MDQ, MMBTU/Day -GCV</i>	<i>29970</i>



6. CT Start Date: 1<sup>st</sup> June, 2011

7. CT End Date: 31<sup>st</sup> May, 2021

12 Conditions precedent to be satisfied by the shipper – Nil

Conditions precedent to be satisfied by the transporter – Nil

13. Condition precedent satisfaction date – Nil"

14. Other Terms and Conditions:

*The Shipper shall be allowed for a "Commissioning period" beginning on the CT Start Date as mentioned on the CT start date as mentioned at Sl. No.7 above and ending at 6.00 hrs on 01.09.2011. During such Commissioning Period, Monthly Ship or Pay shall be NIL. Provided further, the provisions of Article 7 (Liquidated Damages) of the GTA shall not apply during the Commissioning Period."*

8.2.7. As mentioned earlier, Clause 1.77 of the GTA has defined Seller to be entity with whom Shipper i.e. Respondent would have signed the GSA to purchase gas for transportation under the GTA and not with respect to any proposed GSA with Appellant. Further Clause 3 of the GTA shows that the Shipper's obligations under the Agreement in relation to any GTA that were required to be fulfilled were "*....Conditions if any, in relation to relevant CT set out in Exhibit for such CT...*" and CP mentioned and agreed as per Clause 12 required to be satisfied by Shipper is "Nil".

8.2.8. This Tribunal is of the view that a cumulative reading of the CP as mentioned in Clause 3 of the GTA and Clause 12 of the CT Agreement, shows that there was no CP to be fulfilled so as to give rise to the rights and obligations of the parties under the GTA. This clause is also subject to the satisfaction of conditions if any, in relation to relevant CT, which in the disputed CT#1 has

been mutually agreed to be Nil. Further GTA also did not provide "stipulated period." Thus could not have been CP. No such stipulated date was agreed or existed.

8.2.9. The language used in Clause 3.1 (ii) to satisfy CP" *Conditions if any, in relation to relevant CT set out in exhibit have been satisfied*" or *"Any other broad conditions, like execution of GSA by the Shipper for the relevant volume of gas"* clearly shows that clause is generic in nature and does not provide for execution of GSA as necessary condition by the shipper as a condition precedent.

8.2.10. Further, If there had been any intention of signing the GSA, then the clause would have specifically provided for execution of a GSA by the shipper and it should have been part of CT (as CT is a specific agreement under GTA). Thus the CP mentioned in clause 3.1 is concerned vis a vis Clause 12 of the CT #1, there was no such CP placed on either party and is mutually agreed to be Nil by shipper as well as by the transporter to kick in the requirement of satisfaction of a condition precedent. The words any other broad conditions followed by "like execution of GSA" was by way of an example and nothing more.

8.2.11. It is well established in law that a contingent contract which cannot be enforced, cannot also be breached. The Term Sheet and GTA both were independent Contract having no relation with each other. The obligation of supplying gas on Appellant to Respondent would have been there provided GSA would have been signed pursuant to the signing of Term Sheet which admittedly was never signed. GTA signed between the parties was only for

transmission of gas through the Appellant's pipeline for which the obligation for sourcing of gas was on Respondent. Nowhere it is mentioned in the GTA that the obligation of the Appellant was for sourcing gas. The GTA signed between the parties was only for transmission of gas.

8.2.12. Thus the contention of the Respondent that GTA and CT are not enforceable under Section 32 & Section 35 of the Contract Act as the stipulated conditions precedent were not satisfied has no substance. In the CT agreement executed under the GTA, there was no such CP placed on either party, which is mutually agreed to be Nil by the parties. There was no specific condition like execution of a GSA agreed between the parties either in the GTA or in the CT to kick in the requirement of satisfaction of a condition precedent. GTA and CT both were existing and were valid agreement.

The Term Sheet signed between the parties was subject to condition precedent. There was no obligation under the GTA on the Appellant for sourcing of gas but was on Respondent. Term Sheet was not an exclusive arrangement between the parties and no restriction was imposed by Appellant on Respondent for sourcing gas from others. Obligations of the parties under the GTA and Term sheet are not interlinked being independent agreement. The Terms Sheet got frustrated and never got converted into GSA and thus became contingent due to non fulfillment of condition precedent mentioned there in. It is also clear that there was NIL CP mutually agreed between the parties under the GTA. The Letter of Credit, the Bank Guarantee and the Security Deposit were submitted by Respondent under the GTA and not for Term sheet. The Respondent was obligated to submit Bank Guarantee, Letter of Credit and Security Deposit as per GTA and it cannot be

considered to be manipulation of price causing unjustified costs on the petitioner. The Term sheet signed between the Appellant and Respondent was not exclusive arrangement and no restriction was ever imposed by Appellant to execute agreements with other entity(ies). Respondent failed to show any competition was ever restricted by Appellant. **It is a matter of fact that Appellant and Respondent companies are not competitor to each other which could have actual or probable effect of restricting preventing or distorting lessening or destroying competition for the purpose of establishing RTP. Board erred in holding that CP stipulated in GTA were never satisfied by Appellant in the Impugned judgment and thus no RTP is established on the part of Appellant.**

8.3. **Whether GAIL has unilaterally altered the CT Start Date**

8.3.1. Board in its Impugned order has held that the unilateral change of CT Start Date and the insistence on the respondent to provide the Letter of Credit, Security and Bank Guarantee of the above amount, without making delivery of gas and the demand of transmission- charges in violation of the regulatory provisions, further shows a practice which leads to manipulation of price causing unjustified costs on the petitioner.

8.3.2. It is contended by the Respondent that here is no unilateral right vested with Appellant, as a common carrier, to unilaterally change CT Start Date to a self-declared date of completion of pipelines and unilaterally impose, with retrospective effect, ship or pay charges. The ship or pay invoices are void not only for being *ultra vires* the provisions of the GTA but also being in violation of obligations of a common carrier under the PNGRB Act. It was also

contended that GTA and Sravanthi CT had become void as on the CT Start Date, i.e. 01.06.2011, Appellant had failed to complete the pipeline and hence the GTA became impossible to perform and therefore void. The Parties to the GTA and Sravanthi CT never mutually agreed to amend the CT Start Date and hence the said GTA and Sravanthi CT became void under Section 56 of Indian Contract Act, 1872, as it was an agreement to do an impossible act since no pipeline existed on 01.06.2011.

8.3.3. To analyze this contentious issue, this Tribunal has perused the record submitted by both the parties. The CT Start Date, for the purpose of CT Agreement is defined under Clause 4.1 (d) as the day on which obligation relating to such CT become effective, which is nil as mentioned in CT #1. Further Clause 5.2 of the GTA states that the CT Start Date for any such CT shall be specifically provided in the relevant exhibit for such CT. Clause 5.3 provides for obligations upon the start date and 5.3 (c) and (d) specifically provides that a CT Start Date would be when either party is ready to perform its part of the obligation notwithstanding the other party not being ready. Clause 5.3 reads as under:

*[c] If on the CT Start Date and thereafter on any such Day, Transporter is able to take deliveries of the Gas quantities up to the CT Delivery Point MDQ at the Delivery point and allow the off-take of Gas quantities up to the CT Redelivery Point MDQ at the Redelivery Point and the Shipper is unable to deliver gas to the Transporter at the Delivery Point and/ or has not commenced off-takes of gas at such Redelivery Points then the Shipper shall still be required to pay the applicable Transmission Charges.*

*[d] If on the CT Start Date and thereafter on any such Day, Shipper is able to make deliveries of the Gas quantities up to the CT Delivery Point MDQ at the Delivery Point and off take Gas quantities up to the CT*

*Redelivery Point MDQ at the Redelivery Point and the Transporter is unable to accept delivery of such gas at the Delivery Point or deliver such gas to the Redelivery Point then Clauses 7.2 and 7.3 shall apply.*

- 8.3.4. Thus Clause 5.3(c) makes it clear that if on the CT Start Date and thereafter any such date, the Appellant is able to take deliveries of gas and allow off-take of the same at the re-delivery point then the Respondent herein will be liable to pay the applicable Transmission charges even if the Respondent has not sourced gas for transportation and/or is not ready to receive gas which will result in application of the Transmission Charges on such date when the pipeline of the Appellant is operational.
- 8.3.5. From the record it is also well established that the status of construction of the pipeline was well within the knowledge of the Respondent. In fact, it was the Respondent itself who wrote various letters to the Appellant regarding the stage of construction of the Pipeline. The Respondent was always aware of the progress of the completion of the pipeline and it is a fact that, vide Letter dated 15.11.2011, itself had asked for revision of commissioning period, as pipeline construction was still under progress and requested the Appellant to amend the Commissioning period, as the pipeline construction was still ongoing.
- 8.3.6. The Respondent has admitted that it was not ready and willing to receive gas on 01.06.2011 either from the Appellant or from other sources and therefore the only relevant factor to be taken into consideration is as to when the Appellant was ready to provide connectivity to the plant for transportation of gas, which was on 01.06.2012.

- 8.3.7. The respondent was well aware about its obligation of sourcing of gas, non-availability of Vasai gas and in fact was also trying to get the gas from other Sources. It is a matter of fact that Appellant also offered the available MDP gas at the relevant price which was refused by the Respondent considering it non profitable.
- 8.3.8. The Respondent was also well aware that the CT Start Date is 01.06.2011 (which is ending on 31.05.2021) and that monthly ship or pay charges will not be applicable only during the "commissioning period" ending on 01.09.2011 after which the applicable Ship or Pay charges will start accruing on them and will be liable to pay the same in case they are unable to source gas once the construction of pipeline is completed and their power plant is connected. Knowingly that the commissioning period is over and ship or pay charges will be applicable once the construction of pipeline is completed, in order to refrain from paying ship or pay charges, Respondent itself wrote the letter to Appellant on 15.11.2011 (which was after the completion of commissioning period) requesting to amend and to read "commissioning period beginning on 01.12.2011....". It is important to note that vide this letter dated 15.11.2011, Respondent never asked for change of CT Start Date but only to amend the commissioning period which was already ended on 01.09.2011. The Respondent has itself admitted that it was not ready and willing to receive gas on 01.06.2011 from the Appellant or other sources and therefore the only relevant factor would be as when the Appellant was ready to commence transportation.

8.3.9. The existing facts in the case shows that that CT Start Date, as mentioned in CT#1, was not considered to be so sacrosanct, according to both the parties at the relevant time, so as to adjudicate the rights and obligations of the parties and the same could be amended/modified at the will of the parties. However, this issue was first time raised by Respondent in 2014 when the invoices were raised by Appellant. Respondent failed to show its readiness to receive gas either from the Appellant or from any other sources not only on 01.06.2011 but later also. So, the only factor for consideration is as to when Appellant was ready for providing connection to the plant of the Respondent. The pipeline Commissioning certificate issued by M/s Mecon and the PESO (a Statutory Organization of Govt. of India authorized to issue approval for construction and commissioning permission for cross country pipelines under Petroleum Rules, 2002 / MSIHC Rules, 1989) permission is evident to show that the pipeline and the associated pipeline terminals / facilities were ready on 01.06.2012.

8.3.10. The fact is that Respondent was well aware that the pipeline was in operation by 01.06.2012 but still it failed to transmit gas (which was his obligation) and thus the liability cannot be shifted upon the Appellant. It is relevant to mention herein that It is only upon the request of the Respondent and by signing CT#1 that the Appellant had blocked certain capacity of the pipeline to be used exclusively by the Respondent. In fact it is hard to believe that the Respondent was not aware about the pipeline being completed as the Appellant was already transporting gas from the same pipeline to M/s Surya Roshni from 01.06.2012 which was located to the downstream of Sravanthi (as also shown in the map submitted before the Tribunal). Further as per clause 15.2 of the



GTA “the terms of this Agreement may be amended only in writing by authorized representative of the Transporter and the Shipper.”. Even if one goes by the argument that CT Start Date could not be unilaterally change than in that scenario, the CT Start Date would be 01.06.2011, as mentioned in CT# 1 which was mutually agreed by both the parties and would not make the GTA & CT voidable and does not give right to Respondent to terminate the GTA., which could have only be done in accordance of Clause 13, wherein the grounds of termination has been mentioned following the procedure mentioned therein. Thus in view of 5.3 (c) & (d),Board erred in holding that Appellant unilaterally changed the CT Start Date in its impugned order and does not establish RTP on part of Appellant.

8.4. **Whether GAIL has right to issue invoices with retrospective effect and are not in accordance with the terms of the GTA and applicable law and are void**

8.4.1. This leaves us with the issue whether Appellant has right to issue invoices with retrospective effect and are not in accordance with the terms of the GTA and applicable law and are void.

8.4.2. In the present case, Respondent had entered into an GTA dated 11.11.2010 with the Appellant, pursuant to a communication dated 29.10.2010, whereby it specifically requested for booking capacity of 1.8 MMSCMD in the pipeline of the Appellant to be transported to their plant at Kashipur. This GTA also contemplated signing of a Capacity Tranche (CT Agreement) for the purposes of booking capacity and transmission of gas which was also signed by Respondent on 11.11.2010 for the period from 01.06.2011 to 31.05.2021. The

obligation of sourcing gas, as per GTA, was on Respondent and not on the Appellant. Respondent failed to produce any document before this Tribunal to show that Appellant prevented Respondent to execute necessary agreement with other supplier(s) and failed to source gas. Appellant issued the ship or pay invoice for the period of October 2014 on 31.10.2014, however Respondent on 03.11.2014 terminated the GTA and CT Agreement. It is correct to hold that invoices were raised by Appellant for the current period and were not backdated. The contention of the Respondent that invoices were for retrospective period is incorrect. Respondent has filed its complaint in February 2015 before the Board, challenging these invoices, none of which were of retrospective period. The Respondent itself has submitted that after filing of complaint before Board, Appellant has raised a claim for the period w.e.f. 01.06.2012 onwards. It is clear that the ship or pay claim from 01.06.2012 onwards claimed by letter dated 17.08.2015 and certainly could not have been the basis of the complaint filed by the Respondent.

- 8.4.3. It is relevant to mention herein that as a prudent practice the Appellant should have raised invoices within specified time as per the terms of the agreement however always had an option to raise the claim within the limitation period and if not specifically restricted cannot be questioned. Further if a party claiming unenforceability of the Agreement for its non-performance would need to show that performance has been truly prevented, rather than merely rendering causal link between the event and its inability to perform. As a prudent person consideration should also be given to the risk management

measures. Respondent always had the option to source gas from others and there was no restriction imposed by the Appellant for the same.

8.4.4. However the RTP alleged in the complaint filed dated Feb 2015 by Respondent before the Board was against those current invoices.

8.4.5. It is in the arbitration, that the Appellant claimed for the ship or pay period from 01.06.2012 to 15.06.2016. The said claim letter was not subject matter of complaint before the Board but was a subject matter of Arbitration for which Award has already been passed by the Arbitrator. It is correct to say that raising of claim for the purpose of adjudication in accordance of law cannot be termed as RTP. In fact, Board erred in holding that invoices were raised under the Term Sheet (which is independent of GTA under which the claim has been raised).

Thus raising invoices by the Appellant are as per the GTA under the applicable law and does not fall under any RTP.

8.5. **Issue w.r.t GAIL suppression of MOPNG letter:**

8.5.1. Board in its impugned order has held that Ministry of Petroleum Natural Gas, vide letter dated 28.06.2010, had made it clear that natural gas could have not been available from Vasai field but Appellant, without bringing this letter of the Ministry to the knowledge of the Respondent executed the GTA on 11.11.2010. Appellant had assured and agreed to source/supply gas at market driven price, in case of non-availability of gas from ONGC Vasai field but did not make efforts in this regard. In spite of keeping the petitioner waiting for more than two years and thereafter, Appellant offered the gas at such rate

which could have not been acceptable to the petitioner. Such practice of the Appellant manifestly caused obstruction of resources into the stream of production and also tends to impose unjustified costs on petitioner.

8.5.2. It is contended by Respondent that GTA and CT are contracts caused by suppression of the MOPNG letter to GAIL dated 28.06.2010 that showed that gas volumes for which GTA was being entered into would not be available due to MoPNG directions, a fact that was disclosed by GAIL only after the execution of GTA on 11.11.2010 vide GAIL letter 21.03.2011. GAIL received the MOPNG Letter date 30.09.2011 as per which the ONGC Vasai Fields were no longer available for gas allocation, and the same was disclosed by GAIL vide its letter dated 19.12.2011, which was actually a communication providing for the extension of the 2010 Term Sheet by Respondent. Appellant was aware that the gas volumes for which the GTA was entered into would not be available due to MOPNG directions. Thereby this concealment falls under the scope of "misrepresentation" under Section 18(2) Contract Act and, in the alternate falls under 18(3) Contract Act.

8.5.3. This Tribunal has perused Appellant's letter dated 21.03.2011, wherein Respondent was informed about the status of gas availability and it was expressly mentioned that:-

*".....MOPNG vide its letter dated 28.06.2010 has forwarded Government approved guidelines for pricing and commercial utilization of non APM Gas produced by NOC from their nominated blocks and has directed that the commercial utilization of natural gas available from such filed, shall be in accordance with the approved Government guidelines and shall*

*need approval of the MOP&NG. Further MOPNG vide letter dated 19.01.2011 has indicated that utilization of Vasai East Gas through swap arrangement by ONGC is under consideration. In view of the above position you may please note supply of gas from Vasai Fields may not be available unless otherwise decided by MOPNG. Other terms and conditions of the Term sheet would remain unchanged".*

- 8.5.4. It is clear from the reading of the Minutes of Meeting dated 11.11.2010 that Respondent was not dependent on Appellant with respect to sourcing of gas but was also trying from other sources. In fact, Appellant has also offered available MDP gas at the prevalent price to Respondent which was refused, considering it non profitable as argued & submitted before the Tribunal. In view of the above all references to Vasai Gas stood deleted from the Term Sheet.
- 8.5.5. Thus it is clear that Respondent was aware of the contingency of the availability of Vasai Gas and after discussion had agreed, before and at the time of signing the term sheet dated 22.02.2010, that in case of nil/less availability of gas from Vasai Field or delay in availability of gas from Vasai fields or any Government directives, Appellant will offer any other Market Driven Price (MDP) gas to Respondent including RLNG which will again be subject to availability and mutually agreed terms and conditions including price. However, the Term Sheet was never converted into GSA.
- 8.5.6. GTA signed between the parties was only for transporting gas, for which obligation of sourcing the gas through Appellant's Pipeline was on Respondent and not on Appellant and secondly nowhere in the GTA it is

mentioned that the Vasai gas will be transported or GTA was dependent on the availability of Vasai Gas.

- 8.5.7. It is also to be considered that pursuant to Appellant's letter dated 21.03.2011, Respondent once again requested for extension of the validity of Term Sheet by a further period of 06 months and to convert Term Sheet into GSA. However, Appellant vide letter dated 01.06.2011, while referring to its letter dated 21.03.2011, executed an understanding specifically stating that validity of the Term Sheet was extended for 6 months and the gas supply under the Term Sheet shall be subject to directives and guidelines/policies of Government of India from time to time and shall be governed by Clause 3 of the Term Sheet with regard to availability and the type of MDP gas being supplied.
- 8.5.8. Even at this stage no issue was raised by Respondent with respect to GTA or otherwise. In fact, Respondent continued to seek additional requirement with respect to transportation of gas even on 26.08.2011 in pursuance of which it sought to execute a second CT agreement knowing fully well that the Vasai Field gas was not available.
- 8.5.9. With this it is clear that the Respondent was aware about the status of availability of Vasai gas and after discussion only signed the Term Sheet wherein it was clearly agreed that in case of less or nil availability Appellant will offer MDP gas including RLNG subject to the condition precedent. GTA was signed with respect to transmission of gas to be sourced by Respondent. It is also prudent to mention herein that Respondent sought to execute second CT agreement with the additional requirement of gas under the GTA

agreement knowing fully well that the Vasai gas was not available. So while doing the additional CT, the additional source would have been definitely in the mind of SEPL. During the hearing respondent was asked whether their Board has done any risk analysis on non-availability of the Vasai gas and the source of gas which they might have taken into consideration however no satisfactory answer was submitted by the Respondent.

In our opinion there has been no misrepresentation to the Respondents by the Appellant about the availability of Vasai gas. It is clear that respondents were well aware about the status of Vasai gas even at the time of signing of Term sheet dated 22.02.2010 wherein contingency action in case of non-availability of Vasai gas was also dealt. Thus, there was no misrepresentation or concealment by Appellant, hence no RTP establishes on part of the Appellant.

**8.6. Sravanthi's arguments w.r.t Business Efficacy:**

8.6.1. It is argued by the Counsel of Respondent that under the 2010 Term Sheet and thereafter under the GTA, Appellant was under the obligation to supply gas keeping in view the principle of business efficacy and thereby imposing ship or pay charges on Respondent under the GTA in isolation of the terms of the 2010 Term Sheet is incorrect, as these contracts are to be read in business efficacious manner.

8.6.2. We do not agree with this contention of the Counsel of Respondent as it is settled law that if contract is capable of interpretation on its plain meaning, and the terms or the expression in a contract is clear, unambiguous and capable of providing an interpretation with respect to intention of the parties implied terms cannot be read into.

8.6.3. The principle of Business Efficacy is applicable only when the interpretation of the plain meaning of the contract is incapable of giving expression to the intention of the parties. It shall not be within the rights of the parties or the court to read an implied terms and provide an alternative interpretation under the guise of giving expression to the true intention of the parties.

8.6.4. In the present case the Term Sheet of 2010 and GTA are two independent Contract having defined and clear & expressed obligation mentioned therein for the parties. On the plain reading of the clauses of the Term Sheet it is expressly clear that it was subject to fulfillment of condition precedent. Being aware of the contingency of availability of Vasai gas, it was also agreed that Appellant will offer MDP gas at the prevailing rate. There was clear intention of the parties to convert this term sheet into GSA, which was never done and got frustrated in 2012. With respect to GTA, there was no obligation on Appellant for sourcing the gas, but was on Respondent, which it failed to do. Moreover, Clause 3 of the 2010 Term Sheet (which was required to be converted into GSA, but later got frustrated due to non -signing of GSA)) shows that it was mutually agreed by the parties that in case of Nil/ Less availability of gas from Vasai fields or delay in availability of gas from Vasai Fields, the Appellant shall offer any other Market Driven Price (MDP) gas to the Buyer subject to the availability. Gas was also offered by Appellant at the prevailing rate even though there was no obligation under the GTA to supply gas.

Thus we do not agree with the Counsel of Respondent that under the 2010 Term Sheet and thereafter, under the GTA, Appellant was under the obligation to supply gas keeping in view the principle of business efficacy,



## 9. Restrictive Trade Practices:

In the sieve of Rules & Laws on Restricted Trade Practice, we have examined the conduct of Appellant.

9.1. **"Restrictive Trade Practice"** is defined in Section 2(zi) PNGRB Act to mean

### Quote

"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 natural gas or services in such manner as to impose on the consumers unjustified costs or restrictions."*

### Unquote

9.2. It is a settled principle in law and also been laid by Hon'ble Supreme Court in various judgments that restrictive trade practices are actions *in rem* that cannot be settled by arbitration and that only disputes that relate to actions *in-personam* can be settled by arbitration. It has to be borne in mind that disputes relating to actions *in rem* are non-arbitral by their nature and need to be settled in courts of law only. The complaint of indulgence in restrictive trade practices by a party stated to be 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.

9.3. The issue before the Tribunal is whether the practices identified by Appellant amounts to a "restrictive trade practices" or not as identified in Impugned

Order. For this Rule of Reason is to be applied to decide whether Trade Practice is restrictive or not. It is correct to say that as per the principle laid down by Hon'ble Supreme Court, and followed by this Tribunal in various judgments, any restrictions as to area or price will *per se* not be a RTP. For this to be looked into is 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 and three aspects are to be considered for establishing Restrictive Trade Practices:

- (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

9.4. 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. 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. Such practice has to be peculiar to the business. Therefore, comprehensive facts have got to be considered to decide the issue and one needs to consider whether facts and circumstances in the instant case for which Appellant is accountable has any actual or probable effect of diminishing or preventing competition.

- 9.5. In the present case nothing on the record has been showed by the Respondent which could have resulted in establishing Restrictive trade practices adopted by Appellant. Knowingly well with the contingency of availability of Vasai Gas, Respondent has signed the Term Sheet. There was clear understanding between the parties that in case of nil/less availability of gas from Vasai Field or delay in availability of gas from Vasai fields or any Government directives, the Appellant will offer any other Market Driven Price (MDP) gas to Respondent including RLNG which will again be subject to availability and mutually agreed terms and conditions including price.
- 9.6. Further the term sheet was not exclusive and Respondent was free to sign agreement with others for sourcing of gas. No restriction was ever imposed by Appellant on Respondent for sourcing gas. Moreover Term sheet signed between the parties was subject to condition precedent upon firstly availability of gas and secondly for signing of GSA with upstream supplier, which admittedly was never signed between Appellant and upstream Supplier, Further detailed agreement between GAIL and Sravanthi for supply of gas was also required to be signed as per Term Sheet, which was also never signed and was not extended beyond March, 2012, got frustrated thereby resulting in extinction of the obligation of the parties under the Term Sheet.
- 9.7. Term Sheet do not debar or has restricted or prevented the Respondent from arranging gas from any other source and was not an exclusive arrangement with GAIL. Respondent was free to arrange gas from any source in case it was not inclined to purchase gas from Appellant on market driven prices, upon there being no gas from Vasai field of ONGC.

- 9.8. Further Gas Transmission Agreement dated 11.11.2010 was executed between the parties, which was also pursuant to the request of Respondent made vide letter dated 29.10.2010 for booking 1.8 MMSCMD gas capacity in the Pipeline for their plant at Kashipur. The limited obligation of the Appellant under the GTA is only to transport the gas sourced by the Respondent.
- 9.9. Respondent has admittedly failed to take any meaningful steps to arrange gas for the purpose of transportation through the pipeline of the Appellant and liability cannot be shifted upon the Appellant.
- 9.10. Gas Transmission Agreement and Term Sheet (which was later required to be converted into Gas Supply Agreement) are completely independent agreements and contractual obligations under the GTA cannot be interlinked with the obligations under Term sheet or vice - versa.
- 9.11. Respondent has admittedly failed to take any meaningful steps to arrange gas for the purpose of transportation through the pipeline of the Appellant and liability cannot be shifted upon the Appellant. It is also pertinent to mention that Respondent had signed Term Sheet for supply of 0.6 MMSCMD on Firm basis which was only part of their total gas requirement of two plants of around 1.8 MMSCMD which also establishes that Respondent was not solely relying on Gas from Vasai fields.
- 9.12. Further there was no such condition precedent placed on either party in the CT executed under the GTA, which is mutually agreed to be nil by the parties,. to kick in the requirement of satisfaction of a condition precedent. In fact MOM between the parties dated 11.11.2010 shows the fact the Respondent was not dependent on Vasai Gas only and was trying to be source from others. The

respondent was well aware about its obligation of sourcing of gas, non-availability of Vasai gas and in fact was also trying to get the gas from other sources. In fact, the Appellant also offered the available MDP gas at the relevant price which was refused by the respondent considering it non profitable.

9.13. Respondent was also well aware that the CT Start Date is 01.06.2011 (which is ending on 31.05.2021), and that monthly ship or pay charges will not be applicable only during the "commissioning period" which ended on 01.09.2011 after which the applicable Ship or Pay charges start accruing on them in case they are unable to source gas once the construction of pipeline is completed and their power plant is connected. In order to refrain from paying ship or pay charges, Respondent itself wrote the letter to Appellant on 15.11.2011 (which was after the completion of commissioning period) requesting to amend and to read "commissioning period beginning on 01.12.2011....". Respondent never asked for change of CT Start Date but only to amend the commissioning period which was already ended on 01.09.2011. The Respondent has itself admitted that it was not ready and willing to receive gas on 01.06.2011 from the Appellant or other sources and therefore the only relevant factor would be as when the Appellant was ready to commence transportation.

9.14. The existing facts in the case shows that CT Start Date, as mentioned in CT#1, was not considered to be so sacrosanct, according to both the parties at the relevant time, so as to adjudicate the rights and obligations of the parties and the same could be amended/modified at the will of the parties however this issue was first time raised by Respondent in 2014 when the invoices were

raised by Appellant. Board in its impugned order itself has held that Appellant could charge transmission charges as per Tariff order.

- 9.15. The ship or pay claim from 1.06.2012 onwards was claimed by the letters dated 17.08.2015 and certainly could not have been the basis of the complaint filed by the Respondent. In fact, Respondent remained silent until it received the invoices on Ship or Pay charges and alleged imposing exorbitant prices through non market determined RLNG without producing any evidence that Appellant has resorted to discriminatory pricing. The invoices raised by the Appellant were under the GTA and not under the Term Sheet.
- 9.16. GSA & GTA are independent to each other i.e. mutually exclusive not inclusive and Respondent was well aware of non-availability of Vasai Gas even at the time of signing of Term sheet in 2010.
- 9.17. Appellant's pipeline to the respondents' power plant was commissioned on 01.06.2012 and could claim/invoice from the date of commissioning as per GTA.
- 9.18. Respondent failed to show any restriction were imposed or were ever prevented by Appellant for sourcing gas from others. In fact, Appellant also offered MDP gas on a best endeavour basis at the prevalent price which Respondent could have taken it. However, considering it non profitable Respondent refused to take it.
- 9.19. Appellant has neither restricted gas supply nor gas transportation or manipulated in prices.

- 9.20. Enforcement of GTA by Appellant in no manner has brought about manipulation of prices or condition of delivery of flow of gas supply. It was based on the tariff orders issued by the Board.
- 10.** It is a matter of fact that the Appellant and the Respondent companies are not competitors to each other and in no terms has the effect actual or probable, of restricting, preventing or distorting, lessening or destroying competition for the purpose of falling into RTP. There is no evidence adduced by the Respondent to even remotely to establish any RTP by the Appellant.
- 11.** In view of the above, this Tribunal is of the considered opinion that Board has erred in its impugned majority order dated 11.04.2016 and concludes the matter as under:
- 11.1. Term sheet and GTA are independent agreement and has no link, Board's decision of holding that obligation of Term Sheet and GTA are interlinked is factually incorrect.
- 11.2. Contingency of Vasai gas was very well within the knowledge of Respondent.
- 11.3. Respondent failed to establish the misrepresentation by the Appellant w.r.t the non-availability of Vasai Gas.
- 11.4. The Capacity Tranche Agreement #1 (CTA) and the Gas Transmission Agreement (GTA) executed between the Appellant and the Respondent are enforceable.
- 11.5. Board also mistook that GTA was linked with Term Sheet and/ or Vasai gas and erred in holding that obligation of gas supply was on the Appellant under

the GTA which was actually on the Respondent as GTA was independent of GSA.

- 11.6. Board erred in holding that the Term Sheet obligations were not complied by the Appellant. Term Sheet was a contingent contract subject to condition precedent and was not enforceable.
- 11.7. Invoices raised by the Appellant for the “Ship or Pay’ charges, are as per the valid GTA and not under the Term Sheet as stated by the Board, therefore the contention that invoices were raised under the Term Sheet is factually incorrect. The invoices raised by Appellant were not retrospective.
- 11.8. Board has wrongly interpreted CT Start Date in its Impugned order and completely overlooked clause 5 while interpreting GTA.
- 11.9. Respondent failed to show that any restriction was ever imposed by the Appellant for transporting gas. Respondent has admittedly failed to take any meaningful steps to arrange gas for the purpose of transportation through the pipeline of the Appellant and liability cannot be shifted upon the Appellant.
- 11.10. The decision of the Board to hold that non fulfillment of condition precedent specified in clause 3.1 under the GTA amounts to Restrictive Trade Practice is factually incorrect.
- 11.11. Board misled itself with respect to Security Deposit as it had no co-relation with the Term Sheet but was submitted under GTA exclusively.

## **ORDER**



Having regard to the factual and legal aspects of the matter as stated above, we are of the considered opinion that the Board has erred in holding that Appellant has indulged in Restrictive Trade Practice in its Impugned order dated 11.04.2016 as per PNGRB Act.

Accordingly the Appeal is allowed and the impugned order dated 11.04.2016 is quashed and set aside.

No order to the cost.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING  
ON THIS 27<sup>th</sup> DAY OF OCTOBER, 2021.

(Dr. Ashutosh Karnatak)  
Technical Member

(Justice R.K. Gauba)  
Judicial Member

**REPORTABLE / ~~NON-REPORTABLE~~**