

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

APPEAL NO. 245 OF 2021

Dated: 06th October, 2021

**Present: Hon'ble Mr. Justice R.K. Gauba, Judicial Member
Hon'ble Dr. Ashutosh Karnatak, Technical Member (P&NG)**

In the matter of:

HARYANA CITY GAS DISTRIBUTION LIMITED

[Through its Director]

A-149, Sushant Lok, Phase-1,

Gurugram 122 002

info@hcgonline.co.in

... Appellant

VERSUS

1. PETROLEUM & NATURAL GAS REGULATORY BOARD

[Through its Secretary]

1st Floor, World Trade Center,

Babar Road

New Delhi -110 001

contact@pngrb.gov.in

2. BHARAT PETROLEUM CORPORATION LIMITED

[Through Its Authorized Representative]

28-A, ECE House, Kasturba Gandhi Marg,

NEW DELHI 110001

DLBPCLSAPTC@bharatpetroleum.in

... Respondents

Counsel for the Appellant(s) : Mr. Shiv Kumar Pandey
Mr. Chandrashekhar Chaklabbi

Counsel for the Respondent(s) : Mr. Rahul Sagar Sahay
Ms. Pinki Mehra
Ms. Veena Raju
Mr. Siddharth Bangar
Mr. Mohit Budhiraja
Ms. Shipra Malhotra for R-1
Mr. Rajat Navet for R-2

J U D G M E N T

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

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

2. The appeal under Section 33(1) of the Petroleum & Natural Gas Regulatory Board Act, 2006 (in short, "*PNGRB Act*") has assailed the Order of Petroleum & Natural Gas Regulatory Board (in short, the "*Board*") communicated on 19.06.2020 to the second respondent i.e. Bharat Petroleum Corporation Limited ("*BPCL*") thereby indicating that the authorization to lay, build, operate or expand City or Local Gas Distribution Network (in short, "*CGD Network*") for Geographical Area ("*GA*") of Rohtak has been restituted in its favour. The appellant, Haryana City Gas Distribution Limited (for short, "*HCGDL*" or "*Appellant*") is a private entity engaged in the business of laying, building, operating, etc. of CGD network and has felt aggrieved by such decision.

3. The facts and background of this appeal lies in a very narrow compass and may be taken note of at the outset. BPCL (second respondent herein) had been awarded authorization for development of CGD network in GA of Rohtak by the Board on 09.04.2018 and in terms of the requirements under the relevant Regulations it had submitted a

Performance Bank Guarantee (“PBG”, for short) of Rs. 713 crores to the Board. On 07.06.2018, BPCL incorporated a subsidiary, wholly owned by it, named Bharat Gas Resources Limited (“BGRL”, for short). It has been stated that BGRL had been a bidder in 9th and 10th CGD bidding rounds held by the Board in the year 2018 and has been awarded four GAs for development of CGD Network.

4. Indisputably, on 27.11.2018, BPCL had submitted a request before the Board seeking approval of the transfer of authorization issued in respect of four GAs, *inter-alia*, including GA of Rohtak (which is the subject matter of the present controversy) in favour of BGRL, invoking the jurisdiction and power of the Board under Regulation 10(3) of the PNGRB (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations 2008 (hereinafter referred to as, “*the Authorization Regulations*”).

5. On 12.07.2019, the Board approved the request of BPCL for transfer of the authorization of GA for Rohtak in favour of BGRL. A formal communication to that effect was issued on the said date to BPCL, the relevant part thereof reading thus:-

“...
2. PNGRB, after examination of your request on the above subject has accepted the proposal/request to amend the authorization of Geographical Area of Rohtak district in favour of Bharat Gas Resources Limited (BGRL) from the existing entity

Bharat Petroleum Corporation Limited (BPCL), subject to the condition that BGRL would continue to be a wholly owned subsidiary of BPCL and that BGRL shall submit fresh/amended Performance Bank Guarantee of Rs. 713 crore wherein BGRL shall be named as the authorized entity. Accordingly, it is requested to submit the amended PBG within 60 days from the receipt of this communication. Other terms and conditions, including work programme shall remain same as per authorization letter issued by PNGRB on 09.04.2018 for Rohtak GA.

3. *Further, BGRL will be obliged to inform the Board in case any changes are made in its equity structure. Besides, BGRL shall also abide by the existing/modified terms and conditions of the authorization including compliance with the service obligation and adherence to the quality of service standard.*

4. *BGRL is accordingly permitted to take over the activities of laying building operating or expanding the CGD network of Rohtak district GA.*

(Emphasis supplied)

6. Though, BGRL, by its consent in writing, on 16.08.2019 appears to have accepted the transfer of authorization on basis of the above noted communication, it is not in dispute that it did not submit the PBG of Rs. 713 Crore as was required. It took extension of time up to 31.10.2019 and, later, made another request for the time to be extended up to 31.12.2019 (by communication dated 25.10.2019). The fact remains that the requisite PBG was never furnished.

7. On 21.11.2019, BPCL addressed a request to the Board with reference, *inter-alia*, to the transfer of CGD network authorization of Rohtak GA. The relevant part of the said letter of request reads thus: -

“ ...

The request for change in authorization was given by BPCL consequent to its Board approving transfer of its Gas business of BGRL through a slump sale route. The slump sale included inter alia the LNG bulk business, CGD business, share-holdings in various entities where BPCL holds shares, etc. This required approvals from all the counter parties, including inter alia the Gas suppliers like Petronet LNG Ltd., RasGas, Mobil Australia, Re-gasifiers, Gas transporters, JV partner, etc.

While all the above approvals are nearing finality, the intended divestment of Govt. stake in BPCL and transfer of Management control to a strategic investor, has posed many new way forward issues, including PBCL-BGRL asset transfer.

We would therefore request you to treat the Bank Guarantees of BPCL as valid till date of asset transfer from BPCL to BGRL, which now is predicated on progress of disinvestment process.

Both, BPCL and BGRL hereby commit to submit the revised Bank Guarantees with effect from the date of asset transfer. In view of the above, we would request you to keep the authorization transfer on hold and rely upon the BGs already submitted by BPCL.

...”

(Emphasis supplied)

8. The above noted request dated 21.11.2019 eventually resulted in the impugned order communicated on 19.06.2020. The said document reads thus:-

“ ...

This is with reference to transfer of authorization letter issued by PNGRB on 12.07.2019 for Rohtak GA and subsequent communications from BPCL with respect to restituting back the authorization of Rohtak GA from BGRL to PBCL due to the ongoing divestment process of Government stake in BPCL and consequently the entity's inability to submit the required amended/fresh Performance Bank Guarantee (PBG).

2. As per the condition mentioned in the transfer letter, BGRL was required to submit the amended/fresh PBG within 60 days of

transfer, i.e., by 10.09.2019. Since BGRL has not submitted the PBG till date, hence, the condition as mentioned in the transfer letter has not been fulfilled.

3. In view of the above, PNGRB hereby withdraws the conditional transfer of authorization of Rohtak GA from BGRL and restitutes the authorization back to BPCL, thus making BPCL as the authorized entity for development of CGD network in Rohtak GA. Other terms and conditions including work programme shall remain same as per authorization letter issued to PBCL by PNGRB on 09.04.2018 for Rohtak GA.

...”

(Emphasis supplied)

9. It is the contention of the appellant (HCGDL) that the above-quoted impugned decision dated 19.06.2020 is illegal because it violates the mandate of Regulation 10(3) of Authorization Regulations, 2008, it being impermissible to allow transfer of authorization from a wholly owned subsidiary to its parent company. The appellant avers that while passing the said impugned Order dated 19.06.2020 the Board has failed to appreciate that the rights of BPCL had already been *extinguished* by virtue of decision dated 12.07.2019 whereby the authorization of GA of Rohtak was transferred, on request, in favour of BGRL which, in turn, had accepted the said transfer. It is also the contention of the appellant that BGRL having failed to submit the PBG in terms of the approval for transfer granted on 12.07.2019, the authorization granted in respect of GA of Rohtak is to be *deemed* to have been *cancelled* in terms of Regulation 10(1) of the Authorization Regulations.

10. The appellant presses the following prayers through the appeal:

- (a) *Allow the present appeal and quash and set aside the decision dated 19.06.2020 by the Petroleum and Natural Gas Regulatory Board.*
- (b) *Direct that the BGRL has failed to meet the requirement of transfer of authorization vide letter dated 12.07.2019 and accordingly the authorization issued to BGRL is revoked.*
- (c) *That this Hon'ble Appellate Tribunal be pleased to grant any other appropriate relief deemed appropriate in the facts and circumstances of the present case.*
- (d) *Allow the appeal as prayed and pass any other order that is deemed fit and proper under the facts and circumstances of the case.*

11. The appeal is resisted by the Board (first respondent) as also by BPCL (second respondent), each questioning the *locus-standi* of the appellant to bring up these issues before this Tribunal under Section 33 of PNGRB Act, the arguments being that the appellant does not have any right, much less vested right, in the authorization of GA of Rohtak and cannot claim to be a "person aggrieved" within the meaning of Section 33(1) of PNGRB Act. The second respondent also questions the maintainability of the appeal on the preliminary objection that there is a defect of non-joinder in as much as that BGRL has not been included in the array of parties to these proceedings.

12. We have given our considered thoughts to the submissions on the issue of *locus standi*. We may note here that it is an admitted case of the second respondent that when the bidding process with regard to GA of

Rohtak had been concluded the appellant had raised a dispute with objection that such authorization could not be accorded because it (the appellant) was a pre-existing entity working in the said GA. The objection of the appellant to such effect was rejected by the Board by communication dated 04.11.2015. The bidding process, grant of authorization and rejection of the objection were questioned by Civil Writ Petition No. 26501 of 2015 before the High Court of Punjab and Haryana by the appellant. The said writ petition, however, came to be dismissed by Order dated 09.03.2018. It is an admitted case that the judgment of the High Court is under challenge before the Hon'ble Supreme Court by Civil Appeal No. 3284 of 2018 which matter is still pending.

13. It may be noted that the appellant does not have an immediate/direct stake involved in the continuance of the authorization of GA of Rohtak as on date. But it cannot be said that the appellant is wholly an alien to the authorization process *vis-à-vis* GA of Rohtak. Its appeal has been entertained by the Hon'ble Supreme Court and the contentions of the appellant concerning the authorization are *sub-judice* therein. In these facts and circumstances, we are not inclined to throw out the appeal at hand on the technical objection of want of *locus standi* with reference to the exposition of the expression "*person aggrieved*" by judgments of Hon'ble Supreme Court reported as *Jasbhai Motibhai Desai v. Roshan Kumar, Haji*

Bashir Ahmed, (1976) 1 SCC 671 and *Ayaaubkhan Noorkhan Pathan vs. The State of Maharashtra and Ors.*, MANU/SC/0939/2012 besides judgment of this tribunal reported as *Reliance Industries Limited v. Petroleum & Natural Gas Regulatory Board*, 2014 SCC OnLine APTEL 5: [2014] APTEL 7.

14. BGRL, the wholly owned subsidiary of second respondent/BPCL, had some interest involved in the GA of Rohtak so long as the request for transfer of the authorization in its favour was being pursued for or on its behalf. As a result of the request made by its parent company (BPCL) on 21.11.2019, the Board by the impugned decision communicated on 19.06.2020 closed the chapter in that regard. In the present matter, it is not the *right* of BGRL to take over the authorization from BPCL in terms of the approval granted on 12.07.2019 which is subject matter of scrutiny. What is being challenged essentially is the right of BPCL to continue to operate as the authorized entity in the said GA. In these facts and circumstances, BGRL is definitely not a necessary party. Therefore, we do not give any weight to the objection of non-joinder, the absence of BGRL from the fray being inconsequential.

15. The Regulation 10 of the Authorization Regulations which is at the heart of the matter needs to be quoted, to the extent germane, as under: -

“10. Grant of authorization.

(1) The successful entity shall be issued a letter of intent (LOI) upon finalization of the bid. The entity

shall be required to furnish performance bond within 30 days of issue of LOI and complete such other formalities as may be required by the Board. Upon furnishing the performance bond and completion of such other formalities, the authorization shall be granted to the successful entity, in the format given in Schedule D, within 30 days;

Provided that the Board may extend the date for submission of performance bond for a period not exceeding 15 days, failing which LOI shall be deemed to have been withdrawn or cancelled.

Provided further that in case of non-submission of performance bond within the stipulated time, the bid bond shall be forfeited or encashed and such bidder entity shall be considered at default and shall be barred for a minimum period of three years from bidding. Further, the process of issuance of LOI and grant of authorisation to the bidder entity with second highest composite score shall be carried out in the same manner as specified in sub-regulation (3) of regulation 7.

(2) The grant of authorization is subject to the entity achieving a firm natural gas tie-up and a financial closure as per regulation 11.

(3) The grant of authorization to the entity shall not be assigned by way of sale, transfer or any other manner or surrendered to or in favour of any person or entity during the period of five years from the date of its issue or till the achievement of work programme, whichever is earlier;

Provided that there shall be no bar on the entity on transferring less than fifty per cent equity shares during such period of five years from the date of authorization or until the achievement of work programme, whichever is earlier, subject to the condition that the lead partner of the original consortium or joint venture shall hold not less than the percentage stake lower than any other partners. The lead partner shall be declared upfront in the bid.

No restructuring of the entity is allowed after submission of the bid and before issuance of Grant of Authorization.

Provided also that the Board may accept transfer of authorization by the entity to its wholly owned subsidiary company, subject to the condition that the entity provides to the Board a corporate guarantee, in a form specified at Appendix III.

Provided also that the Board may also accept transfer of authorization from a wholly owned subsidiary company to its parent company.

...”

(Emphasis supplied)

16. The learned counsel for the appellant was at pains to argue that the approval of the transfer request communicated by the Board on 12.07.2019 having permitted BGRL to “*take over the activities of laying, building, operating or expanding the CGD network of Rohtak district GA*”, the transfer of the authorization of GA within the meaning of second proviso to Regulation 10(3) by the parent company in favour of its wholly owned subsidiary company was a concluded process, the rights of the erstwhile authorized entity (BPCL) having thereby been *extinguished*. It was submitted that since the transferee (i.e. BGRL) did not furnish the PBG which was condition precedent attached to the approval of authorization, the authorization in favour of BGRL will have to be deemed “*to have withdrawn or cancelled*” within the meaning of first proviso to Regulation 10(1). It is further the argument of the appellant that the Authorization

Regulations as they stood at the relevant point of time did not conceive of transfer of authorization from the hands of wholly owned subsidiary in favour of its parent company. It is submitted that the Regulations then only permitted such transfer of authorization from the parent company to its wholly owned subsidiary company. Though it is submitted that by amendment to the Regulations brought into effect from 07.09.2021, the reverse process of transfer of authorization from the hands of subsidiary company in favour of the parent company is also made permissible, such amended Regulations cannot be allowed to have retrospective effect. It is argued that the Board is a creature of statute and must follow the law scrupulously and since the Regulations then in operation did not permit the transfer of authorization from the subsidiary company in favour of parent company, the impugned decision is bad in law. Reliance is placed on the judgments passed by the Hon'ble Supreme Court reported as *N.C. Dhoundial v Union of India and Others [(2004) 2 SCC 579]* and *Municipal Corporation of Greater Mumbai (MCGM) v Abhilash and Others [(2020) 13 SCC 234]*.

17. It is the argument of the appellant that both the Board and the entities involved (BPCL and BGRL) had acted on the transfer approval accorded on 12.07.2019 treating it as *fait-accomplis*. It is pointed out from the various communications essentially engaged in by BGRL wherein it seems to have

asserted itself as the authorized entity in respect of GA of Rohtak. Reference is also made to a bid document wherein certain contracts were offered *vis-à-vis* CGD network, *inter-alia*, of GA of Rohtak by BGRL. It is also pointed out that in the internal office noting dated 25.11.2019 initiated by a member of the Board with reference to the transfer of authorization from BPCL to BGRL, the request for time extension (presumably for PBG) beyond 31.10.2019 was placed before the Chairperson of the Board.

18. We find no merit in the arguments of the appellant, based on the material in above nature, to the effect that the transfer of the authorization of GA was a process that had been concluded irreversibly on 12.07.2019 for the reason the parties, including the Board, had accepted and acted on the said supposition during the subsequent period. In fact, not only the communication dated 12.07.2019 (quoted earlier) but all subsequent communications emanating from the Board, including the impugned decision dated 19.06.2020, as indeed even the office noting dated 25.11.2019, reflect that the approval of transfer of the authorization from BPCL in favour of BGRL was conditional, it being subject to furnishing of the PBG by the transferee (wholly owned subsidiary of BPCL). As noted earlier, the condition of PBG was never fulfilled by BGRL. The entity, in whose favour the transfer was sought did not pursue the said matter effectively. The condition not having been fulfilled the order did not result in

the actual transfer of the authorization. On the contrary, there is enough material on record to show that BPCL never forfeited the authorization. It has kept the PBG furnished by it to the Board (at the time of grant of authorization in its favour) alive till date. There is sufficient material on record also to show that BPCL has continued to assert itself as the authorized entity particularly after submission of the letter dated 21.11.2019 seeking the transfer process to be kept *on hold* and also in the wake of the impugned decision rendered on 19.06.2020.

19. The submissions of the appellant that the rights of BPCL stood extinguished by virtue of the Order dated 12.07.2019 or that on account of failure on the part of BGRL to furnish the PBG in terms of communication dated 12.07.2019 the authorization of GA of Rohtak is to be deemed to have been cancelled are fallacious. At the cost of repetition, we observe here that the process of transfer was inchoate till the request was withdrawn by communication dated 21.11.2019 and the approval itself was rolled back by the Board by impugned Order dated 19.06.2020.

20. BPCL having kept the PBG alive, its rights in the authorization cannot, by any stretch of reasoning or logic, be treated as having been extinguished. The provision of deemed cancellation of the authorization for failure to furnish PBG within the time specified by Regulation 10(1) is not attracted to BPCL. We are satisfied that harmonious reading of Regulation

10(1) and Regulation 10(3), the latter permitting transfer to wholly owned subsidiary, shows that the default on the part of BGRL to furnish PBG can only result in cancellation or withdrawal of the approval of transfer of the authorization in its favour but can have no adverse effect on the rights in the authorization vesting in the parent company i.e. BPCL.

21. We do find that use of the words “*PNGRB restitutes the authorization back to the BPCL...*” as employed in the impugned decision dated 19.06.2020 a little jarring. The chronology of events shows that the authorization in favour of BPCL never came to an end. It had been selected by the bid process and had fulfilled all the conditions including furnishing of PBG which has been kept alive throughout. It had made a request for transfer of the authorization in favour of BGRL, its wholly owned subsidiary company, but BGRL not having fulfilled the conditions, the transfer did not come into effect. In these circumstances, BPCL continues to occupy the space as the authorized entity. Since BPCL was never displaced as the authorized entity at any point of time, there is no question of it being “*restituted*”. The Board will have to understand that in formal communications of such nature, the language used has to be appropriate and unambiguous.

22. We find the reliefs sought by the present appeal, particularly prayer clause (b), to be misconceived and misplaced. The Board itself has revoked its permission for transfer since the requirement of PBG was not fulfilled. This is the import of the impugned order brought in question by the appellant. In this view we find no occasion for a direction to such effect being issued.

23. For the foregoing reasons, we find the appeal to be wholly devoid of substance and merits. It is dismissed.

24. No order as to costs.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING
ON THIS 06th DAY OF OCTOBER, 2021.

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

(Justice R.K. Gauba)
Judicial Member