

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

APPEAL NO. 101 OF 2022

Dated: **18.05.2022**

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

In the matter of:

ASSAM GAS COMPANY LIMITED

Having its registered office at:

P.O. Duliajan,
Distt: Dibrugarh,
Assam- 786602

... **Appellant(s)**

Versus

**PETROLEUM AND NATURAL GAS
REGULATORY BOARD**

1st Floor, World Trade Centre,
Babar Road,
New Delhi- 1100001

... **Respondent(s)**

Counsel for the Appellant (s)	:	Ms. Molshree Bhatnagar Ms. Shefali Tripathi Mr. Aditya Jain Mr. Neelkandan Rahate
-------------------------------	---	--

Counsel for the Respondent (s)	:	Mr. Raghavendra Shankar Ms. Pinki Mehra Ms. Arshiya Sharda Ms. Tanuja Dhoulakhandi Ms. Shipra Malhotra
--------------------------------	---	--

JUDGMENT (ORAL)

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

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

2. We had noted the background facts, the contentions raised and the submissions made at the hearing, at some length, in the order dated 20.04.2022, which had to be corrected to remove two errors that had crept in, by subsequent order dated 04.05.2022. The order dated 20.04.2022, as corrected by order dated 04.05.2022, reads thus:

“The dispute relates to a transportation pipeline for natural gas that had statedly been established by the appellant in 1986, its economic life then conceived to expire in 2011. The Petroleum and Natural Gas Regulatory Board Act was enacted in the year 2006 and was notified on 03.04.2006. In terms of the said legislation, The Petroleum and Natural Gas Regulatory Board (hereinafter referred to as “the Board”) was constituted by the Central Government on 01.10.2007, which, by virtue of the provisions of the law, became the “appointed date”. In exercise of the powers vested in it by the law, the Board eventually framed the necessary regulations, two of which are relevant for the present purposes. The first such regulation is known as ‘Petroleum and Natural Gas Regulatory Board (Authorising Entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations, 2008’, which were notified on 06.05.2008 (hereinafter referred to as “authorisation regulations, 2008”). This was followed by the framing and notification of ‘The Petroleum and Natural Gas Regulatory Board (Determination of the Natural Gas Pipeline Tariff) Regulations, 2008’, published in the official gazette on 20.11.2008 (hereinafter referred to as “tariff regulations, 2008”).

Under The Petroleum and Natural Gas Regulatory Board Act (“the PNGRB Act”), an entity intending to lay, build, operate or expand any

pipeline either as a common carrier or a contract carrier or for development of a natural gas distribution network, is obliged to take proper authorization from the Board, there being an express inhibition against any such activity to be indulged in without obtaining proper authorization by provision contained under section 16. However, the proviso to section 17 of the PNGRB Act protects such entities as were engaged in laying, building, operating or expanding, inter alia, a pipeline as common carrier or contract carrier, "immediately before the appointed date", from applying for any such authorization. This proviso, however, is subject to the condition that in case there is a "change in the purpose or usage", the entity would necessarily require a separate authorization to be granted by the Board. Thus, except in the case of change in the purpose or usage, the existing work of such nature undertaken prior to the appointed date is covered by "deemed authorization".

The title to deemed authorization, however, is subject to further provision contained in section 17(1) which may be noted hereunder:

"17. Application for authorisation.— (1) An entity which is laying, building, operating or expanding, or which proposes to lay, build, operate or expand, a pipeline as a common carrier or contract carrier shall apply in writing to the Board for obtaining an authorisation under this Act:

Provided that an entity laying, building, operating or expanding any pipeline as common carrier or contract carrier authorised by the Central Government at any time before the appointed day shall furnish the particulars of such activities to the Board within six months from the appointed day."

By the impugned order dated 04.06.2019, the Board determined the transportation tariff in respect of the pipeline of the appellant, the economic life whereof presently stands extended up to 31.03.2021, on account, inter alia, of augmentation, acceptance and validation etc. The appellant is aggrieved by the impugned order on two counts namely (i) the method and formula applied for calculation of tariff determination; and (ii) the enforcement of the transportation tariff with effect from 20.11.2008 (the date on which tariff regulations 2008 became effective). It is submitted on behalf of the appellant that the regulatory framework

has been challenged on question of method and formula prescribed by the tariff regulations before the High Court of Delhi by a Civil Writ Petition presented in 2021, which, however, is yet to be registered and taken up by the Court for hearing. It was submitted at Bar by the learned counsel for the appellant that for this reason the challenge to the impugned order on that score is not pressed in the present appeal, it being restricted to the second issue only i.e. date of enforcement of the tariff order.

It appears that the appellant had applied for authorisation in respect of the pipeline in question before the Board on 19.10.2012. The authorization was granted by a formal order / communication on 20.12.2013. It is the contention of the appellant that in this view the tariff order could not have been made effective vis-à-vis the pipeline in question from 20.11.2008 and consequently, the directions to the appellant to refund the differential to its customers in the preceding period is unjust, unfair and unlawful.

During the course of hearing, however, question arose as to whether there was strict compliance with the requirement of proviso to section 17(1) of the PNGRB Act, as quoted above, and further as to what was the purpose of application made for authorization submitted before the Board on 19.10.2012, more than five years after the appointed date.

The learned counsel for the appellant fairly conceded that there is no material available as on date as to whether the particulars were furnished to the Board within the period of six months after the appointed date in respect of the pipeline within the requirement of the proviso to section 17(1). She, however, is not clear as yet, still awaiting full instructions, on the issue as to what was the reason for the application for authorisation to be submitted on 19.10.2012. To put it more clearly, she needs to find out whether the trigger for moving such an application was in terms of section 19 read with section 16 of PNGRB Act or for any other reason.

In our view, clarity on the above aspect is necessary to examine as to whether the tariff order should have been applied retrospectively from 20.11.2008. Conversely, connected to this would also be the question as to whether in the face of admitted non-compliance with

section 17(1), the business undertaken by the appellant after a lapse of six months of the appointed date and till the grant of authorization, was authorized or lawful or otherwise, and in the event of latter be the case, as to what are the consequences that must follow.

In the above facts and circumstances, we direct the appellant to discover on oath all necessary facts supported by the requisite documentary material. The needful shall be done well in time before the next date. The respondent Board, in the meanwhile, shall also assist by bringing better clarity on the basis of records available with it.

3. Pursuant to the directions by order dated 20.04.2022, the appellant had submitted an affidavit discovering certain facts, the respondent Board also having filed a reply affidavit in response thereto.

4. The matter came up for consideration again on 11.05.2022 when exception was taken to certain assertions in the affidavit of the Managing Director of the appellant that had been submitted earlier. The clarification given by the learned counsel for the appellant in that regard was duly noted and the matter having been further heard, certain tentative views were recorded. The order dated 11.05.2022 may be extracted, to the extent relevant, as under:-

"2. While taking note of the background facts, in brief and the submissions made and while giving certain directions for discovery, by proceedings recorded on 20.04.2022, we had noted as under:

"By the impugned order dated 04.06.2019, the Board determined the transportation tariff in respect of the pipeline of the appellant, the economic life whereof presently stands extended up to 31.03.2021, on account, inter alia, of augmentation, acceptance and validation etc. The appellant is aggrieved by the impugned order on two counts namely (i) the method and formula applied for calculation of tariff determination; and (ii) the enforcement of the transportation tariff with effect from 20.11.2008 (the date on which tariff

regulations 2008 became effective). It is submitted on behalf of the appellant that the regulatory framework has been challenged on question of method and formula prescribed by the Tariff Regulations before the High Court of Delhi by a Civil Writ Petition presented in 2021, which, however, is yet to be registered and taken up by the Court for hearing. It was submitted at bar by the learned counsel for the appellant that for this reason the challenge to the impugned order on that score is not pressed in the present appeal, it being restricted to the second issue only i.e. date of enforcement of the tariff order."

(Emphasis supplied)

3. In compliance with the directions in the abovesaid order dated 20.04.2022, the appellant has submitted an affidavit sworn by Mr. Gokul Chandra Swargiyari, Managing Director of the appellant company attested on 09.05.2022, discovering certain facts/documents. It is pointed out by the learned counsel for the Board that in para 5 and 6 of the said affidavit, the Managing Director of the Appellant Company has stated as under:

"5. That, in view of the above, Appellant apprised the Hon'ble Tribunal that the Appellant has preferred a writ before the Delhi High Court against the Tariff Regulations, limited to the extent of the 'Volume Divisor' methodology that has been notified by the Respondent Board thereunder. In view of the same, the Appellant crave the leave of the Hon'ble Tribunal to not press issue (b) above at this juncture since if the methodology is set aside, the entire exercise of tariff determination will have to be undertaken de-novo by the Respondent Board. Therefore, the Appellant craves the leave of this Hon'ble Tribunal to approach this Hon'ble Tribunal subsequently, if the need so arises after the adjudication on the writ pending before the Delhi High Court.

6. That, on 20.04.2022, this Hon'ble Tribunal has recorded the aforesaid submission of the Appellant, however, the leave to approach this Hon'ble Tribunal subsequently, has not been mentioned in the said Order. Therefore, it is once again submitted and humbly prayed that such leave may be granted by this Hon'ble Tribunal, otherwise, grave prejudice be caused to the Appellant in case it did not succeed before the writ court."

(Emphasis supplied)

4. The learned counsel for the Board submitted that there can be no quarrel with the assertion that in the event of writ court accepting the challenge to the methodology of calculation, the impugned decision will require reconsideration by the Board. He, however, submitted that the appellant having given up the said ground of challenge before this Tribunal in this appeal, it was improper on the part of the Managing Director to seek to reserve the said contention for being re-agitated later in case the appellant does not succeed before the writ court.

5. Upon being called upon to explain, Ms. Molshree Bhatnagar, advocate representing the appellant submitted that the plea for contentions to be reserved for being re-agitated in the event of failure before the writ court was inadvertently added, she having been instructed to reiterate what was submitted before this Tribunal on 20.04.2022. Thus, for clarity, we record that the appellant gives up the ground of challenge on the issue of methodology before this Tribunal and restricts the appeal only on the issue of date of applicability of the Tariff Order, not pressing for any leave of the nature mentioned in para 6 of the affidavit of its Managing Director as quoted above.

.....

7. During the course of hearing today, it was further brought out that though, PNGRB Act was notified on 01.10.2007, that turning out to be the "Appointed Date", section 16 was notified only on 15.07.2010.

8. From the documents and information discovered through the affidavit, it seems to be the case of the appellant that compliance with the requirement of furnishing the particulars within six months of the appointed date was made by the appellant on 05.12.2007. The Board seeks to join issue with this by submitting, inter alia, that there is no clear document submitted in support, the other documents on record indicating that what was furnished to the Board on 05.12.2007 was particulars of the CGD Network and not of the pipeline in question. Be that as it may, there seems to be no denial on the part of the appellant that no information in format prescribed by the schedule - H with reference to regulation 17 of the Authorization Regulations which came into force on 06.05.2008 was ever submitted. Though, it must be added, requisite information on similar lines appears to have been furnished when application for authorization was moved on 19.10.2012. It is claimed that some information was furnished on 04.05.2010, but there seems to be no clarity as to whether such

submission could be treated as due compliance with the requirement of law and regulations.

9. Against the above backdrop, wherein we find lack of clarity in the expression of reasons set out in the impugned order as to the choice of the date of applicability of tariff thereby determined, we asked the learned counsel for the Board as to whether it would be inclined to undertake an exercise of review in light of contentions urged by the appellant through the appeal at hand before this Tribunal, restricted to the issue of date of applicability of the tariff. The learned counsel submitted that he needs time to seek instructions in this regard.”

5. The learned counsel representing the respondent Board, at the hearing today, submitted that he has been instructed to submit that the Board is ready and inclined to subject the impugned decision to a review, in light of the contentions raised by the appellant in the appeal at hand, restricted to the issue as to the date from which the tariff thereby determined is to become enforceable against the appellant. The learned counsel for the appellant submits that if such order were to be passed in the appeal at hand, she would not press for any further relief or directions at this stage.

6. In the forgoing facts and circumstances, as duly noted in the previous orders quoted above, we dispose of this appeal directing the respondent Board to undertake a review of the impugned order, restricted to the issue of the date from which the tariff thereby determined is to become effective. Needless to add, the matter would deserve some primacy and, therefore, we would expect the Board to undertake the review expeditiously and pass the requisite order, in accordance with law at an early date, preferably within two months.

7. We may make it clear that the Board will be obliged to afford to the appellant an effective opportunity of hearing before the matter in review, in terms of this remit, is decided.

8. For removal of doubts, if any, we must add that nothing in this order or in the previous orders passed by this Tribunal shall be treated as an expression of opinion on the issue which is to be revisited by the Board as above.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERRING ON THIS 18th DAY OF MAY, 2022.**

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

mg/tp

(Justice R.K. Gauba)
Officiating Chairperson