IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 160 OF 2022
APPEAL NO. 161 OF 2022
AND
APPEAL NO. 162 OF 2022

Dated: **28.09.2022**

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

In the matter of:

M/S JAY MADHOK ENERGY PVT. LTD. LED CONSORTIUM
Through its Authorized Signatory
F-249, Ground Floor, New Rajinder Nagar,
New Delhi – 110 060 … Appellant(s)

VERSUS

PETROLEUM & NATURAL GAS REGULATORY BOARD
Through its Secretary
1st Floor, World Trade Centre,
Babar Road,
New Delhi-110 001 … Respondent(s)

Counsel for the Appellant (s)	:	**Mr. Parag P. Tripathi, Sr. Adv.** Mr. Saurav Agarwal Ms. AakritiDawar Mr. Apoorv Tripathi Mr. Anshuman Choudhary Mr. Anirudh Dusaj
Counsel for the Respondent (s)	:	**Mr. Paras Kuhad, Sr. Adv.** Mr. Utkarsh Sharma Mr. Jatin Chaturvedi Mr. Shuaib Hussain Ms. Pinki Mehra

J U D G M E N T

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

1. The appellant, describing itself as a Consortium presently comprising of *Jai Madhok Energy Private Limited* (hereinafter referred to as *"JMEPL")*

and *Jai Madhok Holdings Private Limited* (hereinafter referred to as, *"JMHPL")* has presented the captioned appeals feeling aggrieved by the Order dated 03.12.2020 passed on the file of case no. PNGRB/Monitoring/ICGD-3.01/(3)/2013(P-763) by the *Petroleum and Natural Gas Regulatory Board* (hereinafter referred to as, "*the Board*") whereby the authorization earlier granted in respect of *Geographical Areas* (for short, "*GAs*") of Ludhiana and Kutch (East) was cancelled in exercise of its power under Section 23 of the *Petroleum and Natural Gas Regulatory Board Act, 2006* (for short, *"PNGRB Act"*) forfeiting the Performance Bank Guarantees (PBGs) and penalty of an amount equivalent to 50% of PGB imposed on account of certain omissions and commissions, as per the conclusions reached during inquiry, invoking its power under Regulation 16 of the *Petroleum and Natural Gas Regulatory Board (Authorizing entities to lay, build, operate or expand City Gas Distribution Networks) Regulations, 2008* (for short, "*Authorization Regulations*") in respect of GA of Jalandhar, simultaneously directing *transfer* of the authorization of Jalandhar GA from JMEPL to another entity named, *Ishar Gas Jalandhar Private Limited* (hereinafter referred to as, "*Ishar*" or "*IGJPL*") requiring certain compliances to be made.

2. The contentions of the appellant are that the impugned decision is perverse, illegal, unjust, unfair and also vitiated on account of breach of principles of natural justice. The respondent Board contests the three

appeals defending the impugned order submitting that the conclusions reached during inquiry in the wake of Show Cause Notices ("*SCNs*") have been properly reached and are beyond reproach, it being expected of this tribunal to *respect* the approach of the sectoral regulator (i.e. the Board).

3. It may be mentioned here that while the matters arising out of the show cause notices leading to the impugned order were pending consideration, at the hearing before the Board on 04.11.2020, information was given about the execution of *Business Transfer Agreement* ("BTA") entered into by the appellant for renunciation, by sale for consideration, in favour of another entity *viz.* Adani Total Gas Limited (for short, *"ATGL"*), reference being made to Regulation 10(3) of Authorization Regulations. The joint transfer application, formally submitted on 05.11.2020, has not been considered or even mentioned in the impugned order.

4. The PNGRB Act was brought on the statute book on 31.03.2006 and came into force w.e.f. 01.10.2007, the objective being to establish the Board as the statutory authority to regulate the refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas excluding production of crude oil and natural gas, so as to protect the interests of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas and to ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country

and to promote competitive markets and for matters connected therewith or incidental thereto.

5. The functions of the Board, established by the law, include, as per Section 11, its responsibility to "*protect the interest of consumer*" by fostering fair trade and competition; to "*register entities"* to, *inter alia,* "*market notified petroleum, petroleum products;* to "*authorize entities"* to, *inter aila,* "*lay, build, operate or expand city or local natural gas distribution network*" to *"establish storage facilities"* for such products; to "*regulate, by Regulations", inter alia,* access to city or local natural gas distribution network (for short, "*CGD Network*") so as to ensure "*fair trade and competition*" amongst entities as per "*pipeline access code*" etc.

6. Section 16 of PNGRB Act declares, *inter alia,* that "*no entity shall*" engage in the business of laying, building, operating or expanding any CGD Network "*without obtaining authorization*" under the Act. The procedure for calling or submitting the applications for authorization is provided in Section 17 and the authorization is granted by the Board under Section 19. The said provisions (to the extent relevant) may be quoted as under:

> *"17. Application for authorisation:-*
>
> *(1) …*
>
> *(2) An entity which is laying, building, operating or expanding, or which proposes to lay, build, operate or expand, a city or local natural gas distribution network shall apply in writing for obtaining an authorisation under this Act :*

…

(3) Every application under sub-section (1) or sub-section (2) shall be made in such form and in such manner and shall be accompanied with such fee as the Board may, by regulations, specify.

(4) Subject to the provisions of this Act and consistent with the norms and policy guidelines laid down by the Central Government, the Board may either reject or accept an application made to it, subject to such amendments or conditions, if any, as it may think fit.

(5) In the case of refusal or conditional acceptance of an application, the Board shall record in writing the grounds for such rejection or conditional acceptance, as the case may be.

…

19. Grant of authorisation :-

(1) When, either on the basis of an application for authorisation for laying, building, operating or expanding a common carrier or contract carrier or for laying, building, operating or expanding a city or local natural gas distribution network is received or on suo motu basis, the Board forms an opinion that it is necessary or expedient to lay, build, operate or expand a common carrier or contract carrier between two specified points, or to lay, build, operate or expand a city or local natural gas distribution network in a specified geographic area, the Board may give wide publicity of its intention to do so and may invite applications from interested parties to lay, build, operate or expand such pipelines or city or local natural gas distribution network.

(2) The Board may select an entity in an objective and transparent manner as specified by regulations for such activities."

[Emphasis supplied]

7. Noticeably, the authorization is granted by the Board in relation to specified *Geographical Area* ("*GA*") and after the grant, the entity in question is known as the "authorized entity", an expression which is defined by Section 2(d) as under:

"2. Definitions :-

...
(d) "authorised entity" means an entity-
(A) registered by the Board under section 15 –
(i) to market any notified petroleum, petroleum products or natural gas, or
(ii) to establish and operate liquefied natural gas terminals, or
(B) authorised by the Board under section 16 –
(i) to lay, build, operate or expand a common carrier or contract carrier, or
(ii) to lay, build, operate or expand a city or local natural gas distribution network;
…"

8. An authorized entity which lays, builds, operates or expands, amongst others, CGD network will have the "*right of first use for its requirement*", the remaining capacity being permitted to be used, by Section 21, amongst other such entities as the Board may determine having regard to the needs for fair competition. The transportation tariff, *inter alia,* for CGD networks is determined by the Board in accordance with regulations that may be framed under Section 22.

9. The regulatory power to grant authorization under Section 19 is complemented by power vested in the Board to *suspend* or *cancel* such authorization, in terms of Section 23, which may quoted as under:

"23. Suspension or cancellation of authorisation :- If the Board, on an application of an affected party or on its own motion, is satisfied that the entity in favour of which authorisation has been granted under section 19 has failed to comply with any conditions of authorisation, it may, after giving an opportunity to such entity of being heard, either suspend the authorisation for such period as the Board may think fit or cancel the authorisation:

Provided that where the Board is of the opinion that an authorised entity persistently acts in a manner prejudicial to the interests of consumers, it may take action for the suspension of

> *the authorisation immediately subject to the opportunity of hearing being given subsequently, after which action so taken may be confirmed or revoked."*
>
> *[Emphasis supplied]*

10. The Board has been established not only as the sectoral regulator but also as the adjudicatory forum to "settle disputes" among entities, or between an entity and any other person, in accordance with provision contained in Section 24 which reads thus:

> *"24. Board to settle disputes:- (1) Save as otherwise provided for arbitration in the relevant agreements between entities or between an entity or any other person, as the case may be, if any dispute arises, in respect of matters referred to in sub-section(2) among entities or between an entity and any other person, such dispute shall be decided by a Bench consisting of the Member (Legal) and one or more members nominated by the Chairperson:"*

11. The provisions make it clear that the Board is conceived by the law as a substitute for the "*civil court*" in matters of the kind specified requiring dispute resolution. There are occasions where complaints of contravention of obligations under the law or regulations, or contracts, necessitate inquiry or investigation and follow up action on the consequences that emanate. The procedure for filing of complaints of the kind mentioned in Section 12 is provided by Section 25 read with Section 26 giving the power unto the Board "to investigate".

12. As is clear from the provision contained in Section 23, the occasion to exercise the power to direct "*suspension or cancellation of authorization*" would arise, *inter alia,* if the authorized entity is found to have "*failed to comply with any conditions of authorization*". For such eventuality, the

Board is also competent, in terms of Section 28, to levy "civil penalty", the clause reading thus:

> *"28. Civil penalty for contravention of directions given by the Board:-*
> *In case any complaint is filed before the Board by any person or if the Board is satisfied that any person has contravened a direction issued by the Board under this Act to provide access to, or to adhere to the transportation rate in respect of a common carrier, or to display maximum retail price at retail outlets, or violates the terms and conditions subject to which registration or authorisation has been granted under section 15 or section 19 or the retail service obligations or marketing service obligations, or does not furnish information, document, return of report required by the Board, it may, after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of civil penalty an amount which shall not exceed one crore rupees for each contravention and in case of a continuing failure with additional penalty which may extend to ten lakh rupees for every day during which the failure continues after contravention of the first such direction :*
>
> *Provided that in the case of a complaint on restrictive trade practice, the amount of civil penalty may extend to five times the unfair gains made by the entity or ten crore rupees, whichever is higher."*
>
> *[Emphasis supplied]*

13. Imposing a civil penalty under Section 28, or ordering suspension or cancellation of authorization under Section 23 (it also being a civil sanction) are processes which are penal in nature, the exercise of which extraordinary jurisdiction is guided by section 27 which reads thus:

> *"27. Factors to be taken into account by the Board :- The Board shall, while deciding a dispute under this Chapter, have due regard to the provisions of this Act and to the following factors, namely:-*
>
> *(a) the amount of disproportionate gain made or unfair advantage derived, wherever quantifiable, as a result of the default;*
>
> *(b) the amount of loss caused to an entity as a result of the default;*
>
> *(c) the repetitive nature of the default."*
>
> *[Emphasis supplied]*

14. By virtue of Section 13, the Board is vested with some powers as are enjoyed by a civil court under the Code of Civil Procedure, 1908 ("CPC") while trying a suit, by virtue of Section 13, in respect of the matters specified therein which include summoning and forcing the attendance of witnesses, receiving evidence by examining witnesses on oath or on affidavits, review, etc but the *hallmark of the procedure* to be adopted by the Board is contained in section 13(3) which reads as under:

> *"13. Procedure of the Board:-*
> *...*
> *(3) The Board shall be guided by the principles of natural justice and subject to other provisions of this Act and of any rules made there under, shall have powers to regulate its own procedure including the places at which it shall conduct its business."*
>
> *[Emphasis supplied]*

15. The Board is conferred with the power "*to make regulations, consistent with*" the Act, by virtue of Section 61, including on the subjects of registration and authorization. The Authorization Regulations concededly were framed and notified by the Board in exercise of the said power in 2008, and amended on 19.07.2010.

16. It is necessary at this stage to take note of two particular regulations forming part of the Authorization Regulations, to the extent relevant, as under:

> *"5. Criteria for selection of entity for expression of interest route.*
>
> *(1) The Board may carry out a preliminary assessment of the expression of interest with respect to the following, namely:-*
>
> *(a) natural gas availability position;*

(b) *possible connectivity with an existing or proposed natural gas pipeline for supply of natural gas to the city gate of the proposed CGD network, including LNG supplies by tank trucks or tank wagons and CNG by cascades; and*

(c) *any other relevant issue as the Board may consider necessary.*

(2) The Board may, within fifteen days of the receipt of expression of interest and based on its preliminary assessment, either issue an open advertisement in at least one national and one vernacular daily newspaper (including webhosting) publishing receipt of an expression of interest and commencement of public consultation process period of thirty days or reject the expression of interest:

Provided that in case the Board rejects the expression of interest, it shall inform the entity of the decision along with the reasons for rejecting the expression of interest.

…

(6) The Board shall scrutinize the bids received in response to the advertisement in respect of only those entities which fulfill the following minimum eligibility criteria, namely:-

(a) *entity has paid the application fee along with the application-cum-bid as specified under the Petroleum and Natural Gas Regulatory Board (Levy of Fee and Other Charges) Regulations, 2007:*

…

(b) *entity is technically capable of laying and building CGD network as per the following qualifying criteria, namely:-*

…

(d) *the entity has agreed to abide by the relevant regulations for technical standards and specifications, including safety standards;*

(e) *the entity has adequate financial strength to execute the proposed project, operate and maintain the same in the authorized area and shall meet the following financial criterion to qualify for bidding for a single CGD network, namely:-:-*

…

(f) *the entity, on being declared as a successful bidder and not being a company registered under the Companies Act,1956, shall become a company registered under the Companies Act,1956;*

(g) the entity should have a credible plan for sourcing natural gas for supply in the proposed CGD network;

(h) entity shall furnish a bid bond for an amount equal to-

…

(j) in case the entity submitting the bid does not fulfill the requirements of any criteria under clauses (a) to (i), the bid submitted by it shall be summarily rejected and a communication in this regard shall be sent to it and the financial bid shall not be opened for that entity;

(i) the bid bond shall be –

i) encashed if an entity submitting the bid walks out;

ii) released in respect of the unsuccessful entity submitting the bid;

iii) retained till the prescribed performance bond is furnished at the time of authorization by the successful bidder.

…

10. Grant of authorization. –

(1) The selected entity shall be issued a letter of intent (LOI) to grant authorization upon finalization of the bid. The entity shall be required to furnish Performance Bank Guarantee within 15 days of issue of LOI and complete such other formalities as may be directed by the Board. Upon furnishing the Performance Bank Guarantee and completion of other formalities, the authorisation shall be granted to the selected entity, in the form of Schedule D.

(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 authorisation to the entity shall not be renunciated by way of sale, assignment, transfer or surrender to any person or entity during the period of three years from the date of its issue.

(4) The entity intending to renunciate the authorization in favour of another entity after the end of the three years period shall submit a proposal to the Board at least thirty days in advance and shall provide all information as may be called for by the Board.

(5) The Board after satisfying itself that the proposal will not adversely affect the existing or proposed activities of

laying, building, operating or expansion of the CGD network shall either accept the proposal in full or with such modifications as it may deem fit and in a case where the entity is permitted by the Board to take over the activities of laying, building, operating or expanding the CGD network such entity shall abide by the existing or modified terms and conditions of the authorization including compliance with the service obligations and adherence to the quality of service standards:

Provided that the Board reserves the right to reject the proposal in public interest and in such a case the Board shall provide in writing the reasons for such rejection,

…"

[Emphasis supplied]

17. The Board, after its establishment, had initiated action for earmarking GAs in different parts of the country and for authorization to be granted in their respect to such registered entities as were interested, by the route of competitive bidding. The third round of bidding for development of CGD networks was initiated by an invitation extended by the Board through public notice dated 23.07.2010, it including the GAs of Jalandhar, Ludhiana and Kutch (East). The dispute at hand relates to authorization granted by the Board by a process of selection through bidding that thus commenced in 2010 but completed in 2015.

18. It be noted that the bid document titled, "*instructions to bidders*", *inter alia,* stated as under:

"8.0 Restructuring of the Authorized Entity

Any restructuring/reconstitution of the authorized entity within the initial three years of grant of authorization shall be permitted only if the initial JV partners/entity retain more than 50% equity stake post

reconstitution on a cumulative basis in all cases of such reconstitution, the lead partner of the original Consortium /JV shall compulsorily hold higher or equal stake than any other partner and shall be declared up front."

[Emphasis supplied]

19. It must be observed here itself that though under the Authorization Regulations the mandatory requirement for a successful bidder (entity) to "*become a company registered under Companies Act, 1956*" (if it was not already a company) is included in clause (f) of Regulation 5(6) as part of the "*minimum eligibility criteria*", it is clear that compliance with such requirement cannot correspond to grant of authorization but expected to be made subsequently. It was fairly conceded at the bar on both sides that the Authorization Regulations, as they stood during the relevant period, did not specify any particular time frame for compliance on this score to be shown to the satisfaction of the Board. It was stated that though by subsequent amendment to these regulations, a period of six months has been now prescribed but, for purposes of scrutiny of the matter at hand, the requirement of the regulations to this extent will have to be construed as an obligation on the part of the authorized entity to become a company duly incorporated under the law *within a reasonable period*, the words "*on being declared*" indicating expectation of immediacy. To put it differently, the bid submitted by an entity which is not a company at the time of submission of the bid cannot be rejected for non-fulfillment of the minimum eligibility criteria under Regulation 5(6)(f). Instead, it would be part of the conditions for grant of authorization for such entity to be in full compliance, in true

letter and spirit of the requirement as above, within a *reasonable time* of grant of authorization.

20. As is clear from a conjoint reading of Regulation 5(6)(h)&(k), the Bank Guarantee (Bid Bond) submitted by the successful bidder is "*retained*" when LoI is issued and at the time of authorization replaced by a "Performance Bond"(performance Bank Guarantee). This, we note, is meant to be the mode through which the Board is entitled to enforce order of penalty that may be passed by following the procedure prescribed.

21. As stipulated in Regulation 10(3) of the Authorization Regulations, quoted above, it is not permissible for grant of authorization to be "*renunciated*" by the authorized entity for a "*period of three years*" from the date of such grant. The regulations define the word "*renunciate*" to mean "*sale, assignment, transfer or surrender*" to any other person or entity. Regulation 10, by clauses (4) & (5), permits such "*renunciation*" in favour of any other entity "*after the end of three years period*" subject to the proposal being submitted in the manner specified and the Board being satisfied, *inter alia,* that such renunciation in favour of any other entity – essentially transfer of authorization – "*will not adversely affect*" the development of the CGD network.

22. The "*restructuring*" covered by clause 8 of the instructions to bidders, in relation to the case at hand is not to be confused as an exception

created to the general prohibition against renunciation within three years of the grant of authorization by Regulation 10. Noticeably, the restructuring permitted by Instruction 8.0 (of bid documents) is "*of the authorized entity*" and not in the nature of transfer in favour of any *other* person or entity. Such restructuring *of the authorized entity* is permitted *even within the initial period of three years* of grant of authorization apparently because the entity remains the same. In the process of restructuring, however, new persons may join as partners of the consortium or Joint Venture (JV). It does appear that *Application-Cum-Bid-Document* ("ACBD") inhibits a stranger to take over the Bid, after its submission not the least beyond the period within 24 hours prior to expiry of the due date of submission of Bids. Instruction no. 8.0 of bid documents, therefore, postulates that the lead partner of the original consortium /JV *must* continue to be the lead partner, post-restructuring, so as to compulsorily hold equity stake higher than any other partner.

23. At the cost of repetition, we may say, the restructuring of the authorized entity is allowed even within three years, it not being in the nature, or in the teeth, of the prohibition against renunciation within the meaning of Regulation 10, as quoted above. It may be added that since it is one of the essential conditions for the grant of authorization, by virtue of Regulation 5(1)(f) – as quoted earlier – that the authorized entity, not being a company, shall become a company duly registered under the law, the

steps required to be in compliance might entail "*restructuring of the authorized entity*" within the first three years of the grant. So long as the lead partner of the original consortium/JV continues to hold higher or equal stake than any other partner and the initial JV partner/entity retains more than 50% equity stake, such restructuring is permissible even as a step taken in full compliance of Regulation 5(1)(f).

24. *JMEPL* which leads the consortium (the appellant) was incorporated on 25.09.2009. Parallelly, a partnership firm named *Jai Madhok Holdings* (for short, *"JMH")* had been formed on 13.04.2010, its partners including individuals named Satinder Singh, Jaswant Singh, Sandeep Singh, Prakash Kaur, Harneet Kaur, Sumohita Kaur besides three companies *viz*. M/s Jaspark Speciality Chem. Pvt. Ltd, M/s Jay Tel Mobile Pvt. Ltd and M/s Sundaram Software Pvt. Ltd.

25. *JMEPL* joining hands with *JMH,* forming a consortium, holding stake in the ratio of 80:20 had submitted its bids for the GAs of Ludhiana, Jalandhar and Kutch (East) on 18.02.2011, pursuant to the invitation for bids issued by the Board on 23.07.2010. The consortium had submitted an undertaking to the Board on 03.06.2011, in terms of Regulation 5(6)(f) that it shall convert the partnership into a company in case of grant of authorization under the bid process. The Board took a long time in completing the process. The authorization in favour of *JMEPL* led

consortium for Jalandhar GA was issued on 06.09.2013, satisfaction having been recorded that it was meeting the technical and financial criteria. The authorizations in respect of Kutch (East) GA and Ludhiana GA were granted in favour of said consortium much later on 12.03.2015 and 25.06.2015 respectively. During the interregnum, certain events took place which have a bearing on the controversy at hand. The same may be noted in brief at this stage.

26. A *Public Interest Litigation* ("PIL") was initiated before High Court of Punjab and Haryana, it being Civil Writ Petition no. 13490/2008. The issue brought for adjudication before the writ court primarily is as to whether a Compressed Natural Gas (CNG) station is part of CGD network. It appears that M/s GAIL Gas, a public sector undertaking engaged in the business, has taken a stand that CNG station is not part of CGD network. The invitation for bids issued by the Board contrarily seems to have been premised on the assumption that CNG stations are integral part of CGD network, the scope of work mentioned in the bid documents so indicating. Admittedly, on 18.09.2013 the Union of India ("UOI") through Ministry of Petroleum and Natural Gas had filed an affidavit in the PIL pending before the High Court supporting the stand of M/s GAIL Gas. The appellants' case is that it became aware of such litigation before the writ court *after grant of authorization* of Jalandhar GA on 06.09.2013 and in the wake of the position taken by the UOI through its affidavit dated 18.09.2013, it had sought and

was impleaded as a party to the PIL. Subsequently, on 18.12.2013, the Board having filed its affidavits before the High court on 08.01.2013 and 03.07.2013, issued a public notice on 18.12.2013 informing all stakeholders that the said issue was *sub-judice* before the High Court. The PIL has remained pending on the file of the High Court and the submission of the appellant is that this had created some *uncertainty* affecting the development work.

27. Statedly in order to be in compliance with the eligibility criteria, within the letter and spirit of Regulation 5(6)(f), a company named *Jai Madhok Holdings Private Limited* (JMHPL) was incorporated on 09.05.2011 by three persons *viz.* Satinder Singh, Jaswant Singh and Sandeep Singh. We recall that these three persons, along with certain others, were partners in the firm *JMH* which had been formed in 13.04.2010, *JMH* being a 20% stakeholder in the consortium led by *JMEPL,* then a bidder awaiting grant of authorization. In the *Memorandum of Association* ("MoA") of *JMHPL*, incorporated on 09.05.2011, it was stated, *inter alia,* that the main objects to be pursued by the company, upon its incorporation, would include as under:

> *"To acquire and take over the business carried on by Jai Madhok Holdings, a Partnership Firm and to take over all the assets and liabilities of the same. The firm shall stand dissolved on the incorporation of the Company."*
>
> *[Emphasis supplied]*

28. As already noted, the processing of the applications for the other two GAs at the end of the Board took a longer time, no explanation for such

delay, however, having been offered to this tribunal. It be noted that the intimation of the incorporation of JMHPL was concededly given to the Board on 14.10.2014, there being some dispute raised with regard to the claim of the appellant that an intimation had been given earlier also on 04.04.2013. Be that as it may, it is quite clear from the chronology of events that the authorization in favour of the appellant relating to GA of Kutch (East) was issued by the Board on 12.03.2015 and in relation to Ludhiana GA on 25.06.2015, both indisputably *after* the Board had been duly informed that JMHPL had been incorporated, at least by communication sent on 14.10.2014.

29. Meanwhile, JMEPL and Satinder Singh, one of the partners of JMH, took steps and set up the company named *"Ishar Gas Jalandhar Private Limited"* (IGJPL) incorporated on 13.12.2013, each holding equal shares. Later, JMEPL joined and come to hold shares in same ratio as in the consortium led by JMEPL. After IGJPL had been incorporated on 13.12.2013 and subsequent to the change in its shareholding, as on 31.03.2015, a formal request was made by the appellant on 25.04.2015 requesting the Board to transfer the authorization from the name of the consortium to Ishar Gas (the JV of JMEPL and JMHPL).

30. From the scheme of the law, and the regulations framed there under, particularly the Authorization Regulations, it is clear that the authorization in

favour of an entity for, amongst others, laying, building, operating, etc. of CGD network, comes with certain conditions not only for being in full compliance with the eligibility requirements – illustratively, for the authorized entity to become a company – but also to show the requisite or desired performance, meeting the timelines or if in default suffer the risk, *inter alia,* of imposition of civil penalty under Section 28 or even suspension or cancellation of authorization under Section 23. The detailed procedure for visiting an entity with such consequents, as envisaged in the provisions, *inter alia,* contained in Sections 23 and 28 of the PNGRB Act, is provided by Regulation 16 forming part of the Authorization Regulations, which (as the provision then stood) reads thus:

> *"16. Consequences of default and termination of authorization procedure.*
>
> *(1) An authorized entity shall abide by all the terms and conditions specified in these regulations and any failure in doing so, except for force majeure, shall be dealt with as per the following procedure, namely:-*
>
> *(a) the Board shall issue a notice to the defaulting entity allowing it a reasonable time to fulfill its obligations under the regulations;*
>
> *(b) no further action shall be taken in case remedial action is taken by the entity within the specified period to the satisfaction of the Board;*
>
> *(c) in case of failure to take remedial action the Board may encash the performance bond of the entity equal to percentage shortfall in meeting targets of inch-kms and/or domestic connections. Provided that, the value so encashed would be refunded, if the entity achieves the cumulative targets at the end of exclusivity period for exemption from the purview of common carrier or contract carrier. In case of failure to abide by other terms and conditions specified in these regulations, performance*

bond shall be encashed as under:

(i) 25% of the amount of the performance bond for the first default; and

(ii) 50% of the amount of the performance bond for the second default:

Provided that the entity shall make good the encashed performance bond in each of the cases at sub-clause (i)and (ii) within a week of encashment, failing which the remaining amount of the performance bond shall also been cashed and authorization of the entity terminated.

(iii) 100% of the amount of performance bond for the third default and simultaneous termination of authorization of the entity;

(d) The procedure for implementing the termination of an authorization shall be as provided in Schedule G;

(e) Without prejudice to as provided in clauses(a) to (d), the Board may also levy civil penalty asper section 28 of the Act in addition to taking action as prescribed for offences and punishment under Chapter IX of the Act."

[Emphasis supplied]

31. Regulation 16, as quoted above, is the procedure statutorily prescribed for imposition of civil penalty under Section 28 or for suspension or cancellation of authorization under Section 23. The authority given by the above quoted Regulation 16(1)(c) to "*encash the performance bond of the entity*", to the extent specified, is a consequence not different from but same as the one conferred on the Board by Section 28, being "*civil penalty*". From this perspective, we are clear in our mind to conclude that the act of encashment of the performance bond in exercise of jurisdiction under Regulation 16(1)(c) by the Board will necessarily have to be *preceded* by imposition of civil penalty under Section 28. To put it more

clearly, the Board will first have to impose the penalty and then is permitted to recover it by encashing the performance bond. To put it slightly differently, the encashment of the performance bond is only the mode of execution of the order imposing the civil penalty and not imposition of a penalty by itself.

32. Indisputably, the achievement of Financial Closure ('FC') and development work *on ground* in each GA, pursuant to the authorizations that had been granted was delayed, the stipulated timelines not having been met. Against such backdrop, the Board initiated action under Regulation 16 of the Authorization Regulations sometime in 2015/2016. The matter relating to GA of Jalandhar, on the basis of notices thus issued earlier, was adjudicated upon by the Board by its order dated 28.09.2015 imposing penalty by encashment of the performance bank guarantee ("PBG") to the extent of 25%. The appellant challenged the said decision by Appeal no. 13 of 2016 which was dismissed by this tribunal, by judgment dated 26.05.2017, primarily on the view that no case of fraud or irreparable loss or injury had been made out and that it was not permissible for the order encashing the bank guarantee to be interfered with.

33. It is pertinent to note here that in the afore-mentioned appeal, while seeking to explain the defaults in progress or compliances with the terms and conditions of the grant of authorization, the appellant had pleaded

certain facts including the uncertainties arising out of the PIL pending before the writ court. This tribunal declined to entertain the request for shifting of the zero date of the project on such basis observing that the matter was *sub-judice* and it could not be said as what the verdict would be, acknowledging, at the same time, that if it were to be finally decided that CNG station was not part of the CGD network, it "*could affect*" the CGD network project of the authorized entity, it being open to the latter to pursue such remedies as may be available in law there against. Taking note of certain orders of the writ court having a bearing on the subject, this tribunal, however, also concluded that the State of Punjab was then *"not fully equipped to facilitate the entity involved in the CGD network in the State*", agreeing with the submissions of the appellant that such policies and permissions of the State Government "*are very much necessary for implementing the CGD network*".

34. By the time the decision was rendered on the appeal against Order dated 28.09.2015, the Board had issued fresh show cause notice for "*second default*" on 06.07.2016. Declining to grant any relief against encashment of PBG, to the extent of 25%, this tribunal disposed of the appeal by judgment dated 26.05.2017 with following concluding observations:

> *"51. We recognize the fact that non-availability of policies with the State Government of Punjab for laying natural gas pipelines for CGD network, has been a hindrance to a great extent for the Appellant for making any progress on ground as per schedule. We also note that in absence of*

policy, the Appellant has taken a positive initiative in the interest of the public to create CNG facility in IOC's Retail Outlets at Jalandhar by carrying natural gas by cascades in absence of pipelines. The Appellant has also brought to the notice of this Court a show cause notice issued to the Appellant by the Board on 06.07.2016 under Regulation 16 of the CGD Authorization Regulations attracting action against second default for not meeting the targets in terms of domestic PNG connection and laying of steel pipeline infrastructure. This notice as per the Appellant is illegal. It is further submitted that the Board could not have proceeded to issue this second notice during the pendency of the appeal before the Tribunal.

52. While the Board will take its independent decision, it may consider the aspects of non-availability of policies with the State Government of Punjab for CGD network and also the initiative taken by the Appellant in absence of policies prior to invoking further in future Regulation 16 of the Petroleum and Natural Gas Regulatory Board (Authorizing entities to lay, build, operate or expand city or local natural gas distribution network) Regulations, 2008 and also while pursuing the second show cause notice already issued to the Appellant."

[Emphasis supplied]

35. On the basis of Show Cause Notices issued earlier, by its Order passed on 15.07.2016, the Board had cancelled the authorization granted in respect of GAs of Ludhiana and Kutch (East) and encashed the entire performance bank guarantee submitted by the authorized entity (appellant). The said orders were also challenged by Appeal nos. 196 & 197 of 2016 before this Tribunal. The appeals were allowed by judgment dated 28.04.2017. It was found, *inter alia,* that the process required for invoking Regulation 16 had not been followed and, thus, the Order dated 15.07.2016 of the Board was vitiated.

36. In the context of challenge to the Order dated 15.07.2016 of the Board pertaining to GAs of Ludhiana and Kutch (East), questions had

arisen in relation to applicability of Regulation 16. Certain observations on this aspect in judgment dated 28.04.2017 need to be extracted as under:

> *"52. From above, we note that as per Regulation 16 (1) if an authorized entity commits any breach of terms and conditions specified in these regulations, it shall be dealt with in accordance with the procedure contemplated in Regulation 16 (1) (a), (b) and (c). Only exception to this will be force majeure. In regards to non-achievements of physical targets viz laying of inch-kms pipeline and domestic gas connections, the procedure is clearly spelt out separately linking encashment of performance bond to percentage shortfall and not linked to specific percentage of 25%, 50% etc. For other terms and conditions only, Regulation 16 (1) (c) stipulates for encashment of performance bank guarantee in terms of 25%, 50% etc.*
>
> *…*
>
> *54. As per the learned counsel for the Appellant, a perusal of the notice shows and establishes that as per the own understanding of the Board, there was violation of provision of Regulation 11, for which provision of Regulation 16 are attracted. A conjoint reading of Regulation 11 and 16 shows that Regulation 11 provides for substantive law on default while Regulation 16 provides for procedure for implementation of Regulation 11.*
>
> *55. The Appellant claims that both Regulation 11 and Regulation 16 are interlinked. The Board claims that both the Regulations are independent of each other. The Board also admits that they made an error in the second part of the notice i.e. the provision under which consequences would follow in case of failure to meet with requirements of Regulation 11 which they termed as legal matter of the case. The learned counsel for the Board reiterated that the factual part i.e. the first part of the notice was correct that under Regulation 11, the Appellant was scheduled to submit the Gas Supply Agreement and the Financial Closure within 180 days of the date of authorization which they failed to do so. Learned counsel for the Appellant reiterated that Regulation 16 has to be followed for any consequences of default and termination of authorization procedure which is very much relevant in the instant case.*
>
> *56. Our strong observation is that there has been a big ambiguity between the intent of the show-cause notice served to the Appellant by the Board and the action taken against the Appellant vide their impugned order dated15.07.2016. In this respect, we would rely on the judgment of the Supreme Court in Gorkha Security Services Vs.*

Govt. (NCT of Delhi) & Ors., (2014) 9 SCC 105 (J. Chelameshwar; A.K. Sikri, JJ), held as under:-

> *"We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. However, we may also add that even if it is not mentioned specifically but from the reading of the show cause notice, it can be clearly inferred that such an action was proposed, that would fulfill this requirement. In the present case, however, reading of the show cause notice does not suggest that noticee could find out that such an action could also be taken. We say so for the reasons that are recorded hereinafter." ,*

Similar to the above case, in the instant case, the show cause notice does not suggest that the authorization granted to the Appellant could be cancelled straightway relying on Regulation 11 without following Regulation 16. Hence, our considered opinion is that cancellation of the authorization based on the show-cause notice served to the Appellant is illegal. Show cause notice specifically mentions Regulation 16. Cancellation of authorization without following the procedure under Regulation 16 is therefore illegal. In addition, the Board even otherwise, should have followed Regulation 16 to take action against the Appellant for non-fulfillment of their requirements which can be seen in the following paragraphs."

[Emphasis supplied]

37. The crucial issue on the attribute of non-compliance with terms and conditions of authorization granted for GAs of Ludhiana and Kutch (East) has been that of '*financial closure'*. The concerns of the Board on account of want of '*financial closure'* had led to cancellation order passed on 15.07.2016. While examining the subject matter in appeals decided on 28.04.2017, *albeit* in the context of procedural requirement of Regulation 16, this tribunal had observed thus:

> *"63. We also observe that no clear and specific format is given in the relevant Regulations for CGD network for submission of Financial Closure except the stipulations provided under Regulation 11 (4) which talks of*

legally binding commitment of equity holders and debt financiers. We also did not find any instructions given by the Board to the Appellant as to how the FC to be submitted to the Board. A clarity as to how a FC needs to be submitted to the Board would have eased out the above disputed situation between the rival parties.

…

65. On above, we observe that even if the Appellant would have submitted an acceptable FC and GSA after expiry of 180 days of authorization, the Board could not have declared the same to be valid to continue with the authorization since the Board cancelled the authorization relying on the fact that the Appellant could not submit FC and GSA within the stipulated time period of 180 days of authorization. It leads to believe that the Appellant was not given any scope to resubmit the FC and GSA which would have been acceptable to the Board though lot of correspondences was going on between the rival parties after the show-cause notice was issued to the Appellant. After going through Regulation 16, we find that such scope exists under Regulation 16 (1) (a) to allow reasonable time to fulfill the obligations."

[Emphasis supplied]

38. The judgment dated 28.04.2017 concluded as under:

"70. From the written submissions and the counsel's arguments in this court, we have also noted one allegation made by the Board that the Appellant till the date of cancellation of their authorization, has not made any progress in the physical activities viz laying of inch-kilometer of steel pipeline and domestic connections vis-à-vis their targets.

…

74. Based on our discussions and findings as above, the impugned orders are liable to be set aside and are accordingly set aside. We direct the Respondent i.e. the Petroleum and Natural Gas Regulator Board to follow Regulation 16 of the Petroleum and Natural Gas Regulatory Board (Authorizing entity to lay, build, operate or expand city or local natural gas distribution network) Regulations, 2008 and pass order in accordance with law."

[Emphasis supplied]

39. In the wake of above decisions, (judgments dated 26.05.2017 and 28.04.2017), the Board issued certain further notices, called for certain further information and held hearing on several dates. By its letter dated 03.01.2018, with reference to judgment dated 28.04.2017 in Appeal nos.

196 – 197 of 2016, the Board had called upon the appellant to appear for hearing on 15.01.2018 and explain the reasons for failure in achievement/ delay, *inter alia,* in '*financial closure'* for GAs of Ludhiana, Jalandhar and Kutch (East). It appears that some hearing before the Board took place on 19.01.2018 in continuation. Post the said hearing, a letter was submitted by JMEPL on 29.01.2018 placing before the Board certain documents described as "*copy of (our) letters for Ludhiana and Kutch East dated 30th June 2016 and 11th July 2016 respectively duly received by PNGRB together with the documents therein and the letter submitted in the Ld. APTEL"***.**

40. The enclosures to the said documents admittedly included copy of a letter dated 29.09.2016 of Deutsche Bank AG, Singapore which had been submitted earlier during hearing before this tribunal. It appears that the Board had sought confirmation from the Deutsche Bank, by its letter dated 21.12.2018. In answer thereto, Deutsche Bank sent a communication dated 14.02.2019. Along with the said communication dated 14.02.2019 of Deutsche Bank addressed to the Board, copy of a letter dated 29.09.2016, that had been addressed by the said bank to another entity *viz*. British Chemicals Pte Limited, was also statedly sent.

41. Eventually, on 26.03.2019, three Show Cause Notices were issued, almost on similar lines, separately in respect of GAs of Jalandhar, Ludhiana and Kutch (East), thereby withdrawing and superseding the notices issued

earlier. It is the said notices which have culminated in the Common Order dated 03.12.2020, under challenge here.

42. The allegations concerning alleged breaches of Regulations 5(6)(f) and 10(3) and of Clause 8.0 of Bid document, are set out similarly in the aforesaid notices as under (quoted from Show Cause Notice of Jalandhar GA):

> *"…*
>
> *2.1 The net worth qualification as per Regulation 5(6)(f) of the CGD Authorization Regulations of the JMEPL led consortium for grant of authorization was calculated on the combined net worth of Jay Madhok Energy Pvt. Ltd. ("JMEPL") and Jay Madhok Holding ("JMH") partnership firm. This was in terms of the bid submitted by the consortium of JMEPL and JMH. As calculated by PNGRB, the Net worth required for said GA at the time of bidding was Rs. 50 million. The Net worth at the time of bidding for both the consortium partners are Rs. 0.09 million of JMEPL and Rs. 1643.57 million of JMH. Hence, the entity had met the Net worth criteria through JMH only.*
>
> *2.2 The consortium of JMEPL (80%) and JMH (20%) was awarded the bid based on the qualifying criteria and the bidding criteria as per Regulation 7(1) read with Regulation 7(3) of the CGD Authorization Regulations after it emerged as the successful bidder.*
>
> *2.3 Based on a study of the information, documents and earlier correspondence available with the PNGRB, what emerges now is that prior to the grant of authorization on 06.09.2013 to the Consortium of JMEPL and JMH, the consortium partners never informed the Board that Jay Madhok Holding Private Limited (JMHPL) was formed on 09.05.2011 and ostensibly took over the assets and liabilities of JMH on 29.03.2013 i.e. before the grant of authorization.*
>
> *2.4 The fact that JMH was dissolved prior to the grant of authorization on 06.09.2013 was never brought to the notice of the Board before the grant of authorization. There was suppression/ concealment of material facts and documents knowingly by the Entity and in effect the bid was won by*

deliberately suppressing/ concealing material facts and documents.

2.5 Considering that the grant of authorization was given to the JMEPL led consortium (of which JMH was a 20% partner) on 06.09.2013 for Jalandhar GA and not to the consortium of JMEPL and JMHPL, which never bid for the GA of Jalandhar, this information of dissolution of JMH (one of the consortium bidders) was vital as at the time of grant of authorization one of the consortium partners which had submitted the bid was not even in existence. If this fact had been known to the Board, the authorization would have never been granted to the Entity since one of the consortium partners was not even in existence at the time of grant of authorization.

2.6 The Board has also noticed from a perusal of documents submitted earlier by the Entity that Clause 8 of the Memorandum of Association of Jay Madhok Holding Private Limited clearly states that '… The firm shall stand dissolved on the incorporation of the company…'

2.7 It appears that JMH was dissolved on 09.05.2011 itself, which is less than 3 months from the date of submission of the bid by the consortium of JMEPL and JMH on 18.02.2011. The fact was knowingly suppressed/ concealed and never brought to the notice of the Board by the Entity even though the grant of authorization was only given on 06.09.2013.

…

In terms of Section 23 of the Act, the Board is prima facie of the view that the Entity has failed to comply with important conditions of authorization as given in Ground No.2 below.

…

3.1.2 As the consortium led by JMEPL was not a company registered under the Companies Act, 1956 (since JMH was a partnership firm), it was required to become a company registered under the Companies Act, 1956 with the shareholding pattern of JMEPL and JMH being 80% and 20% in terms of the consortium agreement between JMEPL and JMH.

…

3.1.4 A plain reading of Regulation 5(6)(f) read with Clause 8 of the Bid Document and the consortium agreement shows that the shareholding pattern in the company to be registered as per Regulation 5(6)(f) above should have been in the ratio of 80% shareholding for JMEPL and 20% shareholding for JMH since

these were the consortium partners which submitted the bid and were issued the grant of authorization.

3.1.5 In terms of Regulation 5(6)(f) and Regulation 10 read with Clause 8 of the Bid Document, both JMEPL and JMH, being the initial bidders, had to retain more than 50% equity stake post reconstitution on a cumulative basis.

3.1.6 However, inste3ad of forming the company with JMEPL and JMH owning more than 50% equity stake post reconstitution to comply with Clause 8 of the Bid Document, the new company Ishar Gas Jalandhar Private Limited ("IGJPL") was initially formed with JMEPL and Shri Satinder Singh Madhok as shareholders in a 50:50 shareholding pattern as per the Memorandum of Association of IGJPL and without JMH or its partners being there at all.

3.1.7 It is also pertinent to note that IGJPL was incorporated on 13.12.2013 but this fact was only informed to the Board vide letter dated 26.05.2017. However, the entity claimed that they have informed the Board on 14.10.2014.

3.1.8 The Board therefore asked for clarifications vide letter dated 20.07.2017 on how IGJPL could comply with Clause 8 of the Bid Document and the equity contribution as per the consortium agreement between JMEPL and JMH. In response, JMEPL informed the Board vide letter dated 05.08.2017 that the composition of IGJPL as on 31.03.2015 was in the ratio of JMEPL – 80% and JMHPL – 20%. This was once again in violation of Regulation 5(6)(f) read with Clause 8 of the Bid Document.

3.1.9 The Equity, in another letter dated 21.09.2017 requested once again for transfer of the authorization in the name of IGJPL and also inter alia stated that the necessary documents and clarifications had been provided to PNGRB in its letter dated 05.08.2017.

3.1.10 Vide letter dated 28.09.2017 the Board asked for clarifications on the deviations from the consortium agreement between JMEPL and JMH. The Board also highlighted in this letter that transfer of stake from the consortium to the special purpose vehicle ("SPV") i.e. IGJPL requires PNGRB approval and should be in compliance with the relevant PNGRB Regulations.

3.1.11 The Entity thereafter vide letter dated 29.09.2017 inter alia stated that JMH had changed its structure and was renamed as JMHPL, which was informed to PNGRB on 14.10.2014. The Entity also stated in this letter that IGJPL was

incorporated in 2013 based on its undertaking given as per the PNGRB Regulations.

3.1.12 The above facts would show that the formation of IGJPL is prima facie in violation of the provisions of the CGD Authorization Regulations and the conditions of the grant of authorization (Para 15 wherein the Entity is supposed to comply with the CGD Authorization Regulations). Till date the requirements of Regulation 5(6)(f) and Regulation 10(3) of the CGD Authorization Regulations as well as the requirements of Clause 8 of the Bid Document have not been complied with by the Entity.

4. Regulation 16 of the CGD Authorization Regulations provides for inter alia the consequences of default and termination of authorization procedure and encashment of the performance bond of the entity equal to the percentage shortfall in meeting targets of inch-kms and/ or domestic connections. The present Show Cause Notice is also being issued under Regulation 16(1)(c) of the CGD Authorization Regulations for zero progress in respect of inch-kms and domestic connections as detailed below in Ground 3. This is independent to and without prejudice to Grounds 1 above."

43. On the basis of facts and circumstances thus set out, the appellant was called upon to show cause as to why action be not taken *vis-à-vis* authorization of Jalandhar GA on the following lines:

"6. In light of the above facts and circumstances and the Grounds for the present Show Cause Notice the Entity is required to Show Cause on the following:

6.1. Why the authorization of the Entity should not be cancelled by the Board considering that the bid was prima facie won by suppression/concealment of material facts / documents in relation to the JMEPL led consortium and suppression/concealing the fact that one of the consortium partners (JMH), which bid for the project, was dissolved prior to the grant of authorization on 06.09.2013?

6.2. Why the authorization of the Entity should not be suspended/ cancelled by the Board in terms of Section 23 of the Act considering failure to comply with conditions of the authorization by non-compliance with the provisions of Regulation 5(6)(f), Regulation 10(3) of the CGD Authorization Regulations and Clause 8 of the Bid Document even after almost 5 and a half years from the grant of authorization?

6.3. Why the Performance Bank Guarantee of the Entity should not be encashed equal to the percentage shortfall in meeting targets of Inch-kms and domestic connections for the Jalandhar Geographical Area by the Board in terms of Regulation 16(1)(c) of the Act considering failure to comply with conditions of the authorization in relation to zero Progress on PNG Domestic Connections and Inch-kms of Steel Pipeline and failure to achieve the month/quarter wise targets in the catch-up plan?"

44. The allegations concerning breaches of Regulations 5(6)(f) and 10(3) and of Clause 8.0 of Bid document *vis-à-vis* Ludhiana and Kutch (East) are similar to those set out in Show Cause Notice for Jalandhar GA (already extracted). The issue which separates the cases of GA of Jalandhar from that of the two others relates to proof of *financial closure* respecting the latter.

45. The Show Cause Notices dated 26.03.2019 in relation to Ludhiana and Kutch (East) GAs, thus, also alleged as under:

"3.1.8 As sought by the Board vide minutes of hearing dated 30.01.2018, the Entity had, on 29.01.2018 submitted a loan sanction letter in the name of JMEPL, which was dated 29.09.2016 of Deutsche Bank AG, Singapore Branch ("DB"). The letter of DB dated 29.09.2016 was for a sanction for a total amount of US$298 million for 5 years for development of CGD Networks in Ludhiana and Kutch East. This sanction letter was submitted by the Entity as a part of Financial Closure required under Regulation 11(3) of the CGD Authorization Regulations.

3.1.9 It is pertinent to mention here that the PNGRB, vide its letter dated 21.12.2018, had asked DB to confirm whether the letter dated 29.09.2016 was issued to JMEPL by DB and also asked for details of the disbursement and outstanding loan to JMEPL. In response, DB had sent letter dated 14.02.2019 signed by its Managing Director and Senior Legal Counsel stating inter alia as under:

"… Deutsche Bank AG, acting through its Singapore branch had issued a non-binding letter (DB letter) to arrange a

financing for British Chemicals Pte. Ltd., a Singapore incorporated entity (British Chemicals) in its capacity as a principal shareholder of JMEPL, to finance their investment in JMEPL subject to conditions set out in the DB Letter, inter alia being satisfactory due diligence, documentation, and receipt of all internal approvals including legal and credit approvals, and British Chemicals providing acceptable collateral including bank guarantees.

The said financing as set out under the DB Letter did not progress, as neither did British Chemicals furnish the requisite documents nor did they satisfy any of the conditions set out in the DB Letter, including but not limited to provision of the bank guarantees.

In the view of the foregoing, we would like to bring to your attention, that as mentioned herein, there is no facility contemplated or outstanding or sanctioned or disbursed to JMEPL (or for that matter, its principal shareholder British Chemicals) as on date…"

3.1.10 The above response of DB leads to the prima facie view that the loan sanction letter submitted by the Entity on 30.06.2016 in its name is a forgery since DB itself has confirmed that a non-binding letter has been issued to British Chemicals and not to JMEPL and that the said financing has not progressed. It therefore prima facie appears that JMEPL had submitted forged documents to the Board in order to show financial closure and mislead the Board.

3.1.11 In light of the above facts, the Board is prima facie of the view that even after so many years since the grant of authorization, the condition of authorization in relation to financial closure has still not been achieved by the Entity as on date though it was supposed to be achieved within 180 days from the date of grant of authorization."

46. On above basis, the Show Cause Notices *vis-à-vis* Ludhiana and Kutch (East) called upon the appellant to explain as under [quoted from the notice in relation to Ludhiana GA, the language in the notice concerning Kutch (East) GA being similar, except for reference to the relevant GA]:

"6. In light of the above facts and circumstances and considering the Grounds for the present Show Cause Notice the Entity is required to Show Cause on the following: "

6.1. Why the authorization of the Entity should not be cancelled by the Board considering that the bid was prima facie won by

suppression/concealment of material facts / documents in relation to the JMEPL led consortium and suppression / concealing the fact that one of the consortium partners (JMH) was dissolved prior to the grant of authorization on 25.06.2015?

6.2. Why the authorization of the Entity should not be suspended / cancelled by the Board in terms of Section 23 of the Act considering failure to comply with the conditions of authorization in relation to financial closure and compliance with the related Regulations of the Board?

6.3. Why the authorization of the Entity should not be suspended / cancelled by the Board in terms of Section 23 of the Act considering failure to comply with conditions of the authorization by noncompliance with the provisions of Regulation 5(6)(f), Regulation 10(3) of the CGD Authorization Regulations and Clause 8 of the Bid Document even after almost four years from the grant of authorization?

6.4. Why the Performance Bank Guarantee of the Entity should not be encashed equal to the percentage shortfall in meeting targets of Inch-kms and domestic connections for the Ludhiana Geographical Area by the Board in terms of Regulation 16(1)(c) of the Act considering failure to comply with conditions of the authorization in relation to zero Progress on PNG Domestic Connections and Inch-kms of Steel Pipeline and failure to achieve the month/quarter wise targets in the catch-up plan?"

47. The appellant filed replies on 05.06.2020 contesting the show cause notices. The matters arising out of the three Show Cause Notices were heard together, reference being made to certain documents that had been submitted or gathered in between, the crucial material concerning the alleged "*doctored documents*" *vis-à-vis the* claim of *financial closure* for Ludhiana and Kutch (East) comprising of certain reliance by the appellant before the Board and certain exchange between the Board and the concerned bank *viz.* Deutsche Bank AG, Singapore. The same may be noted at this stage.

48. One of the grievances of the appellant in relation to the Show Cause Notices dated 26.03.2019 in respect of GAs of Ludhiana and Kutch (East) has been that the Board had withheld crucial material in the nature of its letter dated 21.12.2018 addressed to Deutsche Bank as also the reply dated 14.02.2019 which had been received in response. At the fag end of the hearing on these appeals, the Board submitted an application (IA no. 1425 of 2022) seeking permission to place on record additional documents. While some of the documents included in the compilation that was presented with the said application are such as had been specifically called for by us (e.g. the above mentioned two letters and the replies submitted by the appellant in answer to the Show Cause Notices), the Board has also brought in certain further material *viz.* copy of feasibility report dated 16.02.2011 and of letter dated 29.01.2018 both submitted by the appellant. Though we find some merit in the exception taken by the learned counsel for the appellant on the ground that there is no explanation given as to why such material could not have been placed on record earlier, no case under Order 41 Rule 27 CPC having been made out. [*Malyalam Plantations Ltd v. State of Kerala* (2010) 13 SCC 487 and *State of Karnataka and Anr v. K.C. Subramanya and ors* (2014) 13 SCC 468], given its nature and connection with the arguments that have been advanced, we accept the request of learned counsel for the Board that this additional material be not disregarded. At the same time, however, we express strong disapproval of the manner in which the Board has again been selective in placing on

record, for scrutiny, material germane to the issues, this being reflected by the fact that copy of the letter dated 21.12.2018 addressed by the Board to Deutsche Bank (page 135 of the compilation submitted with the above-mentioned IA) reveals there was an annexure sent with the said communication copy whereof has been omitted.

49. As mentioned earlier, while the matter was pending before the Board, the appellant decided to renunciate the authorizations by entering into a *Business Transfer Agreement* (for short, *'BTA'*) for transfer by sale of the CGD business undertakings including authorizations granted by the Board in favour of another entity (ATGL) for consideration. Information about this event was given to the Board at the hearing on the matters leading to the impugned order at hand on 04.11.2020, a joint transfer application having been submitted, on such basis, with reference to Regulation 10(3) of the Authorization Regulations, on 05.11.2020. The decision rendered by the Board on 03.12.2020 does not give any consideration to, or make reference of the said joint transfer application of AGL and the appellant.

50. It appears that the impugned order was challenged by Appeal no. 239 of 2020 also by another entity *viz.* Think Gas Ludhiana Pvt. Ltd. (for short, *'Think Gas'*), objecting to non-cancellation of the authorization of GA for Jalandhar. By *ad interim* Order dated 16.012.2020, this tribunal had granted a temporary stay against further action pursuant to the transfer of

authorization permitted for GA of Jalandhar. PNGRB *returned* the above-mentioned joint transfer application on 28.12.2020, referring to the said *ad interim* order. The appellant objected to the said communication by letter dated 12.01.2021 on the ground of *corum non judice* and violation of principles of natural justice.

51. The appeal of Think Gas was dismissed for want of *locus* by judgment dated 06.08.2021 of this tribunal, the appeal (Civil Appeal no. 5659 & 5662 of 2021) against the said decision having been dismissed by Hon'ble Supreme Court on 13.09.2021/14.12.2021. The appellant then pressed the prayer for transfer in favour of ATGL on the basis of joint transfer application by another communication dated 09.12.2021 to which there has been no response.

52. The first captioned appeal (no. 160 of 2022) relates to GA of Jalandhar, the reliefs thereby sought including not only for setting aside of the impugned decision imposing penalty and adverse findings *vis-à-vis* violation of terms and conditions of the authorization but also for direction to the Board *"to consider and process the application dated 05.11.2020 in respect of Jalandhar GA in accordance with law"*. The other two appeals (nos. 161 & 162 of 2022) pray, *inter alia,* for setting aside of the impugned order cancelling the authorization and for refund of the amounts recovered by encashment of bank guarantees. The prayer for consideration of the

joint transfer application dated 05.11.2020 was reiterated by IA no. 388 of 2022, subsequently moved.

53. The Board has summarized the grounds of the three separate Show Cause Notices in (para 11 of) the impugned order as under:

> *"11. Due to various procedural aspects, the Board had to withdraw the notice dated 14.09.2018and issued 3 separate Show Cause Notices ("SCN") for all 3 GAs on 26.03.2019 under Regulation 16 of CGD Authorization Regulation and Section 23 of the PNGRB Act, 2006,on the following grounds:*
>
> *Common Grounds for all 3 GAs:*
>
> *a) The entity has prima facie won the bid based on suppression/ concealment of material facts/ documents in relation to the JMEPL led consortium and the fact that one of the consortium partners (JMH) was dissolved prior to the grant of authorization.*
>
> *b) Prima facie violation of regulations 5(6)(f) and 10(3) of the CGD authorization regulations and clause 8 of the bid document in relation to the formation of a company or SPV.*
>
> *c) Zero progress on PNG domestic connections and inch-kms of steel pipeline Additional Ground for Kutch (E) and Ludhiana GAs:*
>
> *Additional ground for Kutch (East) and Ludhiana GAs:*
>
> *d) Non-achievement of financial closure and submission of prima facie doctored documents."*

54. The impugned decision turns on attributes of "*suppression and concealment of material facts/documents*", "non-achievement of *financial closure and GSA"* and *"submission of doctored documents"* in respect of Ludhiana and Kutch (East) GAs**.**

55. The allegations in the show cause notices include narration labeled as "Suppression and Concealment of Material Facts/Documents" in relation

to *JMEPL* and *JMH*. The Board, by its impugned Order dated 03.12.2020, has concluded as under:

> *"(i) The bid for the Jalandhar, Ludhiana and Kutch (East) GAs was submitted by the consortium of Jay Madhok Holdings (JMH) and Jay Madhok Energy Private Limited (JMEPL) on 18.02.2011. Thereafter, a new company namely, Jay Madhok Holdings Private Limited (JMHPL) was incorporated on 09.05.2011, without any intimation to the Board in this regard. Clause (8) (A) of the Memorandum of Association of JMHPL clearly stipulates that the partnership firm shall stand dissolved on the incorporation of the company. Hence, it leads to the inescapable conclusion that contrary to the claims of the entity, the partnership firm JMH, which was a part of the consortium which had made the bid, did not remain in existence after 09.05.2011 and the said position was intimated to the Board by the entity only on 14.10.2014, much before the date the Board had already granted the authorization in respect of Jalandhar GA on 06.09.2013. The claim by the entity that it had sent a letter dated 04.04.2013 to the Board, regarding the formation of JMHPL is not available in records of the Board. Moreover, bidding entity or one of the consortium partner cannot be dissolved before or after award of GA without approval of the Board in terms of Authorisation Regulations. The non-intimation of the fact that one of the consortium partners, in whose name the bid had been made, had even ceased to exist much before the date of grant of authorization, amounts to material concealment on the part of the entity. Further, the issue 'whether intimation was sent to the Board on 04.04.2013 or on 14.10.2014 or not will not make any material difference, as the consortium of JMEPL and JMH qualified for bidding based on net worth of JMH (Rs. 164 Crore), which was liquidated on 09.05.2011 and a new company JMHPL was incorporated before authorization, whose net worth was only 0.93 Lakh. If this information were known to PNGRB before award of GA, the consortium of JMEPL and JMHPL would not have qualified the net worth requirement of the bidding and thus would not have even been short listed forbid evaluation.*
>
> *(ii) Further, in its undertaking given to the Board on 03.06.2011, it was stated by the consortium that they shall convert the partnership into a company in case of grant of authorization. Even at that time it was not disclosed by the entity that the partnership firm (JMH) had been dissolved and a new company*

(JMHPL) had already been incorporated. It is also relevant to mention that even in the case of the formation of the Special Purpose Company "Ishar Gas Jalandhar Private Limited", the company was formed on 13.12.2013 but the intimation regarding the same was given to the Board only on 25.04.2015. Therefore, we are inclined to come to a conclusion that substantial omissions, commissions and delays have been made by the entity regarding the formation of the Special Purpose Companies in respect of all the Gas."

[Emphasis supplied]

56. On the issue of violation of Regulations 5(6)(f) and 10(3) of Authorization Regulations, and clause 8 of the Instructions to bidders, the Board has articulated its views in the impugned order as under:

"(i) The Board has scrutinized the documents submitted by the entity and noticed that Ishar Gas Jalandhar Private Limited ("IGJPL"), the SPV for Jalandhar GA, was incorporated on 13.12.2013, around three months after the grant of authorization to consortium of JMEPL and JMH on 06.09.2013, even though the information about the same was provided to the Board much later, as discussed earlier. As per the mandate of regulation 5(6)(f) of the Authorization Regulations, the entity on being declared as a successful bidder and not being a company shall become a company registered under the Companies Act, 1956. This provision was flouted by the entity when it dissolved one of the consortium partners, JMH, before the grant of authorizations in respect of all the three GAs of Jalandhar, Ludhiana and Kutch (East) and incorporated JMHPL on 09.05.2011, without any information or approval from the Board.

In the present case, it is evident from the MOA of IGJPL that at the time of incorporation, 50% of the share capital of the company was owned by an individual, Shri Satinder Singh Madhok, while the remaining 50% of the share capital was owned by JMEPL, one of the consortium partners which had placed the bid. The other consortium partner, JMH, which already stood dissolved, or its partners were not represented in the SPV. The above manner of constitution of IGJPL clearly constitutes a violation of clause 8 of the Application-cum-Bid- Document."

[Emphasis supplied]

57. The Board has treated the requests concerning *Ishar Gas* as one of the recognition of SPV and transfer of authorization in its favour and held as under:

> *"(a) SPV formation was not in compliance with regulation 5(6)(f) of the Authorization Regulations, as per which, the entity on being declared as a successful bidder and not being a company shall become a company registered under the Companies Act, 1956. SPV was formed without proportionate representation of two consortium partners i.e. JMEPL and JMH or its partners. Also as has been mentioned earlier, there was a substantial delay on the part of the entity in intimating the Board about the formation of the SPVs in relation to the various GAs. Apart from the same, there were also several outstanding issues in relation to the entity, pertaining to achievement of FC, concealment and suppression, zero progress, violation of the PNGRB Regulations etc., in relation to which the Board, in the capacity of a statutory regulator, had already issued the present SCNs dated 26.03.2019 to the entity and had called the entity for a hearing in respect of the same.*
>
> *(b) Thereafter, as stated above, the entity kept on filing cases, on one ground or the other, in relation to the present SCNs, because of which the Board could not conclude the hearing and decide the issues highlighted in the SCNs. Even then, acting in furtherance of public interest and in compliance of the order dated10.05.2019 passed by the Hon'ble High Court of Punjab and Haryana at Chandigarh in Writ Petition No. 11783 of 2019, the Board, vide its letter dated 24.05.2019, accorded 'No Objection' to the SPVs incorporated by the entity, namely Ishar Gas Jalandhar Private Limited, Ishar Gas Ludhiana Private Limited and Ishar Gas Kutch (East) Private Limited for CNG dispensation from its outlets in the respective authorized areas.*
>
> *(c) The transfer of authorization is done/ accepted by the Board strictly in consonance with the Authorization Regulations and requires consideration of the manner of formation of the SPY, in whose favor the authorization is sought to be transferred, and its constitution. Since this very issue was also a subject matter of the present SCNs, hence the Board could not have processed the request on the part of the entity for transfer of the authorization in the name of the SPV, till the time the issue is decided. However, as stated above, the Board did*

permit the SPVs to dispense CNG and did not pose any hurdle in the way of the entity from conducting its operations. However, the entity did not use the dispensation for reasons known to itself.

Findings of the Board on Issue Nos. 1 and 2

i. Now that the Issue Nos. 1 and 2 stated above, which were requested by the entity to be decided first before assessment of its performance and consideration of the issue of non-achievement of the targets, specified in the authorizations, on its part, have been dealt, we can analyze and assess the progress made by the entity in laying and building the CGD network in the Gas of Jalandhar, Kutch (East) and Ludhiana, for which authorizations were granted to the entity on 06.09.2013, 12.03.2015 and 25.06.2015respectively.

ii. It is evident from the above discussion, as well as from a perusal of the latest QPRs submitted by the entity, that the progress made by the entity in meeting the targets specified in the authorizations, in relation to the biddable parameters of PNG Domestic Connections and Inch- km pipelines, is abysmal to say the least."

[Emphasis supplied]

58. On the issue of non-achievement of financial closure and GSA, as also the submission of forged documents, the Commission has noted the submissions of the appellant and recorded its findings by the impugned order as under:

"I. Submissions of the Entity

(i) In respect of the issue of non-achievement of Financial Closure (FC) and GSA for Ludhiana and Kutch (East) GAs, JMEPL contended that it has achieved its FC through internal resources and on the basis of financial strength of JMHPL. It has been further contented by the entity that the entire project could be funded through internal accruals and in support of the said contention, the entity, along with its letter dated 08.06.2016, submitted extract of board resolution dated 28.03.2016. It was also stated by the entity that the issue of FC ought not to be treated in isolation and the focus should be to run and execute the project in terms of the authorization.

(ii) The entity also stated that the company's internal accruals have always been enough to fund the City Gas Distribution project granted by the Board. The projects have always been funded by the entity through internal resources, notwithstanding the fact that the entity always had very limited scope to operate legally under the applicable law and PNGRB Regulations, on account of various pending permissions and approvals being awaited from the government, statutory authorities/bodies etc. Further, it was submitted by the entity that the financial proposal from Deutsche Bank has not been executed and no disbursal of any kind from the Bank has ever been taken. The entity has however denied that it had committed forgery of any kind.

II. Findings of the Board

(i) As per regulation 11 of the Authorization Regulations, the entity was required to obtain FC of the project from a bank or financial institution, within a period of 180 days from the date of grant of authorization (within 120 days in case of internally financed project). Thus, in the present case, the entity was required to achieve FC by 11.09.2015 for Kutch (East) GA (by 10.07.2015 in case of internal financing), and by22.12.2015 for Ludhiana GA (by 3.10.2015 in case of internal financing) and it was only on the failure of the entity to achieve the same that the Board, vide its letter dated 02.06.2016, directed the entity for a statutory hearing for non-compliance of the above-mentioned requirement on 04.07.2016. After hearing the entity, the Board observed that:

> *"No credible evidence related to clear FC and GSA has been submitted to this Board and this attracts action under relevant provisions of extant Regulations."*

(ii) On the basis of the above observation, the Board, in exercise of its powers under regulation 11(5) of the Authorization Regulations, cancelled the authorizations granted to the entity for Ludhiana GA and Kutch (East) GA on the ground of non-achievement of Financial

Closure. The orders dated 15.07.2016 passed by the Board were challenged by the entity before the Appellate Tribunal for Electricity,

vide Appeal Nos. 196 of 2016 and 197 of 2016, and by order dated

02.12.2016, the Board was restrained from taking any precipitate steps in the matter. Subsequently, the orders dated 15.07.2016 passed by the Board were set aside on procedural aspects by APTEL vide common judgment dated 28.04.2017, whereby the Board was directed to follow regulation 16 and pass orders in accordance with law.

(iii) Thereafter, in accordance with the directions passed by APTEL, the Board re-examined the issue of achievement of FC by the entity in respect of the Ludhiana GA and Kutch (East) GA. In order to verify the claim made by the entity that it has been able to achieve FC for the GAs of Ludhiana and Kutch (East) through a combination of internal accruals and a committed financing proposal from the Deutsche Bank, the Board sent a letter dated 14.09.2018 (reminder on 21.12.2018) to confirm the position of loan sanction of an amount of 298 million US dollars to JMEPL by the Bank, as claimed by the entity vide its letter dated 29.01.2018.

(iv) Vide letter dated 14.02.2019, the Bank informed the Board that the bank, acting through its Singapore branch, had issued a non-binding letter to arrange a financing for British Chemicals Pte Ltd, a Singapore incorporated entity, in its capacity as a principal shareholder of JMEPL, but the said financing did not progress as the requisite documents for the financing were never furnished to the bank. It was made clear by the bank in its letter that there is no facility contemplated or outstanding or sanctioned or disbursed to JMEPL or its principal shareholder British Chemicals as on date (of Bank's letter). This letter by the bank completely negated the claim by the JMEPL that it had received a committed financing proposal from the Bank. In fact, it was made clear by the bank that they never issued any letter at all in the name of JMEPL and the only letter issued by them was in the name of British Chemicals, which raised serious aspersions about the veracity and authenticity of the letter dated 29.09.2016 submitted by the entity vide its letter dated29.01.2018 before the Board.

(v) When the entity was confronted with the above facts, the entity adopted an evasive approach and apart from merely asserting that it had not committed any forgery, it neither disputed the contents of letter dated14.02.2019 sent by the Bank to PNGRB through production of any document nor was it able to provide any explanation for the same. The only submission made by the entity on this aspect was that it had decided to finance the CGD projects internally and no disbursal of any kind has been taken from the Deutsche Bank, which again goes contrary to the Board Resolution dated 28.03.2016 submitted by the entity to the Board vide its letter dated 08.06.2016, in which the entity stated that it will meet the capital commitment of the project through internal accruals and a committed financing proposal from the Deutsche Bank.

(vi) As a result, till date, the Board has only witnessed constantly changing stands of the entity with regard to achievement of FC and GSA. In respect of GAs of Ludhiana and Kutch (East), the entity has not yet submitted the documents substantiating the financial

capability of the entity to meet the capital commitment of the CGD projects of Ludhiana and Kutch (East) GAs, despite the fact that more than five years have passed since the grant of authorizations by the Board qua the two GAs."

[Emphasis supplied]

59. The Board, in conclusion, has observed thus:

"23. Having considered all the issues at hand and after having deliberated at length, we have come to the conclusion that there has been abject failure on the part of the entity in discharging its obligations under the authorizations and in meeting the specified milestones therein. Apart from this, the entity is also guilty of material concealment and suppression, non-achievement of FC & GSA in terms of the Authorization Regulations, attempt to mislead the Board through submission of doctored documents and also violation of PNGRB Regulations. Now the only question remains as to what is the penalty that ought to be imposed on the entity.

24.The Board as a regulator has to ensure that the public interest is served and the entities, after receiving authorization, do not indulge in delaying tactics and deprive the public from receiving cleaner and greener fuel due to their inefficiency and inability. The Act and the Regulations enable the Board to impose suitable penalties in order to ensure that the authorized entities remain vigilant in meeting their targets and the inefficiency of the authorized entity does not result in an adverse impact on the public interest. In the present case, despite repeated opportunities, the entity has failed to mend its ways and improve its performance, leaving the Board with no alternative but to act against the entity in the interest of the consumers and public at large.

25. The Board as a public body has to act in public interest in general while discharging its duty and functions under the Act. It cannot permit a non-performing entity to continue delaying a project of national importance without making any efforts to discharge its obligations and meet its targets as that will only be detrimental to the public interest and the environment."

[Emphasis supplied]

60. On the basis of above, the impugned directions have been given by the Board through the order under challenge, which read as under:

"ORDER

Keeping in mind the overall factual conspectus of the case, the associated circumstances and the above findings and deliberations, we order as under:

a) *to cancel the authorization in respect of Ludhiana and Kutch (East) Geographical Areas involving submission of doctored documents and evidence letter from Deutsche Bank AG, Singapore in addition to other severe omissions and commissions as discussed above in detail, under section 23 of the Act read with regulations 11 and 16 of Authorization Regulations and immediate encashment of the entire performance bank guarantees (PBGs) available with PNGRB in respect of these two GAs.*

b) *to levy a penalty under regulation 16 of Authorization Regulations for various omissions and commissions as discussed above in detail equivalent to 50% of PBG amount and immediate encashment of the performance bank guarantee (PBG) to that extent out of PBG available for Jalandhar GA.*

c) *to transfer authorisation of Jalandhar GA from JMEPL to Ishar Gas Jalandhar Private Ltd. subject to the compliance of Regulation 5(6)(f) and 10(3) of Authorization Regulations and Clause 8 of the Bid Document within 90 days from this order."*

[Emphasis supplied]

61. The main theme of the submissions of the learned counsel for the Board was that the Board is a statutory authority which has acted as the regulator of the sector, the decisions taken by it being in public interest, this tribunal ought to respect the approach taken because the Board is only insisting on due compliances with the conditions attached to the authorization, and as the author of the regulations, and of bid documents, it being in the best position to interpret and apply the same. Reliance has been placed on the decisions of the Hon'ble Supreme Court in the cases of *Babu Verghese and ors v. Bar Council of Kerala and ors.* (1999) 3 SCC 422; *W.B. State Electricity Board v. Patel Engineering Co. Ltd and ors*.

(2001) 2 SCC 451; *Siemens Public Communication Networks Private Limited and anr. v. Union of India and ors.* (2008) 16 SCC 215; and *Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers v. New J.K. Roadways, Fleet Owners and Transport Contractors and ors.* (2020) SCC OnLine SC 1035. It is also the argument of the Board that if two views are possible and no *malafide* or arbitrariness is shown, this tribunal must *refrain* from interference with the view taken by the authority that had over-seen the bid process.

62. Reference is made to the decision of a division bench of the High Court of Delhi in the case of *Mahindra Electric Mobility Limited v. Competition Commission of India* reported as 2019 SCC OnLine Del 8032 to argue that the power of '*regulation'*, entrusted to the Board by law, means the authority *'to control',* '*to adjust by rule'* or '*to subject to governing principles'*, which embraces within its fold '*the powers incidental*' thereto. The counsel relied on views expressed, in an article entitled *Rulemaking v. Adjudication: a Psychological perspective* [Jeffrey J. Rachlinkski 32 FLA. ST. U.L. REV. 529 (2005)], which has been quoted by the High Court in its decision in the *Mahindra Electric* (supra), particularly the following passage:

> *"Implicit in the deference that both Congress and the courts have shown to agencies as to the choice between rule making and adjudication is faith that the agency itself is in the best position to identify the appropriate means of proceeding. An agency's choice of policy-making instruments, however, probably does not reflect a straight-forward effort to identify the method that will produce the best substantive decision. The agency will be primarily concerned with*

choosing a policy making method that will allow it to be efficient and yet survive judicial review.

63. Seeking to draw support from ruling in *Director General (Road Development) National Highways Authority of India v. Aam Aadmi Lokmanch and ors.* reported as (2021) 11 SCC 566, it was submitted that while dealing with the decisions or orders/directions of regulatory bodies, the appellate authority must bear in mind that the forum of first instance is "*an expert regulatory body"*, its personnel include technically qualified and experienced members, it issues directions after taking into account views of stakeholders who are likely to be impacted and that to insist upon one form of action to the exclusion of the other is to exalt form over necessity.

64. Reference was also made to decision of Hon'ble Supreme Court in the case of *Adani Gas Limited v. Union of India and ors.* reported at (2022) 5 SCC 210 which concerned a challenge that had been brought to validity of Regulation 18 of the Authorization Regulations. The submission is that in matters of evaluation of policy, by regulation or adjudication, it is the substance which matters and not the form, there being a need to give widest possible latitude to the regulatory authority. Reliance is placed on the following observations in the said judgment:

"It is recognized, in certain decisions, by this Court, that regulations and rules framed in exercise of statutory empowerment, by expert statutory bodies, and regulatory authorities, should be interpreted deferentially, with the foreknowledge that such bodies know their task and are best equipped for it."

65. It was submitted for the Board that regulatory proceedings stand on a different jurisprudential pedestal, it being open to the regulator to sustain by introducing new regulatory norms in the adjudication process, the foremost guidance being the public interest objective. It was also submitted that the essence of decision making process by the Board is not the protection of individual rights of the authorized entity and so it may not be correct to set aside the decision on technicalities.

66. The learned counsel for the Board also argued that the Board comprises of members who are not trained in or having experience of adjudicatory process and, therefore, infractions in the matter of compliance with statutory framework or regulations should be overlooked. We do not agree. The Board is a statutory authority that is trusted with responsibilities of great import and significance. It exercises jurisdiction not only to frame regulations for the sector but is also the adjudicatory authority over disputes that arise. In the latter capacity, it acts as a substitute for civil court. For such purposes, the law makes available to it the necessary expertise in the form of Member (Legal) whose presence on the bench is mandatory in dispute resolution processes [S.24(1)]. It has the aid and assistance of personnel drawn from varied fields including law. It is entitled to avail of legal advice as and when necessary. In these circumstances, we cannot allow the Board to come up with such specious plea of lack of adjudicatory expertise or competence.

67. Indeed, the Board has been established by the PNGRB Act as the high-powered statutory regulator entrusted with multifarious duties and responsibilities that include not only framing regulations but also enforcing them for optimum development of the sector, in the best interest of the economy of the country and the consumers at large. As the sectoral regulator, and as a body which is conceived to be one equipped with requisite expertise, its views on the technical issues that arise do deserve deference and respect. Being the authority that initiated, and had the oversight over, the bidding process, its views *vis-à-vis* the meaning or import of terms and conditions forming part of the bid documents have to be given credence and definitely cannot be lightly brushed-aside.

68. But it has to be remembered that upon grant of authorization, after due process, certain rights get vested in the hands of the authorized entity. Taking back such rights granted under such authorization, by invoking the power to suspend or cancel, or by imposition of sanctions – civil or criminal – illustratively by imposition of penalty (recoverable, as in the case at hand, through procedure under Regulation 16) involve a jurisdiction which is *quasi-judicial* in nature. In exercising such *quasi-judicial* jurisdiction, the Board acts as a tribunal and is bound by the law to act dispassionately, follow the procedure prescribed (in law or regulations), and reach conclusions on the basis of evidence that has been gathered through an

inquiry properly held. The end result of such *quasi-judicial* process undertaken by the Board, if it leads to adverse consequences for an entity (which is thereby aggrieved), is subject to the remedy of appeal provided by the law before this tribunal. In an appeal of such nature, it is the bounden duty of this tribunal to subject to scrutiny the propriety and legality of the process in entirety. If this tribunal finds that the procedure has not been properly followed, or the guidance by the law particularly concerning rules of natural justice has been flouted, or conclusions reached are perverse because they stem from extraneous material or are result of misreading of the material available, it is the duty of this tribunal, as the first appellate forum, to step in and bring about the necessary correction.

69. The decision under challenge before us has been rendered by the Board in quasi-judicial proceedings. A decision of such nature will have to defend itself, its validity or propriety to be tested on the reasons set out therein. For this, we need only to quote a Constitution Bench decision of Hon'ble Supreme Court reported as *Mohinder Singh Gill and Another v. The Chief Election Commissioner, New Delhi and Others* (1978) 1 SCC 405 as under:

> *"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji,:*

> *Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.*
>
> *Orders are not like old wine becoming better as they grow older."*

70. The learned counsel for the Board relied on *Chairman All India Railway Recruitment Board & Anr v. K. Shyam Kumar & Ors* (2010) 6 SCC 614 to argue that principles laid down in *Mohinder Singh Gill* (supra) cannot be applied where larger public interest is involved and in such situation, additional grounds can be looked into. We only need to point out that in the case cited, the decision was administrative in nature, unlike the case at hand where the Board has acted a quasi-judicial capacity *vis-à-vis* matters in which it was not only the accuser but also the judge of the cause, the onus of being more transparent and reasonable and to avoid arbitrariness being greater. Be that as it may, we are conscious that overwhelming public interest cannot be disregarded even while bringing about course – correction if appellate scrutiny reveals gross breaches of law or regulation having been committed.

71. We may also add here that we are not at all questioning the authority of the Board to order suspension or cancellation of authorization, or to impose sanctions in the nature of penalty for such delays or defaults, if the same were not properly explained. We are more concerned with

compliance with the due process for meting out such penal consequences as have been imposed.

72. The learned counsel for the Board strenuously argued that the appellant has been guilty of infraction not only of Regulation 5(6)(f) and Regulation 10(3)(5) of the Authorization Regulations, as indeed of Clause 8 of the bid document, but also of inordinate delays in compliances with the terms and conditions of the authorization *vis-à-vis* the three GAs, particularly on the requirements of financial closure, execution of Gas Supply Agreement ('*GSA*'), and progress on ground in development work of inch-kms of pipelines. He referred extensively to the feasibility reports that had been submitted along with the bids and catch-up plans wherein certain targets and roadmaps had been set out, also for the fulfillment of the eligibility conditions required to be met subsequent to the grant of authorization (achievement of financial closure and GSA) and execution of the work. He pointed out that the financial closure is required to be achieved within 180 days of the grant of authorization, which time-line has lapsed long ago.

73. All that we need to observe in the above context is that the delays or defaults in such compliances as achievement of financial closure or of GSA or, for that matter, in execution of the work at ground (development of inch-kms pipelines) are vivid from the material placed before us. The appellant is not even denying that there have been such delays or defaults on its

part. Its plea, however, relates to the propriety or legality of the procedure through which it has been visited with consequences that form operative part of the impugned order of the Board. Its grievances are that the reasons it had placed for consideration by the Board to explain the delays or defaults (of such kind as above) have gone unheeded, not even appreciated, this being not only breach of the procedure prescribed by Regulation 16 but also of the directions of this tribunal in the first round of appeals.

74. The record is replete with material demonstrating *ex facie* that the entire blame for delay in progress on ground or compliances with such requirements as timely securing GSA cannot be placed at the door of the appellant, several factors having played out as road-blocks, the position taken by the Board unfortunately also not having been very helpful. Noting in brief, we may mention in the present context the uncertainty arising out of the issue pending before the writ court on the status of CNG station *vis-à-vis* CGD network and, as was noted at length in the first round of appeals, lack of proper support from the State Government. The High Court had to intervene, *inter alia,* by Orders dated 22.10.2016, 18.01.2017 and 10.05.2019 in Civil Writ Petitions (nos. 13490 of 2008 and 11783 of 2019) to direct the State Government, *inter alia,* to arrange proper systems for grant of requisite permissions or NOCs having a bearing on laying of pipelines. The policy governing grant of permission, levy of restoration

charges and determination of compensation for Right of Use (RoU) for laying of CGD networks was notified, after High Court's intervention, by the State Government only on 03.04.2018.

75. The cancellation of the authorization by the Board on 15.07.2016 was set aside by this tribunal on 28.04.2017. Though a formal request had been made by the authorized entity on 25.04.2015 for incorporation of IGJPL being accepted by the Board as due compliance with Regulation 5(6)(f), the matter remained pending with the Board over prolonged period. The Board has submitted arguments reflecting grudge over the fact that the appellant had taken the issues plaguing progress to the High Court by several petitions, this causing delay in decision-making on its own part. This plea is unacceptable since there is nothing in the order of the writ court to show the pursuit of remedies was uncalled for. The Board had sought clarifications by various communications and each was duly responded to by the appellant with necessary documentary proof in support. As the conclusions reached in (later part of) this judgment would show the objections raised by the Board *vis-à-vis* Ishar Gas were unreasonable. The fact remains that without Ishar Gas (IGJPL) having been acknowledged as the authorized entity replacing the one in whose name authorization had been issued, by virtue of Regulation 5(6)(f) , the authorized entity was unable to make progress in matters such as execution of GSA, the entity (GAIL India) from which gas was to be

sourced being reluctant to go ahead with hook-up agreement or to provide APM gas (reference in this context being made to various letters exchanged including letter dated 19.06.2018 of GAIL India). These facts cannot be treated as inconsequential *procedural delays* which could be anticipated, as in the views taken.

76. The explanations on the above lines for the delays or defaults in lack of progress on ground have not been properly considered by the Board, this in the teeth of observations in the judgment dated 26.05.2017 in Appeal no. 13 of 2016 and directions in judgment dated 28.04.2017 in Appeal nos. 196-197 of 2016, particularly *recognizing* the hinderance caused by such factors in progress on the ground and calling upon the Board to adhere to the procedure prescribed in Regulation 16 wherein re-casting of timelines had become an imperative to afford to the authorized entity "*reasonable time*" to fulfill its obligations.

77. We may add that the delay in achievement of financial closure or execution of the GSA or, for that matter, progress in development of inch-kms within the requisite (or desired) period of time has not even resulted in the order of suspension or cancellation of the authorization. Such delays or defaults are feature common to the authorization in respect of each of the three GAs. Notwithstanding the adverse observations in this context which we find improper and uncalled for, the Board has decided not to cancel or suspend the authorization in favour of the appellant for GA of Jalandhar.

Though the order does not expressly say so, the learned counsel for the Board explained at the hearing that such approach was taken in view of the larger public interest in as much as cancellation or suspension of authorization of Jalandhar GA would have set at naught the entire process undertaken after the grant of authorization on 06.09.2013.

78. Whilst articulating its views leading to the impugned decision concerning Jalandhar GA, the Board has, *inter alia,* observed that if the information concerning JMH and JMHPL were to be known to it before the award of GA, the consortium of JMEPL and JMHPL would not have qualified the net-worth requirement of the bidding and, thus, not even been short-listed for bid evaluation (internal page 13 of the impugned order, already quoted). Yet, the Board had decided not to cancel the authorization in respect of Jalandhar GA for such reason. Since it is the sectoral regulator which had overseen the bidding process, we would defer to its view that the authorization may continue. We must, however, hasten to add here that this is not to be construed as endorsement by this tribunal of the view taken by the Board *vis-à-vis* the status of JMH or JMHPL, an aspect we intend to deal with a little later. What we wish to highlight at this stage is only that the cases of Ludhiana and Kutch (East) GAs have been treated differently by the Board, directing cancellation of the authorization in their respect, not on account of inferences drawn *vis-à-vis* JMHPL but for

the reason that, in its view, "*doctored documents*" had been submitted to claim financial closure which was a conduct wholly unacceptable.

79. The crucial questions that need to be addressed, thus, are as to whether the appellant has failed to abide by the requirements of Regulation 5(6)(f) and Regulation 10(3) & (5) of the Authorization Regulations besides Clause 8 of the bid document and, further, as to whether forged, fabricated or *doctored* documents were submitted to claim financial closure in respect of GAs of Ludhiana and Kutch (East).

80. The learned counsel for the Board was at pains to argue that the reasons for delay in *transfer of authorization* in favour of IGJPL are an after-thought and the conclusion of concealment of the fact of cessation of JMH is a view possible to be drawn from material available, and, therefore, the finding of infraction of Regulation 5(6)(f) and Regulation 10(3) & (5) of Authorization Regulations and Clause 8 of the bid documents cannot be faulted with. He submitted that these issues are inter-linked, the transfer by JMH to JMHPL being breach of Clause 8, creating a situation wherein the selected entity could no longer comply with Regulation 5(6)(f), the bidding entity having ceased to exist. It was submitted that Clause 8 of the MoA on the basis of which JMHPL was incorporated on 09.05.2011 clearly shows that JMH stood dissolved on 09.05.2011. He also argued that there is no proof of submission of the letter of intimation on 04.04.2013, document showing subsequent taking over of assets and liabilities of JMH by JMHPL

on 29.03.2013 being of no effect inasmuch as on the date of incorporation, IGJPL did not include JMHPL as a stakeholder. He submitted that the appellant, in breach of the requirement of Regulation 13 of the Authorization Regulations had failed to submit Quarterly Progress Reports ("QPRs") and in spite of being given repeated opportunities to remedy the breaches with respect to minimum work program ("MWP") targets or for compliances with conditions of in-corporatization and financial closure had defaulted in taking appropriate steps. On this basis, he submitted that the argument of non-compliance with the procedure prescribed in Regulation 16 is not available to the appellant, the findings returned on defaults and forgery being unimpeachable.

81. The learned counsel for the Board also argued that Regulation 16 does not contemplate that when after the first instance of breach, a penalty is validly imposed, and thereafter also the authorized entity fails to remedy the breach, and commits breach of future targets also, a notice to remedy should again be given to the entity. It is submitted that on a bare reading, Regulations 16(1)(a) & (b) apply only to the first instance of a breach, and not when the breach is repeated after imposition of penalty. The argument is that a valid imposition of penalty in the first instance puts the entity sufficiently on notice that it is in breach, and it needs to remedy the same.

82. In the context of the last above-mentioned element – *doctored documents* – the learned counsel for the Board submitted that no effort has

been made by the appellant to secure confirmation from Deutsche Bank with regard to the communication relied upon, the letter addressed to British Chemicals (copy made available by the bank) being so identical with the letter relied upon by the appellant as to give rise to reasonable suspicion that the latter is a product of forgery.

83. The learned counsel on both sides addressed arguments for or against the need or permissibility of lifting of the corporate veil, the submission of appellant being that it is necessary to do so to ascertain whether or not JMHPL is corporate *avatar* of JMH. *Per contra*, it is the argument of the Board that the *Application-cum-Bid–Document* ("ACBD") does not contemplate lifting of corporate veil since there cannot be a change of bidding entity. Placing reliance on *Balwant Rai Saluja and Anr v. Air India Limited and Ors* (2014) 9 SCC 407, he submitted that this is permissible for holding the parent company liable for the conduct of its subsidiary only if it can be shown that corporate form has been misused to accomplish wrongful purposes, the ownership and control of the latter by the former being not enough.

84. In *State of U.P. and Ors v. Renusagar Power Co. and Ors* (1988) 4 SCC 59, the Supreme Court authoritatively settled the law as under:

> *"66. It is high time to reiterate that in the expanding of horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. The aim of the legislation is to do justice to all the parties. The horizon of the doctrine of lifting of corporate veil is expanding. Here,*

indubitably, we are of the opinion that it is correct that Renusagar was brought into existence by Hindalco in order to fulfil the condition of industrial licence of Hindalco through production of aluminium. It is also manifest from the facts that the model of the setting up of power station through the agency of Renusagar was adopted by Hindalco to avoid complications in case of take over of the power station by the State or the Electricity Board. As the facts make it abundantly clear that all the steps for establishing and expanding the power station were taken by Hindalco, Renusagar is wholly owned subsidiary of Hindalco and is completely controlled by Hindalco. Even the day-to-day affairs of Renusagar are controlled by Hindalco. Renusagar has at no point of time indicated any independent volition. Whenever felt necessary, the State or the Board have themselves lifted the corporate veil and have treated Renusagar and Hindalco as one concern and the generation in Renusagar as the own source of generation of Hindalco. In the impugned order of the profits of Renusagar have been treated as the profits of Hindalco.

67. In the aforesaid view of the matter we are of the opinion that the corporate veil should be lifted and Hindalco and Renusagar be treated as one concern and Renusagar's power plant must be treated as the own source of generation of Hindalco and should be liable to duty on that basis. In the premises the consumption of such energy by Hindalco will fall under Section 3(1)(c) of the Act. The learned Additional Advocate-General for the State relied on several decisions, some of which have been noted.

68. The veil on corporate personality even though not lifted sometimes, is becoming more and more transparent in modern company jurisprudence. The ghost of Salomon's case still visits frequently the hounds of Company Law but the veil has been pierced in many cases. Some of these have been noted by Justice P.B. Mukharji in the New Jurisprudence.

69. It appears to us, however, that as mentioned the concept of lifting the corporate veil is a changing concept and is of expanding horizons. We think that the appellant was in error in not treating Renusagar's power plant as the power plant of Hindalco and not treating it as the own source of energy. The respondent is liable to duty on the same and on that footing alone; this is evident in view of the principles enunciated and the doctrine now established by way of decision of this Court in Life Insurance Corpn. of India, that in the facts of this case sections 3(1)(c) and 4(1)(c) of the Act are to be interpreted accordingly. The person generating and consuming energy were the same and the corporate veil should be lifted. In the facts of this case Hindalco and Renusagar were inextricably linked up together. Renusagar had in reality no separate and independent existence apart from and independent of Hindalco.

…"

85. We have examined the material on record guided by law as expounded above.

86. On the issue of compliance with Regulation 5(6)(f) and Regulation 10(3) & (5), as indeed Clause 8 of the bid document, the crucial conclusions reached by the Board are that JMH did not remain in existence after 09.05.2011, the dissolution of JMH before or after the award of GA being impermissible, also because there was no intimation given, this constituting material concealment of crucial facts from the regulatory authority, the letter dated 04.04.2013 being *"not available"*.

87. In our considered opinion, the entire approach of the Board is misdirected. Simply observing that letter dated 04.04.2013 was "*not available"* in the record of the Board is neither here nor there. There is nothing in the proceedings recorded to show that the Bord called upon the appellant to strictly prove the submission of such letter at any stage. Inability of the officials of the Board to trace out such communication from its records – which only can be the basis for such observation as *"not available"* – does not lead to the conclusion that it was never submitted. Even otherwise, the non-availability of such material has not been treated as of any consequence in the further observations of the Board to the effect that submission of such intimation on 04.04.2013 (and on 14.10.2014,

admittedly received) "*will not make any material difference*". If it were so, the non-intimation could not have led to a conclusion of "*suppression"* of information.

88. The Board has returned the finding that JMH ceased to be in existence from 09.05.2011 onwards corresponding to the JMHPL being incorporated. Reference is made in this context to the declaration in the MoA of JMHPL that the "*firm shall stand dissolved on the incorporation of the Company".* It is not fair to read that particular sentence in isolation. As noted above, the expression of intent to dissolve JMH is preceded by the declaration that JMHPL was being incorporated "*to acquire and take over the business"* and "*all the assets and liabilities"* of JMH. This clearly indicated some steps remained to be taken at some point of time in future. Such events would occur, as already noted from the financial statements and ITRs, not on 09.05.2011 but on 29.03.2013. In these circumstances, it is erroneous to hold that JMH had ceased to exist on 09.05.2011 or that there was no intimation given about its assets and liability being taken over eventually on 29.03.2013 by JMHPL.

89. The incorporation of JMHPL and its taking over of the assets and liabilities of JMH was clearly a step in the direction of compliance with the requirement of Regulation 5(6)(f) of the Authorization Regulations. The material on record has demonstrated that the setting up of *Special Purpose Vehicle* ("SPV") or *Joint Venture* ("JV") for full compliance in letter and spirit

of Regulation 5(6)(f) would occur later, in 2015, when JMEPL, the leading stakeholder in the consortium, joined hands with JMHPL in the appropriate control of IGJPL that was incorporated on 13.12.2013.

90. The material placed before us, as was also available to the Board, and to the correctness of which there is no contest, reveals that *JMHPL*, after it was incorporated on 09.05.2011, during the *Financial Year* ("FY") 2011-12, had submitted its *Income Tax Return* ("ITR") for *Assessment Year* ("AY") 2013-14, corresponding to FY 2012-13, submitting therewith the balance sheet as on 31.03.2013 indicating, amongst others, the share capital reserve and surplus as on 31.03.2012 and 31.03.2013 respectively. The duly audited balance sheet submitted with the ITR reveals that *JMHPL,* during the year of its incorporation (FY 2011-12), had three shareholders *viz*. Mr. Jaswant Singh, Mr. Satinder Singh Madhok and Mr. Sandeep Singh Madhok, they holding shares in the ratio of 40:30:30 respectively of the total value of Rs.1,00,000/-. The details of equity shares held by the shareholders controlling more than 5% shares of the aggregate shares in the company, as on 31.03.2013, pertain to three other shareholders *viz*. Mrs. Prakash Kaur, Jaspark Speciality Chemicals Pvt. Ltd and Jay Tel Mobile Pvt. Ltd., their holdings being in the percentage ratio of 17.76:10.94:60.26 respectively. The share capital of *JMHPL* as on 31.03.2013 stood at Rs. 1,11,00,00,000/-, the reserve and surplus being Rs. 3,94,71,05,105/-. The notes to the financial statement for the year

ending with 31.03.2013 in respect of *JMHPL* certified by the auditor, *inter alia,* stated as under:

> *"During the year the Company has succeeded the business carried on by the Jai Madhok Holdings, a Partnership firm and taken over the business including all the assets and liabilities of the Firm on the total consideration of Rs. 5,057,091,596 and allotted 11,09,89,800 fully paid up Equity Shares of Rs. 10 each at a premium of Rs. 35,56357067 per share to the Partners of the Firm in the proportionate share of Partner's Capital in the Firm."*
>
> *[Emphasis supplied]*

91. Parallelly, reliance is placed on the ITR of *JMH,* submitted for AY 2012-13, corresponding to FY 2011-12, the period during which *JMHPL* had been incorporated. The duly audited balance sheet submitted with the said ITR of *JMH* for AY 2012-13 shows the total capital being in the sum of Rs. 5,054,457,171/- this inclusive of Rs.1,495,548,171/- as the partners' capital, the balance of Rs.3,558,809,000/- being capital reserve, as on 31.03.2012. The shares of the partners of *JMH,* as they stood (as on 31.03.2012) are shown to be of the value of Rs. 117,736,645/- *[Satinder Singh (0.013%)]*; Rs.125,175,037/- *[Jaswant Singh (0.024%)]*; Rs. 897,676,157/- *[Prakash Kaur (20.786%)]*; Rs. 127,821,645/-*[Sandeep Singh (0.013%)]*; Rs. 57,817,722/- *[Harneet Kaur (0.713%)]*; Rs. 57,577,722/- *[Sumohita Kaur (0.713%)]*; Rs.553,270,051/- *[M/s Jaspark Speciality Pvt. Ltd. (9.841%)]*; Rs.3,046,923,968/- *[M/s Jay Tel Mobile Pvt. Ltd. (66.439%)]*; and Rs.70,458,224/- *[M/s Sundaram Software Pvt. Ltd. (1.458%)]* respectively.

92. Read together, the above mentioned ITRs of *JMH* for AY 2012-13 and *JMHPL* for 2013-14 reveal that the objective of incorporation of *JMHPL* on 09.05.2011 "*to acquire and take over the business carried on by Jai Madhok Holdings"* was achieved, not immediately upon incorporation, but in the following FY (2012-13), this having been expressly noted in the Auditor Certificate for *JMHPL,* the submission of the ITR declaring the date of allotment of shares as 29.03.2013, on account of "*succession of Partnership Firm Jay Madhok Holdings*". The Board resolution dated 29.03.2013 allotting the fully paid equity shares, for consideration, "*to succeed the business of Jai Madhok Holdings*" confirms the said fact.

93. In 2013, the consortium partners claim to have taken certain steps for compliance with the requirements of Regulation 5(6)(f) to set up an SPV or JV. To achieve this, three different companies *viz*. *Ishar Gas Jalandhar Private Limited* (IGJPL), *Ishar Gas Ludhiana Private Limited* (IGLPL) and *Ishar Gas Kutch Private Limited* (IGKPL) were incorporated. The impugned order concern facts only in relation to the first of them *viz. Ishar Gas Jalandhar Private Limited* (for short, 'IGJPL' or 'Ishar Gas'), there being no fact in relation to the other two companies on the subject of GAs of Ludhiana and Kutch (East) mentioned in the order of cancellation. As noted earlier, the one in question i.e. IGJPL is shown by the documents on record to have been incorporated on 13.12.2013.

Admittedly, on the date of such incorporation, JMEPL held a stake of 50% in the said company (Ishar Gas), the balance being held by Satinder Singh, one of the partners of erstwhile JMH and a shareholder in JMHPL. The documents on record further substantiate that the shareholding of IGJPL in due course underwent a change, the returns filed reflecting that, as on 31.03.2015, JMEPL had come to hold a stake of 80% in IGJPL, the balance 20% being held by JMHPL.

94. There is no doubt that it was part of the conditions attached to the grant of authorization that the authorized entity turned into a company registered under the Company Law so as to fulfil the "*minimum eligibility criteria"* prescribed in Regulation 5(6)(f). It bears repetition to note that there was no timeline prescribed for such compliance to be made (for the cases at hand). The original consortium partners had included a company and a partnership firm. It was the requirement of the regulations with they turned into a company, a Joint Venture (or SPV). The consortium partners opted for a course wherein the partnership firm (JMH) was first taken over by a company (JMHPL), the shareholding of its capital being identical to that of the partners of erstwhile firm, this having been achieved on 29.03.2013. Parallelly, another company IGJPL was incorporated on 13.12.2013 and the stake in the said company was taken over by the consortium partners on 31.03.2015 in the same ratio as in which they had submitted the bid.

95. There is no inhibition in the Authorization Regulations or bid documents or, for the matter, in law that '*joint venture'* of such nature should have been formed from inception by the consortium partners only and none other. In this view, the fact that JMEPL held only 50% stake in IGJPL on 13.12.2013 or that the remainder stake of IGJPL on that day was held by an individual (Satinder Singh) will not make any difference. The crucial fact is that IGJPL presented a mirror image in shareholding as that of the consortium (authorized entity) by 31.03.2015. It is that shareholding pattern with which IGJPL was introduced to the Board with the request by the consortium for the incorporation and status (as on 31.03.2015) of IGJPL be taken as full compliance with the requirement of Regulation 5(6)(f).

96. We may quote with advantage the following observations of Hon'ble Supreme Court, relevant to the present discussion, from decision reported as *New Horizons Ltd. & Anr. v. Union of India & Ors.* (1995) 1 SCC 478:

> *"23. Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22-4-1993 inviting tenders is a condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualize a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into*

consideration. Similarly, a company incorporated under the Companies Act having past experience may undergo reorganization as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganized company. It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganized company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganized company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. …

24. The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, where may be altered by agreement, to share both in profit and losses. (Black's Law Dictionary, 6th Edn., p.830) Accordingly to Words and Phrases,

Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p.117, Vol.23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. …

…

27. The conclusion would not be different even if the matter is approached purely from the legal standpoint. It cannot be disputed that, in law, a company is a legal entity distinct from its members. It was so laid down by the House of Lords in 1897 in the leading case of Solomon v. Solomon & Co. Ever since this decision has been followed by the courts in England as well as in this country. But there have been inroads in the doctrine of corporate personality propounded in the said decision by statutory provisions as well as by judicial pronouncements. By the process, commonly described as "lifting the veil", the law either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies. This course is adopted when it is found that the principle of corporate personality is too flagrantly opposed to justice, convenience or the interest of the Revenue. …

…"

97. In our opinion, the Board has fallen into error by treating the above noted events concerning the incorporation of JMHPL, its take-over by erstwhile partners of JMH on 29.03.2013, and the taking control of IGJPL on 31.03.2015 by the consortium partners in the requisite ratio corresponding to their control of the consortium, as events of *renunciation* (by sale, assignment, transfer, etc.) within the mischief of Regulation 10(3) & (5) by the authorized entity. The setting up of the SPV (Ishar Gas) and taking over its control by 31.03.2015 by the consortium partners were never meant to be steps taken towards renunciation in favour of a stranger ('*any person or entity*') within the meaning of Regulation 10. They were instead steps taken to attain

corporate cloak for the successful bidder in order to meet the minimum eligibility criteria prescribed by Regulation 5(6)(f).

98. The facts noted earlier, show that the change over from JMH to JMHPL does not mean that there was a change of the bidder because JMH and JMHPL are one and the same. JMHPL is the successor of JMH, which was a minor partner of the bidding consortium. In due course JMHPL joined JMEPL as shareholder in IGJPL. Since it is established that (JMEPL + JMH) is equal to (JMEPL + JMHPL), the PNGRB fell in error in examining the financial capacity of JMHPL as on 09.05.2011. The relevant date for checking the financial status of JMHPL should have been 29.03.2013 and not 09.05.2011. By taking a wrong date the Board came to a wrong conclusion. indeed, on 09.05.2011, the net asset of JMEPL was very low but that is because, on that date, the merging of assets of JMH had not happened. At all times, the lead partner JMEPL with 80% share continued to exist. A change in the corporate structure (from partnership to a private limited company) of JMH with everything else being the same, cannot mean that there was a change of the Bidder.

99. Reference to Clause 8 of instruction to bidders demonstrates that the Board, author of ACBD, has neither understood the facts leading to IGJPL being presented as the JV nor properly applied the norms.

Regulation 10(3) absolutely *prohibits* the sale, assignment, transfer or surrender of the authorization by the selected entity within a period of three years from the date of grant of authorization. The requirement of Regulation 5(6)(f), on the other hand, *obliges* the selected entity (one which is not already a company) to become a company. Compliance with Regulation 5(6)(f) cannot be treated as renunciation within the meaning of Regulation 10(3), so long as the entity which submitted the bid remains the same. This might involve some restructuring or reconstitution. Clause 8 of the instruction to bidders does permit such restructuring or reconstitution even within the initial three years period of grant of authorization. The only condition attached is that the initial JV partners or entity must retain majority control ('*more than 50% equity stake*'), the lead partner of the original consortium being required to "*compulsorily hold higher or equal stake than any other partner*". As mentioned earlier, the consortium was led by JMHPL it holding 80% stake, the remaining 20% being brought in by the partnership firm (JMH). It is trite that firm is nothing but a compendious name for the individuals who form the partnership. The individuals who were partners in the firm that had joined consortium led (by JMEPL) control the same stake (i.e. 20%) in IGJPL wherein the lead consortium partner (JMEPL) holds 80% shares w.e.f. 31.03.2015. In these circumstances, it cannot be said that there is either a breach of the prohibition contained in Regulation 10(3), read with Regulation 10(5), or of Clause 8 of the

instructions to bidders. The findings to the contrary returned by the Board are, thus, wholly incorrect and perverse.

100. As noted earlier, by the directions in the impugned order – particularly Clause (c) – the Board has allowed '*transfer*' of the authorization of Jalandhar GA from JMEPL to Ishar Gas subject to compliances being made with Regulations 5(6)(f) and 10(3) of Authorization Regulations and Clause 8 of the bid documents. In our considered view, the Board has misapplied the regulations, and instructions to bidders, by referring to them together.

101. As already noted, restructuring of the authorized entity even within initial three years of grant of authorization was permitted in terms of clause 8 of the bid document, this being possibly also an exception to Regulation 10(3) which generally prohibits renunciation during the said initial period (of three years). The restructuring under clause 8 is not renunciation by sale, assignment, etc. within the meaning of Regulation 10(3). Renunciation under Regulation 10(3) is different from requirement of Regulation 5(6)(f) wherein the selected entity is obliged to turn into a company, if it is not already a company. Each of these provisions operate in different fields. Regulation 5(6)(f) is part of the minimum eligibility conditions though, given its nature, added as a condition to be met subsequent to the grant. Conversion into a company of a non-company (declared as successful bidder under this

regulation) does not require *approval* of the Board nor recording of satisfaction of due compliance with the condition by the Board with such condition amounts to approval for "*transfer*" of authorization. The authorized entity, expected to become a company for meeting the eligibility condition under Regulation 5(6)(f), is only to satisfy the Board about due compliance. But it cannot renunciate the authorization (by sale, consignment, transfer, etc.) without approval from the Board, not the least within initial three years.

102. The conversion of JMH, a partnership firm, which was minority shareholder in the consortium (20%), into the company JMHPL, once the erstwhile members of JMH had taken commensurate control on 29.03.2013, was a step towards due compliance with Regulation 5(6)(f). The consortium partners – JMEPL (80%) and JMH converted into JMHPL with control (to the extent of 20%) acquired by its erstwhile partners on 29.03.2013 – had taken over control of IGJPL by 31.03.2015, the said company (IGJPL) having been previously incorporated on 13.12.2013, an SPV with the avowed objective of taking over the business of CGD network of Jalandhar. The communication in this respect concededly given by IGJPL to the Board on 25.04.2015 was in the nature of report of due compliance with Regulation 5(6)(f). Such request could not have been, but was, treated as a request by the authorized entity for “transfer” under Regulation

10(3) of the Authorization Regulations. In our considered opinion, such approach taken by the Board in the matter was wholly erroneous and improper.

103. It sounds incongruous that the Board has asked for compliances to be made by JMEPL with Regulations 5(6)(f) and 10(3) of Authorization Regulations and clause 8 of the bid document so as to avail of transfer of authorization of Jalandhar GA to IGJPL. JMEPL was only a lead partner in the consortium. It alone cannot take such steps as have been directed. It may be that JMH, the erstwhile minority partner of the consortium, is no longer in existence. It, however, ceased to exist not on 09.05.2011 when JMHPL was incorporated (as has been erroneously assumed by the Board) but on 29.03.2013 when the erstwhile partners of JMH took corresponding control of shareholding of JMHPL. The consortium continues to exist, having converted itself into the SPV, known as IGJPL, and is to be treated as the authorized entity in place of the consortium. For such recognition of the SPV (IGJPL) as the authorized entity in due compliance of Regulation 5(6)(f), there is no occasion for reference being made to Regulation 10(3) or, for that matter, clause 8 of the bid document, this not being a case of *renunciation* or *restructuring* within the initial period of three years. Necessary documentary proof of compliance of Regulation 5(6)(f) of Authorization Regulations having been furnished, directions by the

impugned order – Clause 'c' – are found to be wholly unnecessary and uncalled for.

104. We now turn to the findings of "*doctored documents"* having been presented in the context of GAs of Ludhiana and Kutch (East). The learned counsel for the Board fairly conceded that it was incorrect to use the expression in plural ("*documents")*, the solitary document which has invited this conclusion being letter dated 29.09.2016 of Deutsche Bank.

105. There are three letters of Deutsche Bank which need consideration. They include letter dated 29.09.2016 addressed to the appellant; letter dated 14.02.2019 addressed by Deutsche Bank to the Board; and letter dated 29.09.2016 statedly addressed by Deutsche Bank to another entity British Chemical Pte. Ltd ("British Chemicals"). Having regard to the nature of the arguments which have been raised and the conclusions that have been reached by the Board in the impugned order, we deem it proper to include in this judgment images of the said communications, in chronological order. The same are depicted as under, labelled as *Image-A* (letter dated 29.09.2016 addressed to the appellant), *Image-B* (letter dated 29.09.2016 addressed to British Chemicals) and *Image-C* (letter dated 14.02.2019 addressed to the Board), respectively:

IMAGE–A (*)

Deutsche Bank

29 September 2016

Jay Madhok Energy Private Limited
D-143, Defence Colony
New Delhi – 110024
India

Deutsche Bank AG
Singapore Branch
One Raffles Quay
#18-00 South Tower
Singapore 048583
Tel +65 6423 8001
Fax +65 6883 1788

Subject: **Jay Madhok Energy Private Limited**
Financing for City Gas Distribution Network

Dear Sir,

In your capacity as a principal stakeholder of the consortium led by Jay Madhok Energy Private Limited ("JMEPL"), we are pleased to confirm, as at the date hereof, financing for the development of JMEPL's City Gas Distribution Networks in Jalandhar, Ludhiana and Kutch East in India.

The salient terms that have been agreed between Deutsche Bank AG, Singapore Branch and Jay Madhok Energy Private Limited are outlined below:

Borrower:	Jay Madhok Energy Private Limited
Facility:	US$298m term loan facility
Term:	5 years
Lender(s):	Deutsche Bank AG Singapore Branch and the other banks invited by us
Purpose:	To finance JMEPL's capital expenditure relating to the build out of the City Gas Distribution Networks in the licensed areas of Jalandhar (US$98m), Ludhiana (US$100m) and Kutch East (US$100m)
Security:	a. First ranking pari-passu security over licenses and offtake contracts of JMEPL b. Pledge over all assets and shares of Borrower c. Lien over DSRA and accounts of Borrower

This letter is confidential and may not be disclosed by you to any person other than your employees, accountants and lawyers and in each case only on a confidential and need-to-know basis in connection with this financing.

Wishing you success for the project.

Yours faithfully,

Deutsche Bank AG, Singapore Branch
Name:
Title: Abhay Kumar Sinha
Managing Director

Name:
Title: Birendra Baid
Director

(*) *The above document is printed on two sheets but has been merged for present purposes.*

IMAGE–B (*)

Deutsche Bank

29 September 2016

British Chemicals Pte Ltd ("British Chemicals")
8 Temasek Boulevard
#14-02 Suntec Tower Three
Singapore 038988

Deutsche Bank AG
Singapore Branch
One Raffles Quay
#18-00 South Tower
Singapore 048583
Tel +65 6423 8001
Fax +65 6883 1768

Subject: **Jay Madhok Energy Private Limited**
Financing for City Gas Distribution Network

Dear Sir,

In your capacity as a principal shareholder of Jay Madhok Energy Private Limited's ("**JMEPL**"), we are pleased to work with your group and confirm, as at the date hereof, our high confidence in being able to arrange financing for the development of JMEPL's City Gas Distribution Networks in Jalandhar, Ludhiana and Kutch East in India.

The salient terms of the term sheet (Classified Confidential) that have been broadly agreed between Deutsche Bank AG, Singapore Branch and British Chemicals are outlined below:

Borrower:	British Chemicals Pte Ltd
Facility:	US$298m term loan facility
Term:	5 years from signing
Lender(s):	Deutsche Bank AG Singapore Branch and the other banks invited by us
Purpose:	To finance Borrower's investment into JMEPL to fund JMEPL's capital expenditure relating to the build out of the City Gas Distribution Networks in the licensed areas of Jalandhar (US$98m), Ludhiana (US$100m) and Kutch East (US$100m)
Security:	a. First ranking pari-passu security over licenses and offtake contracts of JMEPL b. Pledge over all assets and shares of Borrower c. Lien over DSRA and accounts of Borrower d. Acceptable Bank Guarantees.

This letter and the term sheet are subject to the conditions set out in the footnote below and are confidential and may not be disclosed by you to any person other than your employees, accountants and lawyers and in each case only on a confidential and need-to-know basis in connection with this financing.

We look forward to working closely with your group, and wish you success on the transaction.

Yours faithfully,

Deutsche Bank AG, Singapore Branch
Name: Abhay Kumar Sinha
Title: Managing Director

Name:
Title: Birendra Baid
Director

(*) *The above document is printed on two sheets but has been merged for present purposes.*

IMAGE–C

Deutsche Bank

Deutsche Bank AG
Corporate Finance
The Capital, C-70, G Block
Bandra Kurla Complex
Mumbai 400 051
Tel +91 (22) 7180 4444
Fax +91(22) 7180 4884

14 February 2019

The Petroleum and Natural Gas Regulatory Board
1st Floor, World Trade Centre
Babar Road, New Delhi 110 001

Attention: **Shri K. Kittappa, Joint Advisor (KK)**

Reference: Letter dated 21 December 2018 in relation to Jay Madhok Energy Private Limited (JMEPL)

Sir,

We are in receipt of your above mentioned letter, seeking to verify whether Deutsche Bank AG has issued the letter dated 29 September 2016 or granted any financing to JMEPL, inquiring as to the status thereof.

Deutsche Bank AG, acting through its Singapore branch, had issued a non-binding letter (**DB Letter**) to arrange a financing for British Chemicals Pte. Ltd., a Singapore incorporated entity (**British Chemicals**) in its capacity as a principal shareholder of JMEPL, to finance their investment in JMEPL subject to conditions set out in the DB Letter, inter alia being satisfactory due diligence, documentation, and receipt of all internal approvals including legal and credit approvals, and British Chemicals providing acceptable collateral including bank guarantees. A copy of the DB Letter is attached for your reference and records.

The said financing as set out under the DB Letter did not progress, as neither did British Chemicals furnish the requisite documents nor did they satisfy any of the conditions set out in the DB Letter, including but not limited to provision of the bank guarantees.

In the view of the foregoing, we would like to bring to your attention, that as mentioned herein, there is no facility contemplated or outstanding or sanctioned or disbursed to JMEPL (or for that matter, its principal shareholder British Chemicals) as on date. This is for your due noting and records.

Thanking you,

Authorised signatory
AMRISH P. BALIGA
MANAGING DIRECTOR

Authorised signatory
SHIBANI RAO
SR. LEGAL COUNSEL

TRUE COPY

106. Saving for now the consideration of the grievance of the appellant about withholding of crucial material in the above nature, we note from the copy of the letter dated 21.12.2018 (made available at the final stage of the hearing on the appeals at hand) that it was addressed to Deutsche Bank at its Mumbai address, the request made therein being for confirmation as to whether letter dated 29.09.2016 (as per Image-A) had been issued to JMEPL by the Bank (assumably the copy of the letter being the annexure sent with such communication) and for details to be provided of the disbursement and outstanding loan to JMEPL for the subject CGD network. We must also note that in the Show Cause Notices, pertaining to Ludhiana and Kutch (East), while extracting certain portions of the letter dated 14.02.2019 of Deutsche Bank (Image-C) certain words were omitted, without mention of information of the noticee, the same being in reference to the letter issued by the Bank to the third entity ("British Chemicals"), the omitted words being "(a) *copy of the DB Letter is attached for your reference and records."* We agree with the appellant that the omission of such words had the effect (and possibly design) of concealing from the authorized entity (the appellant), while being put to notice (for such serious action), the existence or availability of crucial material as eventually became the basis of adverse conclusions being reached and, therefore, violative of principles of natural justice.

107. We do find it jarring that the Show Cause Notices had alleged a letter dated 30.06.2016 to be forgery while the decision taken concludes that letter dated 29.09.2016 has been doctored. There is some mismatch. The gravamen of the accusation is not the same as the finding returned.

108. The letter dated 29.09.2016 (Image-A) was referred to by the appellant in the first round of appeals before this tribunal. By the time the said appellate scrutiny concluded, the notices of second default (under Regulation 16) had already been issued. Though the notices then issued alleging second default were later superseded and substituted by the Show Cause Notices dated 26.03.2019 (on which the present impugned decision was rendered), the entire process has been in continuation. It is against such backdrop that the appellant had placed before the Board, under the cover of letter dated 29.01.2018, a copy of the letter received from Deutsche Bank (*Image-A*). The proceedings recorded by the Board show that initially financial closure on the basis of above-said communication (Image-A) from Deutsche Bank was claimed. But, eventually it was the submission of the appellant that it would proceed with the execution of the necessary works on its own strength.

109. Be that as it may, the letter dated 29.09.2016 (Image-A) purports to be a letter addressed to JMEPL, it having introduced itself as the "*principal stakeholder of the consortium"* for purposes of CGD networks in the three GAs, seeking loan facility (US$ 298 million) for five years. The letter

conveyed to the addressee (JMEPL) an understanding reached for such loan facility to be extended, it being subject to certain conditions including furnishing of *pari-passu* security, pledging of assets, etc.

110. The Board, while considering the claim of the appellant about financial closure sought formal confirmation from the Deutsche Bank and addressed a letter to such effect on 21.12.2018. It appears that it received the reply dated 14.02.2019 (*Image-C)* along with which the bank had also sent a copy of another letter dated 29.09.2016 (*Image-B)* addressed to British Chemicals.

111. Reference was made in the Show Cause Notices respecting Ludhiana and Kutch GAs to the factum of letter dated 29.09.2016 (*Image-A*) having been relied upon and receipt of reply dated 14.02.2019 by the Board in answer to its query vide letter dated 21.12.2018. However, neither the letter dated 21.12.2018 of the Board nor the letter dated 14.02.2019 (Image-C) of the Deutsche Bank were shared with the noticee (appellant). This cannot be brushed aside as an unintentional omission. While extracting the contents of the letter dated 14.02.2019 (*Image-C)* in the Show Cause Notices, the references to letter dated 29.09.2016 (*Image-B)* to British Chemicals were conspicuously omitted. We have already observed that this was unfair and not a very transparent process of inquiry undertaken by the Board.

112. Be that as it may, the Board had alleged in the Show Cause Notices (respecting Ludhiana and Kutch GAs) that it had received communication in above nature from Deutsche Bank which seemed to indicate some assurance of financial support having been tendered to another entity (British Chemicals) for purposes of the three GAs at hand. Though in the letter sent by the Board to Deutsche Bank, the request made, *inter alia,* was for confirmation of the letter of commitment to JMEPL, the response received from the bank was totally silent in that regard. With such material having been gathered, the response of the noticee (the appellant) being one of denial (of forgery), an issue of fact had arisen before the Board *viz.* as to whether the letter dated 29.09.2016 (*Image-A*) was a product of forgery or fabrication. The Board was accusing the appellant in affirmative while the appellant was in denial. This called for proper inquiry into the question of fact.

113. The Board has the requisite powers (of Civil Court) to call for evidence. It was in touch with the local branch (in India) of Deutsche Bank to whom its letter dated 21.12.2018 had been addressed. No effort has been made by the Board to seek clarity. Adverse inferences have been drawn, in affirmation of the allegations made in the Show Cause Notices, leading to the conclusion that the letter in question (*Image-A)* is '*doctored'* only on the basis of letter dated 24.02.2019 (*Image-C*) read with letter dated 29.09.2016 addressed to British Chemicals (*Image-B*). Such

conclusions are wholly unfounded and perverse. We may elaborate on this further.

114. The letter dated 29.09.2016 (*Image-B*) addressed by Deutsche Bank to British Chemicals states that the bank had been approached by the latter (British Chemicals) in its capacity as '*a principal shareholder'* of JMEPL. There is nothing available on record to show, even remotely, that British Chemicals, a company incorporated in Singapore, had ever acquired or even attempted to acquire any stake in JMEPL. The Registrar of Companies ('*RoC'*) in India would be the authority to go to for confirmation of this aspect. The Board has not called for any confirmation in this regard from RoC.

115. It appears from the above-said letter (*Image-C)* of Deutsche Bank to British Chemicals that the latter (British Chemicals) had also made some request, similar to that of the appellant, for financial support, contemporaneously to the efforts being made at the time by the appellant to attain financial closure. An assurance similar to the one given to the appellant seems to have been handed out by Deutsche Bank to British Chemicals with similar conditions attached. By letter dated 14.02.2019 (*Image-C*), the Deutsche Bank informed the Board only the facts concerning it having issued a non-binding letter to British Chemicals (*Image-B*) but avoiding any comment on its similar non-binding letter (*Image-A*) addressed on same date to the appellant. If objectively read, the

reply dated 14.02.2019 (*Image-C*) is not a complete answer to the queries raised by the Board through letter dated 21.12.2018. The bank did conclude its letter dated 14.02.2019 saying that '*there is no facility contemplated or outstanding or sanctioned or disbursed to JMEPL … as on date'* But, it has never been the case of the appellant that the loan facility as applied for was ever granted by Deutsche Bank.

116. Strangely, the Board has concluded, on the basis of above-mentioned reply dated 14.02.2019 of Deutsche Bank (*Image-C)* that it had "*completely negated*" the claim by the JMEPL that it had received a committed financing proposal from the Bank and, further, that it had been made clear by the bank that they "*never issued any letter at all in the name of JMEPL*" and "*the only letter*" issued by them was in the name of British Chemicals. The Board has concluded, on the basis of such inferences, that they raise "*serious aspersions about the veracity and authenticity*" of the letter dated 29.09.2016 (Image-A) submitted by the appellant. We find absolutely no basis for such conclusions to be drawn.

117. There is nothing in the letter dated 14.02.2019 (Image-C) of the bank that it had *never issued* any such letter in the name of the appellant or that the letter to British Chemicals (Image-C) was the "*only letter*". The focus of the communication of Deutsche Bank in its reply dated 14.02.2019 to the Board is to affirm facts concerning proposal received from, or certain assurances for loan facility given to, British Chemicals *vis-à-vis* the three

authorizations in question. The Board *did not* give any reply with reference to the letter dated 29.09.2016 (Image-A) which seem to have been issued on the same very subject simultaneously to the appellant. Since the appellant had contested and denied that the letter dated 29.09.2016 was forged or fabricated, such inferences could not have been drawn without further formal inquiry.

118. It is settled law that proof of fraud (or forgery) in a civil case is of same standard as in criminal case i.e. beyond reasonable doubt. [*ALN Narayanan v. Official Assignee* (1941) 54 LW 606 and *Union of India v. Chaturbhai M Patel & Co.* (1976) 1 SCC 747]. Mere suspicion, however, strong, is not enough to bring home a case of forgery and cannot be a substitute for proof beyond reasonable doubt. We may quote Hon'ble Supreme Court in *Sheila Sebastian v. R. Jawaharaj* (2018) 7 SCC 581, as under:

> *"28. In this case at hand, the imposter has not been found or investigated into by the officer concerned. Nothing has been spilled on the relationship between the imposter and Respondent 1. Law is well settled with regard to the fact that however strong the suspicion may be, it cannot take the place of proof. Strong suspicion, coincidence, grave doubt cannot take the place of proof. Always a duty is cast upon the courts to ensure that suspicion does not take place of the legal proof. In this case, the trial court as well as the appellate court got carried away by the fact that accused is the beneficiary or the executant of the mortgage deed, where the prosecution miserably failed to prove the first transaction i.e. PoA as a fraudulent and forged transaction. The standard of proof in a criminal trial is proof beyond reasonable doubt because the right to personal liberty of a citizen can never be taken away by the standard of preponderance of probability"*

119. The learned counsel for the Board tried to give additional reasoning for suspicion of forgery, beyond what is articulated in the impugned order. This is not permissible [*Mohinder Singh Gill* (supra)]. The finding that the said document is doctored one thus has no basis and must be vacated.

120. By the impugned order, the Board has not only cancelled the authorization in respect of Ludhiana and Kutch (East) GAs but also directed encashment of the Performance Bank Guarantees (PBGs) furnished in that context. Similarly, the Board has proceeded to levy penalty under Regulation 16 of Authorization Regulations in a sum equivalent to 50% of the PBG amount for Jalandhar GA directing encashment accordingly. These penalties, imposed in exercise of power under Regulation 16, have also been brought in question.

121. We have already taken note of the provision contained in Regulation 16. As observed earlier, the procedure prescribed by the regulations framed by the Board for purposes of exercising its power to impose civil sanctions, particularly of the kind envisaged in Sections 23 and 28 of the PNGRB Act is contained in Regulation 16 of Authorization Regulations. Clearly, the provisions contained in Sections 23 and 28 of PNGRB Act being penal in nature, the same require to be construed and applied strictly. Cancellation of authorization or imposition of civil penalty are acts of serious nature, import and consequence. It is trite that punishment cannot be meted out unless the guilt has been properly proved. It follows that the

Board must arrive at a definitive conclusion as to the guilt (on account of contravention or default) before it can proceed to impose the penalty which is to be recovered by encashment of the performance bank guarantee. In this context, clauses (a) & (b) of Regulation 16(1) are of significance. A case may come up before the Board wherein defaults or contraventions are palpable but the Board is not permitted, only on that basis, to proceed to impose penalty or cancel the authorization. It must assess and give "*reasonable time*" to the defaulting entity to "*fulfill its obligation*", and even after elapse of such "*reasonable time*" it must examine the conduct to ascertain if "*remedial action*" has or has not been taken. It is only thereafter that the Board is permitted to avail of its power under Section 23 or 28 to suspend /cancel the authorization or impose civil penalty, and not otherwise.

122. We find no substance in the submission that grant of reasonable time for remedial action is necessary only in case of first breach but not to second or subsequent defaults. The Clauses (a) & (b) of Regulations 16(1) do not say so and cannot be given such restrictive meaning. The penal action under Clause (c) can follow only after Board has complied with Clauses (a) & (b), regardless to the fact whether it is first or subsequent default.

123. This tribunal had occasion to subject a similar process undertaken by the Board *vis-à-vis* another entity under Regulation 16 of the Authorization

Regulations, in the matter of *GSPL India Gasnet Limited v Petroleum and Natural Gas Regulatory Board* decided by judgment dated 13.10.2021 in Appeal nos. 133 & 134 of 2018. We may quote the following passage from the said decision, it being relevant for the matters at hand:

> *"13. The regulation 16, as quoted above, is a punitive law and has to be construed and applied strictly. Regulation 16 (1) (b) makes it unequivocally clear that further action, as envisaged in the subsequent clauses, cannot be taken by the Board unless and until reasonable time given for remedial action has lapsed. The Board may have been within its rights, and sound in its reasons and conclusions, in rejecting the grounds presented by the appellants justifying the delays, but it could not have imposed the penalty of forfeiture by encashment of the performance bank guarantee, to the extent of twenty five percent of the amount of the performance bond, unless and until it had granted, by an express order or communication, " a reasonable time" to the authorized entity, which was in default, to "fulfill its obligations under the regulations". We are unable to find, in the entire record of proceedings, orders or communications exchanged, any express direction given by the Board specifying what was "reasonable time", in its view, for the appellants to carry out the necessary works so as to be relieved of the position of defaulting entities. We are unable to accept the submission of the learned counsel for the Board that the observations in para 6 of the record note of proceedings in relation to review meeting dated 10.07.2014 is to be treated as substantial compliance of the requirements of regulation 16 (1) (a). In punitive action, there cannot be a justification held out by substantial compliance. There must be a strict compliance. It is in this respect that the action undertaken by the Board is remiss.*
>
> *14. For the foregoing default in the due process, we are unable to uphold the impugned order to the extent thereby penalty of encashment of twenty five percent of the performance bond was imposed against each of these appellants. The impugned orders, to that extent, are set aside. The Board will use the money which was realized in terms of directions to the bank for encashment for restoring the performance bonds to their original position."*
>
> *[Emphasis supplied]*

124. As already noted, the Board, by its earlier decision rendered on 15.07.2016, had also cancelled authorization in respect of Ludhiana and

Kutch (East) GAs imposing similar penalties under Regulation 16. This tribunal, by judgment dated 28.04.2017 in Appeal no. 196-197 of 2016 had made similar observations with regard to the procedure to be followed for invocation of power under Regulation 16. It is a matter of regret that such guidance earlier given in previous round of similar action against this very entity has been ignored by the Board.

125. The learned counsel for the Board pointed out that in the previous round of similar action *vis-à-vis* GA of Jalandhar, the Board had imposed penalty to the extent of 25% of the amount of PBG by Order dated 28.09.2015, challenge to which order by Appeal no. 13 of 2016 was repelled by this tribunal through decision dated 26.05.2017, no case of fraud or irrecoverable harm or injury having been made out. We note that this tribunal had expressed opinion in that judgment that no case warranting interference was made out, the PBG to the extent of 25% having already been encashed, no proof of fraud having been adduced. It also needs to be noted here that such view of the matter was taken placing reliance on judgment dated 02.02.2016 of the High Court of Delhi in W.P.(c) no.125 of 2016 – *Siti Energy Limited & Anr. v. PNGRB dated 02.02.2016* – observations found relevant having been quoted thus:

> *"25. The law relating invocation of bank guarantees is no longer res integra. The law is well settled that the interference by the Courts is permissible only where the invocation of the bank guarantee is against the terms of the guarantee or if there is any fraud. In the absence of the same, the bank is liable to pay the guaranteed amount without any demur whatsoever and the bank is bound to honour the guarantee*

irrespective of any dispute raised by is customer since a bank guarantee is an independent and a separate contract. It is also a well settled principle that fraud, if any, must be of an egregious nature, which would vitiate the very foundation of such a bank guarantee and the beneficiary seeks to take advantage of the situation. Allowing encashment of bank guarantee would result in irretrievable harm or injustice to one of the parties concerned has also been recognized by the Courts as a justifiable ground for interference, however, the harm or injustice contemplated must be of such an a exceptional and irretrievable nature as would override the terms of the guarantee [vide U.P. Cooperative Federation Ltd. vs. Singh Consultants and Engineers (P) Ltd. (1988) 1 SCC 174; Vinitec Electronics Private Ltd. vs. HCL Infosystems Ltd. (2008) 1 SCC 544; Himadri Chemicals Industries Ltd. vs. Coal Tar Refining Company (2007) 8 SCC 110; Mahatama Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engg. Coop. Ltd. (2007) 6 SCC 470.] In a recent decision M/s. Adani Agri Fresh Ltd. vs. Mahboob Sharif & Ors. (2015) SCC OnLine SC 1302 the Supreme Court while reiterating the principles of law laid down in the above decisions further explained that the fraud, if any, must be of an egregious nature as to vitiate the underline transaction."

126. With respect, we disagree and find that the view taken by the learned members of the bench of this tribunal in judgment dated 26.05.2017 *per incurium*. In this context, we may refer to the decision of High Court of Delhi reported as *M/s Bottle Glass Pvt. Ltd v. Union of India and ors.* ILR (1984) II Delhi 809. The prime issue in that case concerned cancellation of a permit and invocation of bank guarantee furnished by the permit holder under *Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981*. The Court held as under:

"31. There can be little doubt about the proposition that when the bank issues a bank guarantee it accepts an obligation to make payment to the promisee in terms of the bank guarantee. It is also true that the Courts would not interfere with the enforcement of the bank guarantee if the demand is made in terms thereof. The challenge in the present case is to the action of the Government requiring the bank to pay the amount of rupees two lacs. In our opinion, when the Government obtains a bank guarantee when it is entering into

commercial transaction with another party, then the principles, laid down in the aforesaid decisions of the Supreme Court can be invoked and the Court would be hesitant in staying the operation of the bank guarantee. In the case like the present, however, the bank guarantee was demanded by the respondents not as a part of a commercial transaction but in exercise of its statutory or executive power as a Government. If bank guarantee has been furnished by a party on its being required to do so by the Government, exercising its statutory or executive power, then the Court can examine the action of the Government when it seeks to invoke the bank guarantee. A Government is required to act fairly and judiciously. Any action of the Government which is regarded as arbitrary is per-se violative of Article 14 of the Constitution. If it can be shown, therefore, that the decision of the Government to invoke the bank guarantee is arbitrary or mala fide then the decision can be challenged."

[Emphasis supplied]

127. The bank guarantees have been furnished in the context of authorization granted by the Board under its regulatory framework. They are not bank guarantees furnished in commercial contracts, wherein the party suffering on account of default by the other may be entitled to damages – liquidated or non-liquidated. The bank guarantees furnished here are to ensure due performance of the obligations under the authorization. They are, it bears repetition to say, subject to inquiry with regard to failure to abide by the terms and conditions specified in the Authorization Regulations. As observed in our decision in the case of *GSPL India Gasnet* (supra), encashment of bank guarantee is execution of the penalty that is imposed. Therefore, the Board is obliged by Regulation 16 to first consider as to whether a case of imposition of penalty is made out and, if so, assess and specify the penalty and, thereafter, proceed to recover it from the performance bank guarantee already secured. The

finding that authorized entity is guilty of default, however, cannot be returned unless the Board makes an assessment as to the reasonable period within which the corrective steps may be taken by the entity and grants such period for remedial action. This is what was the import and effect of the decision rendered by this tribunal in previous judgment dated 28.04.2017 involving the same set of parties. It is a matter of worry that the Board has chosen to commit same error as was disapproved by this tribunal by the earlier judgment dated 28.04.2017.

128. As mentioned earlier, the appellant had presented certain facts to explain away the delays and defaults on its part. This tribunal, by judgments in the first round, had observed that such reasons had some merit and deserved to be considered. It is a cause for concern that the Board has yet again failed to do so, the default on its part constituting serious breach of hierarchical discipline.

129. In *M/s Hindustan Steel Ltd v State of Orissa* 1969 (2) SCC 627, in the context of the power vested in the competent authority to impose penalty on a dealer for failure to get itself registered under the Orissa Sales Tax Act, 1947, it was observed thus:

> *"8. Under the Act penalty may be imposed for failure to register as a dealer – Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct*

> *contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."*
>
> *[Emphasis supplied]*

130. Undoubtedly, the Board has the power under Section 28 to impose penalty and to recover it from the performance bank guarantee but in order to exercise the said power, it must follow the procedure prescribed by its own Regulations, particularly Regulation 16. We do not agree with the submissions of the learned counsel for the Board that since the appellant has had many an opportunity to show cause and since there has been inordinate delay, insistence on grant of "reasonable time" under Regulation 16(1)(a) would amount to undue emphasis on form or that the grant of opportunities to explain during protracted hearing on the show cause notices issued on 26.03.2019 deserve to be taken as substantial compliance. We had rejected similar contentions raised in *GSPL India Gasnet* (supra) and do so yet again.

131. Due process is hallmark of fair justice. If the regulations require assessment of "reasonable time" for remedial action to be taken, the Board

has no option but to engage in exercise to do so. Mere prolonged hearing over a number of years, again for reasons not wholly attributable to the appellant, cannot be a substitute for the requirement of reasonable time being afforded by the Board. The failure of the Board to even subject the reasons for defaults or delays to proper scrutiny in fact has vitiated the entire procedure.

132. While we find the impugned decision unjust, illegal and improper, we must also observe that the Board has failed to live up to the expectations of being an effective sectoral regulator. The joint transfer application submitted by the appellant and ATGL on 05.11.2020 had invoked the power and jurisdiction of the Board under Regulation 10(3) of Authorization Regulations. To its knowledge, there had not been much progress made on ground towards development of the infrastructure in the geographical areas in respect of which authorizations in favour of appellant had been granted on 06.09.2013, 12.03.2015 and 25.06.2015. One of the issues that was coming in the way was perceived inability of the appellant to timely attain financial closure. The *Business Transfer Agreement* that had been entered into by the appellant with another entity against such backdrop should have been of some interest to the Board if it is serious in overseeing development in the interest of consumers at large. The prohibition of the initial three years against renunciation or transfer under Regulation 10(3) had already come to an end. Such request could have been considered

under Regulation 10(5). There is no provision in the Regulation permitting "*return*" of such application. The *return* of the joint transfer application on 28.12.2020 by the Board, against the above backdrop is for reasons that cannot be comprehended or appreciated.

133. The prime ground set out in the letter dated 28.12.2020 is the temporary injunction, then operating by the virtue of Order dated 16.12.2020 in appeal of *Think Gas.* It was only an ad-interim order not an indefinite embargo. The joint transfer application could have been retained for consideration as and when the order of injunction was revisited, varied or modified. The temporary injunction order actually stood vacated on 06.08.2021 when the appeal of *Think Gas* was dismissed. The joint transfer application was pressed for reconsideration even at that stage by communications dated 06.09.2021 and 09.12.2021. There is no explanation offered as to why the Board would not consider the same.

134. The return of joint transfer application by letter dated 28.12.2020 itself is not in accord with law. It was a request formally made, under the regulations, *to the Board*. The Board only had the competence to consider and take a decision thereupon. It was directly connected with the matters arising out of the show cause notices issued on 26.03.2019 to the appellant then pending before the Board. For reasons not explained, the Board did not consider it by the impugned order. The letter dated 28.12.2020 does not even say that the return of the application was approved by the Board.

135. For the foregoing reasons, the impugned order is not only illegal but also perverse, unjust and unfair and, thus, cannot be allowed to stand. It is hereby set aside.

136. It is held that *Ishar Gas Jalandhar Pvt. Ltd.* is the entity which is entitled to take over the authorization in respect of the GA of Jalandhar, it having been set up as a Special Purpose Vehicle by the consortium partners, in whose name the authorizations were originally granted, in due compliance of Regulation 5(6)(f) of Petroleum and Natural Gas Regulatory Board (Authorizing entities to lay, build, operate or expand City Gas Distribution Networks) Regulations, 2008. The order of cancellation being bad in law, resultantly vacated, the authorizations in respect of Ludhiana and Kutch (East) geographical areas stand revived and restored. The Board is directed to issue necessary order treating *the concerned SPV/JV* as the authorized entity in respect of the three geographical areas.[1]

137. The order of levy of penalty and encashment of performance bank guarantees furnished by the appellant in context of the authorizations for the three geographical areas having been found to be illegal and unjust and consequently set aside, the Board shall have to refund the corresponding amount and the authorized entity thereupon shall be obliged to refurnish the

[1] Para 136 corrected as per Order dated 19.10.2022

performance bank guarantees of the appropriate value in terms of the relevant regulations. We order accordingly.

138. The return on 28.12.2020 of the joint transfer application moved on 05.11.2020 by the appellant and another entity being improper, the Board is directed to consider it in terms of Regulations 10(3) & (5) of Petroleum and Natural Gas Regulatory Board (Authorizing entities to lay, build, operate or expand City Gas Distribution Networks) Regulations, 2008 and pass the necessary order thereupon, in accordance with law. Since a lot of time has been wasted, it being necessary in larger public interest for appropriate decisions to be taken in an expeditious manner over such proposal, such that infrastructural development does not remain halted indefinitely or inordinately, we would expect the Board to proceed with the processing of joint transfer application expeditiously for appropriate decision to be taken thereupon at an early date.

139. The facts of the case at hand and the manner in which the Board has been dealing with the issues, particularly of delays and defaults on the part of the authorized entities in compliances to be made, as indeed seen almost on regular basis in similarly placed other appeals, give rise to a cause for grave concern. The Board is the statutory regulator and, therefore, expected to be an effective guide and constant monitor. To discharge its functions under the law, such that the public policy objectives are achieved, the Board will have to

gear itself to be up to the task, *inter alia,* by developing robust procedures. The delays on its own part in overseeing the progress, or dealing with such issues as at hand, or lapses in adherence to the due process requirement are anathema to the very purpose of its existence. We take seriously the submission made by its counsel before us that the Board does not have the requisite knowledge, training, experience or assistance for following due process of law in adjudicatory functions. Though we have rejected such plea as an unacceptable excuse, this aspect might need the attention of the authorities that be. We would commend a suitable review of the competence of resources available in, or to, the Board and of action taken on suggestions for improvement given by this tribunal from time to time through various orders, by the nodal ministry responsible for its proper functioning.

140. The appeals are disposed of in above terms.

141. We direct a copy of this judgment to be also sent to the Secretary, Ministry of Petroleum and Natural Gas, Government of India for information and necessary action.

PRONOUNCED IN THE OPEN COURT ON THIS 28TH DAY OF SEPTEMBER, 2022

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

(Justice R.K. Gauba)
Officiating Chairperson

vt