IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 2 OF 2023 & IA No. 298 of 2024

Dated: 15th May, 2024

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Dr. Ashutosh Karnatak, Technical Member

IN THE MATTER OF

IMC Limited
Having its registered office at
"Neeladri" 3rd Floor, 9, Cenotaph Road
Rathna Nagar, Alwarpeth, Chennai- 600018
Tamil Nadu
Telephone: +91 9500028270
Email: in@imc.net **.... Appellant**

VERSUS

1. **Petroleum and Natural Gas Regulatory Board**
Having its office at 1st Floor,
World Trade Centre, Babar Road,
New Delhi – 110 001
Email: contact@pngrb.gov.in **..... Respondent**

Counsel for the Appellant : Anshuman Choudhary
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J U D G M E N T

PER HON'BLE DR. ASHUTOSH KARNATAK, TECHNICAL MEMBER

The present Appeal is filed u/s 33 of the PNGRB Act, 2006 by the Appellant which deals with issues arising out of the impugned Order dated 09.12.2022 passed by the Petroleum and Natural Gas Regulatory Board (hereinafter referred to as the **"Board" or "PNGRB"**) and following relief has been sought.:-

(a) Allow the present Appeal and set aside the Order dated 9 December 2022 passed by the Respondent No. 1/PNGRB in PNGRB/Monitoring/3/PPPL-EPMIA/(1)/2016

(b) Pass any other orders that this Hon'ble Tribunal may so deem fit in the facts and circumstances of the present case.

1.0 Brief Facts of the Case

1.1 That the Appellant (i.e IMC Limited) is a company engaged in the business of seaport terminals and storage tank farm operators, operations and maintenance services, international trading as well as laying and operating natural gas pipeline, petroleum product pipeline and city-gas distribution network(s) with its corporate office located at Alwarpet, Chennai, Tamil Nadu – 600018. The Appellant has been authorized by the Respondent to lay, build and operate the EPMPL project.

1.2 The Respondent is a Petroleum & Natural Gas Regulatory Board (herein referred to as "**Board**") that has been established under the Act to protect the interest of the consumers and the entities engaged in the specified activities relating to petroleum, petroleum products and natural gas and further to promote competitive markets for the ultimate consumers and for any other matters connected therewith and incidental thereto.

1.3 On 1st October 2014, the Appellant submitted Expression of Interest ("**EOI**") to the Respondent to lay, build and operate the Ennore Port-

Manali Industrial Area Petroleum Products Pipeline ("**EPMPL**"), a petroleum products pipeline from outside the boundary of the Ennore Port ("**Port**"), which is run by Kamarajar Port Limited ("**KPL**") to Manali Industrial Area in Tamil Nadu. It is a submission of the Appellant that at the time of the EOI, the EPMPL was not proposed to be laid within the Port area.

1.4 That the Respondent Board initiated a public consultation process on 27th October 2014 regarding the EOI submitted by the Appellant. During this process, it is the contention of the Appellant that the Respondent Board did not raise any objections about the pipeline originating from the Port's boundary but subsequently, on 24th March 2015, the Respondent Board issued an Application-cum-Bid Document, with reference No. BID/PPL/07/2015/1/EPMIAPL, for grant of authorisation for laying, building, operating or expanding **EPMPL** and contemplated that the **EPMPL** would originate from the boundary of the Port.

1.5 That on 18th May 2015 during the pre-bid meeting, one of the potential bidders, being Indian Oil Corporation Limited ("**IOCL**"), suggested that the origin point of **EPMPL** should be from within the Port rather than from the boundary. IOCL also submitted this suggestion in writing to the Respondent Board on 21st May 2015. The Respondent Board accepted this suggestion in its letter dated 16th July 2015 on pre-bid clarifications stating that "*it has been decided to increase the length of the proposed pipeline from 14 km to 21 km. The* originating *point of the proposed pipeline will be Ennore Port"*.

1.6 The Appellant was granted the authorization for **EPMPL** in terms of the PNGRB Authorization Regulations by way of the Respondent's Letter of Authorization ("**Letter of Authorization**") dated 18th December 2015. This authorization was granted for a 21 km

pipeline, of which, approximately 14 kms was outside the Port area and approximately 7 kms lay within the Port area.

1.7 It has been submitted by the Appellant that as per PNGRB Authorization Regulations, they could not commence work until it had achieved financial closure in relation to the EPMPL, which it did on 27th July 2016 by way of a Sanction Ticket issued by the Indian Bank to the Appellant.

1.8 That it was observed by the Respondent Board in the quarterly progress reports submitted by the Appellant, that the progress made by Appellant with respect to the said pipeline project is not satisfactory as no physical work has been started in order to complete the project.

1.9 That considering 'Nil' work progress made by Appellant for the said pipeline project, a hearing under the provisions of Regulation 16 of the Authorization regulations was conducted on 18.03.2019 (herein referred to as the "First Hearing") seeking the reasons from the entity for failure to lay Ennore-Port Manali Industrial Area Petroleum and Petroleum Product Pipeline within the stipulated time. During the course of the hearing, the entity submitted the following in respect of the subject pipeline:

i. The total length of the pipeline is 21 km, against which 14 km of pipeline is to be laid between Kamarajar Port Ltd. (KPL) boundary limits and Manali Industrial Area. The remaining 07 km pipeline would fall within the KPL premises to be laid between the common manifold Area of Ennore Tank Terminals Pvt. Ltd. (ETTPL) terminal and KPL boundary.

ii. All statutory approvals have been acquired by the entity for laying of the pipeline, however, RoW (Right of Way) permission in Kamarajar (Ennore) Port is still pending even though IMC has its office inside port premises and they share a business of approx. 8 MMTPA against the total capacity of 30 MMTPA, with the port authority.

iii. IMC has not yet started laying of the pipeline and envisages to procure long lead items and hire construction contractor, once the pending RoW permission from KPL is acquired. Upon, enquiry, IMC informed that they have sought an appointment with the Chairman and Managing director of KPL to discuss and expediate granting the RoW permission by KPL.

iv. After presenting the latest status of the project, IMC informed that they envisages to complete the laying activities and commission the

project within a year and accordingly, requested the Board to extend the authorisation of EMPL project until December 2019.

1.10 The Respondent Board upon review of the activities undertaken by the Appellant observed that the Appellant is not serious in its approach to implement & execute the project. The Board enquired about the reason for the Appellant for not laying the pipeline in the balance stretches where the clearances are available. In reply the Appellant conveyed that in case it lays the pipeline in the remaining stretches and KPL does not give RoW clearance, there could be requirement for rerouting of the pipeline and the pipeline laid would become unusable. Further all the permissions have to be obtained once again for the new route. The Respondent Board enquired as to the alternate plan for the execution of the project in case of RoW permission is not received from the port authorities. The Appellant informed that as of now, they haven't decided on any alternate plan to execute the project in such a case. Accordingly the Respondent Board vide order dated 08.04.2019 gave following directions:-

"Based upon the discussions, the Board decided to review the status of the project again in a month's time, along with the outcome of the meeting between IMC and Kamarajar Port. In the meantime, the Board directed IMC to deliberate and submit the following before the next meeting is convened:

a) To submit detailed activity chart for completing the said pipeline project. The activities shall include timelines for obtaining permissions/ clearances taking into account the present status of permissions obtained and/or pending etc.

b) To deliberate and prepare alternate plan for execution of the project."

1.11 The Appellant submitted the above-requested documents to the Respondent by its letter dated 17th May 2019 while bringing the Respondent's attention to Appellant's conduct. The Respondent Board asked for certain clarifications on the documents by way of its letter dated 31st May 2019. The Respondent's queries were addressed by the Appellant by way of its letter dated 7th June 2019.

1.12 That considering the above, the Respondent issued a letter dated 20th August 2019 by which it extended the timeline under the Letter of Authorization, for completion of the **EPMPL** project *"upto 31 July 2020, subject to the resolution of all issues related to RoU clearance by December 2019 failing which penal action shall be initiated as per the relevant regulation"*

1.13 That the Appellant failed to fulfill its obligations, as directed by the Board vide letter dated 20.08.2019 and the issue related to RoU within Kamarajar Port still remains unsolved and it was further observed by the Board that despite completion of 4 years since grant of authorization, the progress of the subject pipeline is not found satisfactory. Thus, in accordance with the provisions of Regulation 16 read with Section 23 of the Act, another hearing was given to Appellant on 17.02.2020(**referred to as the "Second Hearing"**) by the Respondent Board wherein it was recorded that:-

> *"Based upon the discussions, the Board quoting the provisions of Regulation 13(4) and 16(1) of the PPPL Authorization Regulations, directed IMC to resolve all issues related to RoU clearance from KPL by 31.03.2020 and commission the EPMIAPL project latest by 31.10.2020. The Board also stated that the time period until 31.03.2020 and the subsequent 7 months, until 31.10.2020, will be considered a remedial time period to complete the EPMIAPL project. In case, IMC fails to take remedial action by 31.03.2020, the Board will be forced to initiate penal action in accordance with the terms and conditions of the authorization and the provisions of PNGRB Act and PPPL Authorization Regulations, and no further extension will be granted to IMC for completion of EPMIAPL project."*

1.14 That at this juncture, with the advent of COVID-19, the Appellant filed an application for consideration of *force majeure* conditions by its letter of 15th May 2020. It is submitted by the Appellant that no response has been received on this application, neither has any decision been taken by the Respondent in respect of this application till date.

1.15 That the Appellant vide letter dated 21.05.2020 submitted to the Respondent Board that :

a) *They had taken up the issue with Chairman - KPL, Secretary- Ministry of Shipping and Minister of Shipping However, due to COVID-19 pandemic, the Row clearance issue was kept pending.*
b) *IMC conveyed that in June 2015, they had informed PNGRB that there is no requirement of authorization of 6-7 kms of pipeline that falls inside the port land as ports follow their own policy of granting Row and receive annual charges for it. Despite that request, PNGRB vide letter 26.07.2015 extended the originating point of the proposed pipeline inside Ennore port thus increasing the length of the pipeline from 14 to 21 kms.*
c) *Contention of IMC that the overall time to commission the pipelines has already been extended till 31.10.2020. As on date, the time for performance is still not complete.*
d) *In view of COVID 2019 pandemic, IMC requested PNGRB to consider a period of 7 months from the date of receipt of RoU from KPL."*

1.16 That it was observed by the Respondent/Board that many opportunities have been provided to the Appellant herein to fulfill its obligations but there has been nil progress in the execution of the 21 km long pipeline by Appellant hence another hearing was held on 06.08.2020 (referred to as the "Third Hearing") by the Respondent Board. However, the Appellant again submitted to the Board that the only obstruction to the execution of the project is the rejection by Kamarajar Port Authority on granting the RoW for a part of the pipeline which passes through the Port area [7 km of the pipeline passes through port area].

1.17 Thereafter, another hearing was held on 20.04.2022 & during the course of hearing, it was submitted by the Appellant that the progress of the project was affected by Covid- 19 pandemic and therefore, Appellant requested the Board to grant time extension. The Board after deliberations directed the Appellant herein to complete the following activities, as committed by Appellant for completion of the project schedule, by14.10.2022. It is relevant to mention herein that the Board also directed the entity the time period till 14.10.2022 shall be considered as a remedial time to complete the above activities under Regulation 16 (1)(a) of the Authorization Regulations. Further, the Board has also communicated to the entity that the penal action would be taken in accordance with the terms and conditions of authorization, in case the Appellant fails to

complete the activities by 14.10.2022. The record notes of the said hearing held on 20.04.2022 stating the above directions, were duly sent to the entity by the Board vide letter dated 28.04.2022.

1.18 That the Appellant failed to complete the targets, given by the Respondent Board in the hearing held on 20.04.2022 another hearing was given to the Appellant on 15.11.2022 (**referred to as the "Fifth hearing"**). However, the subject hearing was deferred and scheduled on 30.11.2022 by the Respondent Board. During the hearing on 30.11.2022, the Board sought the update on the progress of the pipeline project. It was submitted by the Appellant that the CRZ clearance is still under process and with regard to the procurement of long lead items, the contractor has been finalized and pipeline would be delivered within three months of issuance of firm purchase order to the pipe manufacturer. In this regard, the Appellant requested for a time extension till October 2023 for completion of the project. The Board informed that the request for extension of time will be examined by the Board. However, the Board expressed dissatisfaction on the delay in completion of the project which was authorized on 18.12.2015. A substantial time of seven (7) years has already been elapsed and still the entity has failed to adhere to its multiple commitments at various instances.

1.19 Vide Impugned order dated 09.12.2022, the Respondent Board observed that:

> *"….it is mandated under statute to ensure a fair and competitive market amongst entities. The Board while serving public interest is mandated to focus on expanding the sources of availability of gas pipeline and their distribution. As per the present status of the project, it has been observed that despite expiration of nearly 7 years since grant of authorisation, the progress at the ground level of the subject pipeline which is 21 km is NIL.*
>
> *In view of the above deliberations, we are of the considered view that the entity has failed to meet its obligations as prescribed under the Authorisations Regulations despite the Board has granted the reasonable time to meet its commitments and obligations under Regulation 16 (1)(a) of the Authorisation Regulations.*

ORDER

For the foregoing reasons and deliberations, we are hereby considering this first default in accordance with the terms and conditions of Authorisation and provisions under Regulation 16(c)(i) of Authorisations Regulations, encashes the 25% of the performance bank guarantee amounting to Rs. 22.73 Lakh from the PBG submitted by IMC. The entity is directed to refurbish the encashed PBG amount within 1 week of this order, failure to do so shall attract the provisions of the extant regulations."

1.20 It is pertinent to mention herein that the said amount has also been replenished by the Appellant in terms of the Impugned Order dated 09.12.2022.

2.0 <u>Contentions of the Appellant</u> : It is the contention of the Appellant that the Impugned Order is liable to be set aside as being arbitrary, illegal, biased, unconstitutional and opposed to the provisions of the PNGRB Act and regulations made there under on the following grounds.

2.1 <u>Delay Not due to any fault on part of IMC</u>:-

i. Time towards obtaining Right of Way ("RoW") from Kamarjar Port Limited ("KPL") was not attributable to the Appellant [December 2015 – June 2021]. The stretch of 7km out of the 21 km pipeline was located inside the port area which was added after the bid had been issued and require a separate Right of Way permission from the Port authorities which was finally granted by KPL on 9th June 2021 to KPL which shows that the Port authorities had taken an unfair stand in not granting RoW to Appellant for over 5 years and all their pleas that there was space constraints etc were incorrect.

ii. The Appellant took all reasonable and necessary steps to obtain approvals from authorities. The PNGRB never took the view contemporaneously that there were steps that the Appellant could have taken but did not take to obtain the RoW from KPL. In that background, the Impugned Order takes a

completely contrary position ignoring the fact that the circumstances of delay in obtaining the RoW from Appellant were entirely outside the control of the Appellant and therefore, the Appellant cannot be penalised for the same.

2.2 Even though the process of CRZ approval had got nearly completed with best efforts of Appellant, still the Impugned Order held that the Appellant was in first default in accordance with Regulation 16(c) of the Authorization Regulations. The CRZ approval was finally obtained by the Appellant on 11th May 2023.

2.3 The Appellant has nearly completed 2 out of 3 activities directed by the Respondent Board in remedial time granted in hearing on 20.04.2022. The Impugned Order has also failed to consider that whenever alleged "remedial time" was granted, the Appellant took all endeavours within such period to rectify the default. The impugned order does not record in what manner the above milestones were not completed and steps taken by the Appellant. The status on impugned order dated of 9th December 2022 was as follows:

a) Securing CRZ approval :

Status - On 28 June 2022 the State Coastal Zone Management Authority (SCZMA) had recommended the subject pipeline to the National Coastal Zone Management Authority (NCZMA) for clearance under CRZ. Thereafter, the authorities had on 11th October 2022 monitored the Project and on 6th December 2022, the MoEFF approved the Compliance Statement and sent the same to the Appellant. Only a formal meeting of the Expert Appraisal Committee of the MOEFCC was to be held, which was ultimately held on 17th January 2023 and in the 323rd EAC Meeting held on 23 March 2023, the approval was granted.

b) Completion of procurement activities, i.e. tender of pipelines and long lead items, placement of order :

Status – the Appellant had also floated an enquiry to pipe manufacturers for supply of pipes required for construction of the

EMPL and had in fact placed a purchase order on 30th September 2022 with Ratnamani Metals & Tubes Ltd.

c) Commencement of delivery of line pipe and long lead items :

Status – Commencement of delivery would have started as soon as the CRZ approval was granted as taking deliveries of line pipes and storing them would have exposed them to weather conditions and storage of such huge items was not feasible.

2.4 The Impugned Order is devoid of reasoning or any legal authority on how statutory approvals (if diligently applied for by the Appellant) becomes an "inherent risk" in the project, which the Appellant is responsible for. The PNGRB has erroneously held that necessary statutory permissions and approvals are aligned and inherent risks to the project that the Appellant ought to have been aware of at the time of bidding for the project. If that was so, then there was no occasion for the Respondent to grant extensions of time to the Appellant, engage in direct correspondence with KPL, or entertain a complaint against KPL. The reasoning in the Impugned Order is faulty since the Appellant could not have been faulted for delayed actions of KPL, despite having been diligent in its approach and its actions.

2.5 Where a statutory authority/third party acts with delay and/or if there is delay because of factors outside the control of the Appellant, the same cannot automatically become attributable to the Appellant. The said reasoning is incorrect, unfair and will lead to a detrimental precedent being set by the PNGRB. It is settled law that a party cannot be treated to be in breach when it pertains to taking of approvals from a statutory authority. This aspect has not been considered in the Impugned Order.

2.6 An entity cannot be visited with penalty when the delay is due to permissions / approvals from authorities, despite best efforts by the authorized entity. When the fulfillment of obligations is dependent

upon the grant of permissions/approvals, the Respondent Board could not have unilaterally imposed a timeline for fulfillment of the same, without considering that the same was outside the Appellant's control. The Appellant has relied upon:

(a) In *MD Army Welfare Housing Organisation vs Sumangal Services 2004(9) SCC 619, Para 101*, it was held as follows:

> *"101. There cannot be an agreement that somebody would be bound to obtain a statutory order from the statutory authorities, as thereover, he would have no control."*

(b) In *Hindustan Petroleum Corporation Limited vs. Petroleum and Natural Gas Regulatory Board., [MANU/ET/0025/2022]* Appeal No. 25 of 2022 it was held:

> "*Though impossibly of performance is, in general, no excuse for not performing an obligation which a party has expressly undertaken, yet when the obligation is one implied by law, impossibility of performance is a good excuse.*"

This Hon'ble Tribunal has also reiterated the principle laid down by the Hon'ble Supreme Court that the general principle is that a party prevented from doing an act by some circumstance beyond his control, can do so at the first subsequent opportunity. [**Para 17, 26**] This Hon'ble Tribunal further held that the objective of Regulation 16 is not to penalise an entity for delays beyond its control. [**Para 27**]

(c) Imposition of penalty has to be based upon fault liability and a fault effect principle. (See *Tarun Sawhney vs Uma Lal 2011 SCC Online Del 610 Para 26 and Upma Khanna vs Tarun Swahney* 2012 SCC Online Del 610 Para 18-19)

2.7 An authorised entity cannot be visited with penalty when, in the remedial time granted by the Respondent Board, the entity having made its best efforts to get the CRZ approval, was still pending consideration before the authorities and was granted few months later.

2.8 The observation in the impugned order to the effect "*it is well settled by numerous decisions, including of the Hon'ble Supreme Court, that delay in relation to obtaining statutory clearances are inherent project risks to be borne by the authorised entity and the fact that some approvals are pending does not prohibit an entity from pursuing other activities related to a project*" (para 34) is a proposition that does not find mention in any decision of any Court of law.

2.9 The further observation in the impugned order that "..*activities for which external approvals are either not required or have already been obtained are prioritised and executed while awaiting approval in respect of other activities*" (Para 34) overlooks that in the absence of CRZ approval, the Appellant was unable to commence works on the pipelines and could not have been commenced :

(a) Sr. No. 7(i) and 8 of the Coastal Zone Regulation Notification bearing G.S.R. No. 37(E) dated 18 January 2019, issued by the Ministry of Environment, Forest and Climate Change which states that "*All permitted or regulated project activities attracting the provisions of this notification shall be required to obtain CRZ clearance prior to their commencement.*"

(b) the CRZ norms requires that the entity applying for CRZ gives an undertaking to the following effect :

> *"8. The Project proponent shall undertake the establishment of the facility and laying of pipeline only after the getting the required statutory clearance"*

2.10 In *Hindustan Steel Ltd. vs. State of Orissa* 1969 2 SCC 627 [**Para 8**], held that penalty for failure to carry out statutory obligations are quasi criminal proceedings and penalty cannot be imposed unless there is deliberate defiance or conscious disregard of obligations. There has been no deliberate defiance or conscious disregard of its obligations by the Appellant.

2.11 Further, the PNGRB has placed reliance on the decision of this Hon'ble Tribunal passed in the matter of *H-Energy Private Limited vs. Petroleum and Natural Gas Regulatory Board*, Appeal No. 311 of 2022 and I.A. No. 1050 of 2022 in support of its case. It is submitted that the reliance is misplaced and without merit for the following reasons:

(i) In fact, this Hon'ble Tribunal has in the case of H-Energy while considering Regulation 8 of the Authorisation Regulations held that "*…if the Board is of the opinion that the reasons for delay are beyond the control of the entity implementing the project, the Board may take an appropriate view in a fair and transparent manner, and may also allow certain extension period which it may deem fit for the commissioning of the project.*" [**Para 180**]

(ii) Further, the decision of this Hon'ble Tribunal in the *Jay Madhok Energy (P) Ltd. Led Consortium vs. Petroleum and Natural Gas Regulatory Board* 2022 SCC OnLine APTEL 83 was distinguished by this Hon'ble Tribunal in the H-Energy case on facts. [**Paras173-184**]

2.12 The Appellant had taken all other steps of preparedness including obtaining other statutory approvals from the National Highway Authority of India, Tamil Nadu State Highways Department, Tamil Nadu State Pollution Control Board, Public Works Department, permissions from railway authorities, Petroleum and Explosives Safety Organisation aside from placing a purchase order to Ratnamani for supply of pipes. Further, the Appellant has laid 707 mts. of pipelines, therefore it is wholly erroneous to state that there has been 'NIL' progress by the Appellant.

3.0 Contentions of the Respondent

3.1 It is the contention of the Respondent Board that the scheme of the PNGRB Act, 2006 provides for the protection of consumer/ public interest as one of the mandates of the PNGRB. The relevant Regulations shows that the Board has encashed the PBG for the right reasons and in terms of the Regulations keeping in mind the importance of the project and public interest aspects as per the Act and considering the relevant Regulations, the facts and circumstances of the case a reasonable person would also have come to the same conclusion regarding encashment of the PBG as did the Board. Therefore, defaulting entities like the Appellant should not be protected by this Hon'ble Tribunal where they are clearly in the wrong.

3.2 The Respondent Board has followed the mandate of Regulation 16 of PNGRB (Authorizing Entities to Lay, Build, Operate or Expand Petroleum and Petroleum Products Pipelines) Regulations, 2010, encashed 25% of the PBG amount i.e. Rs.22.73 Lakh (Rupees Twenty Two Lakh seventy three thousand) of the Appellant PBG.

3.3 The law relating to Bank Guarantees has been well settled by the Hon'ble Supreme Court of India. A plethora of Judgments of the Hon'ble Supreme Court of India have inter alia held that Bank Guarantee encashment should only be interfered with by the Courts in case of fraud of egregious nature of the beneficiary or irretrievable harm or injury/ special equities. In the case of the Appellants' the above factors of fraud or irretrievable harm/ injury/ special equities are not present. The Hon'ble Supreme Court of India has also held that the contract between the Bank and the beneficiary is an independent contract irrespective of any dispute between the bank's customer and the beneficiary.

3.4 The PBG that has been encashed is unconditional and irrevocable. Further, the decision of the PNGRB, as to whether the authorized entity has failed to or neglected to perform its duty and obligations under the Authorization dated 18.12.2015 is final and binding on the Bank. Therefore, the Judgments of the Hon'ble Supreme Court of India apply squarely to the facts and circumstances of the case.

3.5 In the context of Bank Guarantee law, Hon'ble Supreme Court of India in the case of ***Gujarat Maritime Board Vs. Larsen and Toubro Infrastructure Development Projects Limited and Another – (2016) 10 SCC 46*** - **Paras 9 to 13 pages 52 to 55** of the Judgment is relied on by the Board.

3.6 In case required by this Hon'ble Tribunal, reference may also be made to the Judgments given below, which relate to the position of law in relation to Bank Guarantee encashment as laid down by the Hon'ble Supreme Court of India.

a) General Electric Technical Services Co. Inc. Vs. Punj Sons (P) Ltd., (1991) 4 SCC 230 para 9 page 237;
b) Centax (India) Ltd. Vs. Vinmar Impex Inc., (1986) 4 SCC 136 para 5 page 139.
c) U.P. Co-operative Federation Ltd. Vs. Singh Consultants & Engineers (P) Limited (1988) 1 SCC 174 para 21 page 186 and para 34 page 190;
d) Svenska Handelsbanken Vs. M/s. Indian Charge Chrome (1994) 1 SCC 502 paras 86 and 88 page 530;
e) U.P. State Sugar Corporation Vs. Sumac International Ltd. (1997) 1 SCC 567 para 12 page 574 and para 14 page 575;
f) Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company (2007) 8 SCC 110 para 14 page 117;
g) Vinetec Electronics Private Limited Vs. HCL Infosystems(2008) 1 SCC 544 para 11 page 547 and para 12 page 548;
h) Jagdish Mandal Vs. State of Orissa (2007) 14 SCC 517 para 22 page 531;
i) Jagdish Mandal Vs. State of Orissa (2007) 14 SCC 517 para 22 page 531;
j) Michigan Rubber (India) Ltd. Vs. State of Karnataka (2012) 8 SCC 216 para 24 page 229;

3.7 That the Respondent Board during the final hearing on 13.03.2024 has relied and supplied to the Hon'ble Tribunal and to the Appellant all the notices of the hearing and record of the minutes of the

hearing held under Regulation 16 of PPL Authorization Regulation, 2010, humbly submitting that the Respondent Board has given ample opportunity to the Appellant for the Remedial action as per the mandate of Regulation 16 of the PPL Authorization Regulations, 2010. That the impugned Order dated 09.12.2022 is completely in tune with provision laid down under PNGRB Act and Regulations framed there under.

3.8 There is no illegality or infirmity in the Order passed by the Respondent so as to warrant any interference from this Hon'ble Tribunal.

4.0 Issue

Whether the Respondent Board is justified in encashing 25% of the Performance Bank Guarantee amounting to Rs. 23.73 Lakh from the PBG submitted by the Appellant.

5.0 Deliberations

5.1 In order to analyse the above questions it is pertinent to refer to the relevant sections and scheme of the PNGRB Act. One of the prime mandates of the Board under the Act is to ensure that uninterrupted and adequate gas supply is made to all parts of the country. The Board is also under a duty to promote competitive markets and is also mandated to protect the interest of consumers as well as entities engaged in activities relating to petroleum, petroleum products and natural gas. This mandate of the Board has been captured in the various regulations framed by the Board in exercise of its powers under the Act.

5.2 The major issues that is required to be addressed are in respect of the following :

(i) Compliance of terms and conditions of authorization in regards to physical targets by the Appellant.

(ii) Compliance of provisions of Regulation 16 of Authorisation Regulations for encashment of PBG by the Board.

5.3 That there is no dispute that the Appellant has been granted authorization for laying building, operating or expanding Ennore-Port- Manali Industrial Area Petroleum & Petroleum Product Pipeline vide authorization dated 18.12.2015 wherein the Appellant was required to complete the laying activities & commissioning of P/L project within 36 months from the date of grant of authorization i.e until 17.12.2018. This authorization was granted for a 21 km pipeline, of which, approximately 14 kms was outside the Port area and approximately 7 kms lay within the Port area.

EOI Submitted by	IMC (Boundry of Ennore Port to Manali Industrial Area-(Chennai)	PBG	Rs. 90.92 Lakhs, valid upto 10.12.2022
Bid Submitted by	IMC (ii) IOCL	Capacity builds up	7.0 MMTPA(1.4 MMTPA Common Carrier)
Date of Auth.	18.12.2015	Origin point	Kamarajat Port at Ennore
Configuration of pipeline	21 Km X 24 24	Termination Point	Manali Industrial Area near Chennai
Org. Comp. Schl.	17.12.2018	Capex	Rs. 90.92 Crore
Revised Compl. Schl.	31.07.2020	States	Tamil Nadu
Product	Motor Spirit, High Speed Diesel, Superior Lerosine Oil, Nephtha, Furnace Oil, Vaccum Gas Oil		

5.4 That in terms of Regulation 13 of the Authorization regulation, the Respondent Board is empowered to monitor the progress of the activities. Regulation 13 reads as under :

"13. Post-authorization monitoring of activities (pre commissioning).

(1) An authorized entity is required to provide, on a quarterly basis, a progress report detailing the clearances obtained, targets achieved, expenditure incurred, works-in-progress and any other relevant information in the form at Schedule E.

(2) The Board shall seek compliance by the entity to the relevant regulations for technical standards and specifications including safety standards through conduct of technical and safety audits during the pre- commissioning phase, as well as on an on-going basis thereafter, for ensuring safe commissioning and operation of the CGD network.

(3) The Board shall monitor the progress of the entity in achieving various targets with respect to the CGD network project, and, in case of any deviations or shortfall, advise remedial action to the entity."

5.5 In the instant case, the Board's is empowered to monitor the project as per (3) above. During the monitoring of the project, it was observed in the quarterly progress reports submitted by the Appellant, that the progress with respect to the said pipeline project is not satisfactory as no physical work has been started in order to complete the project.

5.6 That considering *'Nil'* work progress made by Appellant for the said pipeline project, a hearings under the provisions of Regulation 16 of the Authorization regulations was conducted in 18.03.2019 seeking the reasons from the entity for failure to lay Ennore-Port Manali Industrial Area Petroleum and Petroleum Product Pipeline within the stipulated time. The entity submitted that the reasons for failure to achieve the targets are - out of 21 km length of the p\l the 07 km P\L falls within the KPL premises to be laid between the common manifold Area of Ennore Tank Terminals Pvt. Ltd. (ETTPL) terminal and KPL boundary. All statutory approvals have been acquired by the entity for laying of the pipeline, except RoW (Right of Way) permission in Kamarajar (Ennore) Port is still pending even though the Appellant has its office inside port premises and they share a business of approx. 8 MMTPA against the total capacity of 30 MMTPA, with the port authority.

5.7 It is pertinent to mention herein that when the Board enquired about the reason for the Appellant for not laying the pipeline in the balance stretches where the clearances are available in the first hearing, the Appellant conveyed that in case it lay the pipeline in the remaining

stretches and KPL does not give RoW clearance, there could be requirement for rerouting of the pipeline and the pipeline laid would become unusable. Further all the permissions have to be obtained once again for the new route. When the Respondent Board enquired as to the alternate plan for the execution of the project in case of RoW permission is not received from the port authorities, the Appellant informed that as of now, they haven't decided on any alternate plan to execute the project in such a case.

5.8 This tribunal is of the view that since grant of authorization, the progress of the subject pipeline is not found satisfactory. The Appellant did not took sufficient steps since authorization to implement & execute the project. In fact even after completion of 04 years, i.e on 18.03.2019 from the date of authorization, the progress with regard the subject P\L was Nil.

5.9 That since authorization dated 18th December, 2015 many opportunities including hearing on 18.03.2019; 17.02.2020; 6.8.2020; 20.04.2022; 15.11.2022 have been provided to the Appellant herein to fulfill its obligations but there has been a *Nil* progress in the execution of the 21 km long pipeline by Appellant. It is pertinent to mention herein that the Appellant did not had any alternate plan to execute the project in case the permissions would have not been granted by the KPL which was ultimately granted on 9th June, 2021 almost after 05 years from the date of authorization.

5.10 Further, it is relevant to mention herein that in the hearing held on 20.04.2022 the Respondent Board directed the entity to complete the activities as committed by the Appellant for completion of project and granted the remedial time to complete the above activities by 14.10.2022 u/r 16(1) (a) of the Authorization Regularization and communicated that penal action would be taken in case the Appellant fails to complete the following activities within the stipulated time.

i. Securing CRZ approval.

ii. completion of procuring activities viz. tendering of line pipe, log lead items, placement of order.

iii. commencement of delivery of line pipe and long lead items.

5.11 It is the contention of the Appellant that out of these three activities mentioned above, the Appellant has completed 02 activities i.e securing CRZ approval & completion of procuring activities. It is pertinent to mention herein that as per the authorization granted the Appellant was required to accomplished the targets till 17.12.2018. However the Appellant miserably failed to achieve the targets, even after 07 years of grant of authorization, despite giving substantial opportunities and remedial time by the Respondent Board.

5.12 In this regard, our attention is drawn to the impugned order which has also relied on Clause 1(a) of Schedule J of the authorization Regulations stipulating that "*the entity shall obtain all statutory permit, clearances & approval from the concerned approving authorities and shall at all time ensure the validity of said permits, clearances and approvals"* It is pertinent to mention herein that EOI to lay and operate Petroleum and Petroleum Product Pipeline from Ennore Port to Manali Industrial Area was submitted by the Appellant. It is also the fact that the Appellant participated in the competitive bidding process and succeeded in securing the authorization. Therefore it is presume that the Appellant was well aware of the hardships & difficulties involved in the project. The contention of the Appellant that there is an increase in the length of the propose p|l from 14 to 21 km is not relevant as he has participated in the bid knowing well that there is increase in the length of the proposed P\L & is different than what he has proposed in EOI. The Appellant has duly accepted the terms and condition of the authorization letter which is sacrosanct. Thereby the failure on the part of the entity to progress the construction of the pipeline

despite the remedial time is the clear breach of the terms & obligation as mandated in the authorization letter.

5.13 Regulation 16 of the Authorisation Regulations, 2008 deals with the consequences of default and termination of authorization procedure which reads as under :-

"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 n each of the above cases within two weeks of encashment failing which the remaining amount of the performance bond shall also be encashed 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 authorisation 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 as per Section 28 of the Act in addition to

taking action as prescribed for offences and punishment under Chapter IX of the Act."

5.14 Thus Regulation 16 clearly stipulates the consequences of default and termination of authorization and the authorized entity has to abide with the terms and conditions as stipulated in authorization letter and failure to which the entity has to face the consequences as mentioned in Regulation 16. In accordance with Regulation 16, the notice was also issued to the Appellant allowing it a reasonable time to fulfill its obligations under the regulations. However in absence of taking any remedial action by the Appellant to the satisfaction of the Respondent Board amd considering it as the first default the Respondent Board has encashed the 25% of the PGB.

5.15 The Appellant has relied on ***MD Army Welfare Housing Organisation vs Sumangal Services 2004(9) SCC 619, Para 101***, it was held as follows:

"101. There cannot be an agreement that somebody would be bound to obtain a statutory order from the statutory authorities, as thereover, he would have no control."

However, this Tribunal does not agree with the Appellant's reliance of the above mentioned case as it is the case where the Architect duty's was inclusive of obtaining the sanctions. However the Principal entered into the another agreement, wherein the contractor was not the party, stipulating that sanction would be obtained by the contractor and held that any agreement to get the same sanction even if existed, would be illegal and further held that the agreement to obtain statutory order from statutory authority is not enforceable since the party would have no control there over based on *'ex turpi causa non oritur actio*' as the same is bad(illegal) consideration an action cannot arise. However, in the present case pending before this tribunal is entirely different from the case relied by the Appellant. In the present case the Appellant has participated in the competitive

bidding process and succeeded in securing the authorization. The Appellant has duly accepted the terms and condition of the authorization letter which is sacrosanct. Clause 1(a) of Schedule J of the authorization Regulations stipulates that "*the entity shall obtain all statutory permit, clearances & approval from the concerned approving authorities and shall at all time ensure the validity of said permits, clearances and approvals".* Here in the present case, the Appellant miserably failed to comply with the terms of the authorization and even after 7 years of the authorization, the Appellant has only laid 707 mts of a line out of 21kms which is negligible. Necessary statutory permissions and approvals are aligned and inherent risks to the project that the Appellant ought to have been aware of at the time of bidding for the project.

5.16 The Appellant has also relied on ***Hindustan Petroleum Corporation Limited vs. Petroleum and Natural Gas Regulatory Board., [MANU/ET/0025/2022] Appeal No. 25 of 2022*** wherein it was observed that:

> "*Though impossibly of performance is, in general, no excuse for not performing an obligation which a party has expressly undertaken, yet when the obligation is one implied by law, impossibility of performance is a good excuse*."
>
> However reliance is also drawn in the same judgment para no. 8 it was also observed that
> *"..14. The Statutory permissions may never be in place all in one go. One or the other clearance might remain pending but it does not stop the entity from pursing other activities related to the project. The situation on ground does not provide sufficient optimism for early commissioning of the pipeline."*

Thus the above named case relied by the Appellant does not support the contention of the Appellant. It is also a matter of fact that since inception of the progress of the project was negligible and was not found satisfactory. The Appellant did not take sufficient steps since authorization to implement & execute the project. In fact even

after completion of 04 years, i.e., on 18.03.2019 from the date of authorization, the progress with regard the subject P\L was Nil.

5.17 Further, the Appellant has relied on ***Tarun Sawhney vs Uma Lal 2011 SCC Online Del 610 (Para 26)*** **and** ***Upma Khanna vs Tarun Swahney 2012 SCC Online Del 610 (Para 18-19)*** to support the contention for imposition of penalty has to be based upon fault liability and a fault effect principle. However, the above named judgment does not apply in the present case pending before this Tribunal.

5.18 It is to be noted that the overall scheme of the PNGRB Act, the Board has been entrusted with multifarious duties, responsibilities and functions that include primarily the task of the sector regulator, it also being the statutory authority to deal with the issues of non-compliance. Having regard to this, the prime objective is to subserve public interest. The provision contained in the Regulation 16 of the Authorization Regulations makes it clear that the purpose of taking performance bond at the time of authorization is to ensure that all directions, terms or conditions attached to the authorization letter are strictly complied by, the idea being to secure timely compliances however, the same is subject to the Respondent Board also being reasonable in assessing the time required for such compliances to be made including in the matter of completion of a project of such nature as at hand. And in case of the default the Respondent Board is empowered to encash the Performance Bank Performance.

5.19 In the present case, 07 years has been elapsed from the date of authorization, the Appellant has miserably failed to comply with the commitments on the various instances and it is to be noted that even today the Appellant had only laid 707 mts. of a line out of 21kms which is negligible. Further, the Appellant has failed to put on record any sufficient reason for the lack of development in the project as per the authorization. Further, considering the section 16

Clause 1(a) of Schedule J of the Authorization Regulations, the tribunal is of the view that the Respondent Board has granted the reasonable time has been granted within the meaning of Regulation 16 to complete the project . Further, reasonable opportunity of being heard was granted to the Appellant, therefore there is no breach of natural justice.

5.20 The reliance is also placed by the Appellant **on *Hindustan Steel Ltd. vs. State of Orissa* 1969 2 SCC 627** [**Para 8**]. However this Tribunal do not agree with the Appellant reliance on the above case as in the present even after 07 years of authorization, the Appellant has miserably failed to comply with the commitments on the various instances and it is to be noted that even today the Appellant had only laid 707 mts. of a line out of 21kms which is negligible.

5.21 It is also pertinent to highlight that 25% of the Performance Bank Guarantee amount i.e. Rs.22,73,000/-has already been encashed by Respondent Board which has also been replenished by the Appellants in terms of the impugned order and the proviso to Regulation 16 (1) (c) of the said Regulations.

5.22 In view of the well settled principles of law laid down by the Apex Court and also by this Tribunal in connection with Bank Guarantees, we cannot interfere with the encashment of bank guarantee unless it is pointed out that there is a fraud on the part of the beneficiary or irretrievable harm or injury involved in the case which is not the case over here. Although being the Regulator, the Respondent Board has a discretion with regard to the encashment of PBG and such discretion varies on case to case basis. In the present case, the Appellant miserably failed to comply with the terms of the authorization and even after 7 years of the authorization, the Appellant has only laid 707 mts of a line out of 21kms which is negligible. Necessary statutory permissions and approvals are

aligned and inherent risks to the project that the Appellant ought to have been aware of at the time of bidding for the project.

ORDER

In the view that we have taken, the appeal is liable to be dismissed and is accordingly disposed off.

IA, if any pending, is disposed off accordingly.

PRONOUNCED IN THE OPEN COURT ON THIS 15th DAY OF MAY, 2024.

(Dr. Ashutosh Karnatak)	**(Justice Ramesh Ranganathan)**
Technical Member (P&NG)	Chairperson