

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 298 OF 2023 & IA Nos.112, 706 & 2164 OF 2023

Dated : 8th May, 2024

Present: Hon'ble Dr. Ashutosh Karnatak, Technical Member (P&NG)
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

APPEAL No. 298 of 2023

THINK GAS BHOPAL PVT. LTD.

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... Appellant(s)

Versus

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JUDGMENT

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The Consortium of Think Gas Investment Pte. Limited and Think Gas Distribution Private Limited had emerged as successful bidder in the competitive bidding process at the 9th CGD bidding round for the geographical area of Bhopal and Rajgarh District (Bhopal and Rajgarh GA). The authorization was granted to the Consortium on 24th September, 2018 for laying, building, operating, maintaining and expanding city gas distribution network ("CGD" Network) in the said GEOGRAPHICAL AREAS. Later on, the authorization was transferred in the name of the Appellant on 16th May, 2019.

2. The work programme that was submitted by the above named consortium in its successful bid for the said GA had identified the Mallavaram-Bhopal-Bhilwara-Vijaipur Natural Gas Pipeline (hereinafter referred as "MBBPVL") as a source of tap off point as the

hook up point and source of natural gas for the charged areas located in Bhopal District. The work programme for laying of steel pipeline of 2508 inch-kilo meter over 8 years was based on development of two pipeline networks - one for Rajgarh District originating from the GAIL's Tap Off at IP-06 and the second pipeline network for Bhopal District originating from MBBVPL Tap Off Point that was to be near Bhopal city part of Bhopal District.

3. Here it needs to be noted that the Respondent-Board vide letter dated 7th July, 2011 had granted authorization for the MBBVPL to M/s Gujarat State Petromet Limited. On 27th July, 2012, the letter of authorization was amended in favour of M/s. GSPL India Transco Limited (herein after referred as "GITL").Vide letter dated 15th September, 2014, the Respondent-Board amended clause 2 of the letter of authorization granted to GITL for MBBVPL. The Ministry of Petroleum and Natural Gas issued notifications dated 8th September, 2014, 13th August, 2014 and 30th July, 2017 relating to acquisition of Right of Way (RoW) for MBBVPL in the State of MP. Manifestly, it was before the bid submission date for 9th CGD bidding round. MBBVPL was being shown as common carrier pipeline on the gas infrastructure map on the website of the Respondent-Board.

4. Vide letter dated 21st June, 2019, the Respondent Board had extended the time period for completion of MBBVPL till March, 2020. It was made clear in the said communication that if further extension of the gas pipeline is not granted, the balance portion of the pipeline which would include till Bhopal District, could be terminated following the applicable Regulations. Some portions of the said letter dated 21st June, 2019 were challenged by GITL before this Tribunal in Appeal No. 265 of 2019 titled GSTPL Transco Ltd. vs. P&NGRB & Anr. In the Judgement dated 15th November, 2019 passed by this Tribunal in the said appeal, it was recorded that the pipeline MBBVPL was still under construction and GITL had developed the first phase of the pipeline with length of 363 kilometers originating from Kunchanapalli but full line is still not complete.

5. In pursuance to the above referred judgement of this Tribunal, the Respondent-Board issued an order dated 19th March, 2020 stating inter-alia as under :-

"MBBVPL is not yet completed and the GITL has been granted time extension for completion of the project upto March 2020 and further extension upto September 2020 can only be granted if the satisfactory progress is achieved as per the conditions laid down in the impugned order dated 21.06.2019. Hence the Board will consider all those aspects in total in order to take necessary action once MBBVPL Project is concluded. It is further observed that out of 1585 km pipeline only 363 km pipeline has been laid till date and that the Project was to be completed by 2014, which has not been completed till date in

pursuant to which the Board reserves the right to take an action against the GITL. That apart from the infringement of the Act and regulations on the issue of unilaterally reducing the diameter of the pipeline which is leading to the reduced capacity with respect to its authorised capacity, the Board has to also examine the issue of the present status of non-completion of pipeline within time.”

6. Thereafter, came the two judgements dated 13th October, 2021 passed by this Tribunal in Appeal Nos. 133 of 2018 and 134 of 2018 titled as GSPL Transco Limited vs. P&NGRB respectively in which this Tribunal recorded that GITL had claimed Force Majeure in the year 2015 on account of delays in grant of various clearances by State Government as well as Central Government, which was rejected by the Board and the Board had even encashed the Performance Bank Guarantees of the Appellants. However, this Tribunal set aside the encashment of Performance Bank Guarantees and even observed as under :

"Considering the importance of Natural Gas Grid for expansion of gas based economy in India, concerted efforts are required for completion of all authorized Natural Gas Pipelines within stipulated schedule. Possibly, we would wonder, it would help if the Board, before initiating any process for bidding, were to explore the possibility of securing confirmation or assurances from respective State Governments as to timely availability of CA, Permissions and ROU which are key enablers for completion of such projects... "

7. As per the contentions of the Appellant, on 28th February, 2022 i.e. at the end of approximately 3rd contract year, it became clear that MBBVPL of GITL can no longer be considered as a possible

connectivity for Bhopal as it was still not operational on account of the restrictions imposed by the Central Govt. as well as State Government which is a Force Majeure event under Regulation 2(1)(g)(a) of Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008 (hereinafter referred to as “PNGRB Authorizations Regulations 2008”). It is stated that the fact that GITL had claimed Force Majeure for the said pipeline before the Respondent-Board as far as on 5th November, 2015, which was revealed in the above noted two judgements dated 13th October, 2021 of this Tribunal in Appeal No. 163 of 2018 & 164 of 2018 but the same has not been disclosed to the bidders in the 9th CGD bidding round.

8. In view of such constraints, the Appellant, issued a communication dated 15th March, 2022 to the Respondent-Board as a Force Majeure notice declaring Force Majeure for the geographical areas of Bhopal and Rajgarh on account of restrictions imposed by the Central Government as well as State Govt. resulting in MBBVPL ceasing to be a possible source of piped natural gas for the said geographical areas and thus, sought extension of MWP targets and

exclusivity from the purview of common carrier/contract carrier as per Regulation 12(2) for PNGRB Authorization Regulations, 2008. The Respondent-Board found a said Force Majeure notice of the Appellant untenable and accordingly rejected the same vide communication dated 14th July, 2022. The relevant portion of the said communication is quoted hereunder :-

“2.1. PNGRB had authorized Bhopal and Rajgarh Districts GA to TGBPL for development of CGD Network on 24.09.20.18 under the 9th CGD Bidding Round.

2.2. Regulation 12 (2) of the CGD Authorization Regulations provides extension of exclusivity from the purview of common carrier or contract carrier and MWP targets in the case where the designated transmission pipeline is not available in the vicinity of the GA.

2.3. There were no designated pipelines assigned by the Board for providing connectivity in any of the GAs authorized under the 9th CGD Bidding Round. The entities were supposed to get the connectivity from the pipelines that are located nearest to their authorized GAs.

2.4. In the instant case, the pipeline connectivity was already available in the GA from the existing Hazira-Vijaipur-Jagdishpur Natural Gas Pipeline (HVJ) which was operational way before the GA was authorized to TGBPL.

2.5. Since, there is an operational natural gas pipeline available in the GA, the said case does not meet the requirement of Regulation 12(2) of the CGD Authorization Regulations and accordingly does not qualify for extension of MWP targets and exclusivity from the purview of common carrier or contract carrier on account of non-availability of natural gas pipeline.

3. In view of the above, the request of TGBPL for extension of exclusivity from the purview of common carrier or contract carrier and MWP targets under Regulation 12 (2) of the CGD Authorization Regulation on account of non-availability of pipeline connectivity is not tenable and the same cannot be accepted, as no designated pipeline was given for the said GA and the pipeline connectivity was already available in the GA.

4. Accordingly, you are advised to take immediate corrective steps for the improvement in progress and development of CGD infrastructure in the said

GA. Further, the targets assigned to you as per the terms and conditions of the authorization are required to be achieved within the stipulated time given in the authorization letter, failing which, the Board would be constrained to initiate penal action as per PNGRB Act and Regulations thereunder.”

9. The Appellant filed a Review Petition on 16th August, 2022 seeking a review of the said decision of the Board. However, the Board did not decide the Review Petition in its adjudicatory role but left the grounds raised in the Review Petition to be determined on the regulatory side in exercise of its regulatory function.

10. These two orders of the Board dated 14th July, 2022 and 29th November, 2022 have been impugned by the Appellant in the instant appeal.

11. It may be noted here that undisputedly, unlike the previous bidding rounds, the application-cum-bid document in case of 9th and 10th bidding rounds did not specify any designated transmission pipeline from which the authorized entity was supposed to take supply of gas. Even the authorization letters issued for these two bidding rounds neither mandated nor identified any designated pipeline for source of natural gas for the CGD network developments in the geographical areas involved therein. At the cost of repetition, it is noted here that in the working programme submitted by the Appellant

in its successful bid for the Bhopal and Rajgarh GA, it had identified the MBBVPL as the source of tap off point and source of natural gas for the Bhopal district.

12. We may also note here that by way of amendment to PNGRB Authorization Regulations, 2008, 3rd proviso was attached to Regulation 12(2) w.e.f. 6th April, 2018 providing for extension of exclusivity to the authorized entities in case of delay in flow of natural gas in the “Designated Transmission Pipeline” for a period of three months from the scheduled dates. We find it apposite to quote the Regulation 12 of the Regulations as under :-

“12. Exclusivity period

(1) The exclusivity period to lay, build, operate or expand a city or local natural gas distribution shall be as per the provisions in the Petroleum and Natural Gas Regulatory Board (Exclusivity for City or Local Natural Gas Distribution Networks) Regulations, 2008.

(2) Notwithstanding anything contained in any other regulation made under the Act, the exclusivity from purview of common carrier or contract carrier shall be eight years;

Provided that in case an entity timely achieves the work programme in each of the eight contract years, such exclusivity shall be extended by a period of two years.

Provided further that in case an entity is not able to timely achieve the work programme in any of the eight contract years but is successful in timely achieving the cumulative work

programme at the end of the eighth contract year, such exclusivity shall be extended by a period of one year.

*Provided also that in case flow of natural gas in the designated transmission pipeline is delayed for a period beyond three months from the scheduled date as indicated and is also later than the date CGD network is ready to take gas for reasons not attributable to the authorized CGD entity selected through the bidding process, the Board may extend the exclusivity period for exemption from the purview of common carrier or contract carrier by a period corresponding to the difference in the actual and scheduled natural gas flow in the transmission pipeline serving the authorized geographical area or the date when CGD network is ready to take gas, whichever is less, after assessing the reasons for such a delay and in case, the year-wise targets in respect of domestic piped natural gas connection, **CNG stations** and inch-kilometer of steel pipeline as well as schedule of levying transportation rate for CGD and transportation rate for CNG shall also be shifted accordingly by the Board. Further, the exclusivity period for laying, building or expanding the CGD network as stipulated shall also be extended by the same period. For the purpose of monitoring progress of committed targets, the same shall be prorated in the effected years.*

Provided also that in respect of those geographical areas where designated source of natural gas in the bid is other than from natural gas pipelines, including from an LNG terminal, the third proviso shall not apply

Explanation 1:- For the purpose of this sub-regulation, it is clarified that, the exclusivity for laying, building or expansion of CGD networks, in all cases, shall remain twenty-five years from the date of authorization.

Explanation 2:- For the purpose of this sub-regulation, the readiness of CGD networks shall mean any of the following, namely:-

- (a) Operation of at least one CNG Station within authorized geographical area, or*
- (b) Procurement of land for setting up City Gate Station, or*
- (c) Completing laying of steel pipeline at least to the extent of 10% of the MWP target for the first year, or*

- (d) *Completing laying of MDPE pipeline at least to the extent of 50% of the MWP target of steel pipeline for the first year.*

Note: Explanation 2 this will be applicable to all authorized entities irrespective of the year of bidding or authorization”

13. In this backdrop, the issue which arises for consideration in the instant appeal is whether the transmission pipeline MBBVPL identified by the Appellants in its bid in respect of the geographical area of Bhopal and Rajgarh would constitute “Designated Transmission Pipeline” for the purpose of 3rd proviso to Regulation 12(2) of P&NGRB Regulations, 2008 so as to entitle Appellant for extension of the period for MWP targets and marketing exclusivity in said geographical areas on account of delay in flow of gas in the said pipeline (which is termed as Force Majeure vent by the Appellant) or the Appellant was obligated to take supply of gas from Hazira-Vijaipur-Jagadishpur NGPL as stated by the Board in the impugned order dated 14.07.2022.

14. The main plank of the arguments raised on behalf of the Appellant is that communication dated 14th July, 2022 of the Respondent-Board wherein it has rejected Appellant’s Force Majeure notice (hereinafter referred to as “impugned communication”) suffers from a prima facie error. It is submitted that the Appellant had issued

the notice dated 15th March, 2022 under Regulation 14(11), (12) & (13) of PNGRB Authorization Regulations which relate to Force Majeure events but the same has been erroneously treated by the Board as having been sent under Regulation 12(2). It is pointed out by the Learned Counsel for the Appellant that the Force Majeure events agitated by the Appellant in the notice dated 15th March, 2022 have not been referred to or discussed in the impugned communication. It is further argued that the Board has utterly failed to consider the following material facts :-

- (i) MBBVPL Tap Off point was a critical component for the development of the Appellant's CGD network and its business viability, as this network would have catered to the maximum vehicle traffic, industries and households in the Bhopal-Rajgarh GA. The absence of MBBVPL pipeline severely affected the Appellant's MWP targets and its volumes of gas sales within Bhopal City.*

- (ii) The entire Work Programme for laying of steel pipeline of 2508 inch-km over 8 years was based on development of two pipeline networks: (1) for Rajgarh District, originating from the GAIL's Tap Off at IP-06, and (2) for Bhopal District, originating from MBBVPL Tap Off point that was to be near Bhopal City part of Bhopal District, and this aspect was ignored by PNGRB.*

(iii) As noted above, all publicly available information as of 10.07.2018 was indicating MBBVPL as a viable source of pipeline connectivity directly to Bhopal District. The delays in the implementation of the MBBVPL that were being caused by failure of Central Government and State Government to issue timely approvals became available only after the bid submission date of 9th CGD Bid Round more specifically, as described above. In order to provide domestic piped natural gas for domestic PNG consumers, the only option remaining which is being implemented, is to lay a 154 km pipeline from GAIL's IP-06 tap off on Hazira-Vijaipur- Jagdishpur ("HVJ") pipeline to Bhopal.

15. It is argued that the definition of "Force Majeure" envisaged under Regulation 2(1)(g)(a) of the PNGRB Authorization Regulations, 2008 clearly enables the Appellant to declare Force Majeure on account of the fact that there is no prospect of MBBVPL gas pipeline reaching the Bhopal district in the wake of restrictions imposed by the Central as well as State Govts which has directly resulted in delay in the implementation of minimum work programme by the Appellant in relation to Bhopal-Rajgarh GA. The Learned Counsel also laid emphasis on the fact that the Respondent-Board never revealed to the bidders in the 9th CGD bidding round that GITL had claimed Force Majeure for the MBBVPL gas pipeline as far back as on 5th November, 2015 and had this fact been revealed, the Appellant would not have

considered the said pipeline as source of piped natural gas for the Bhopal District in its work programme submitted along with the bid.

16. On behalf of the Respondent-Board, it is argued that the Regulation 2(1)(g)(a) are not attracted to the instant case for the reason that the Board has not designated any pipeline in the 9th CGD bidding round and it was left to the bidders to get gas connectivity from the pipelines that are located nearest to their respective GAs. It is pointed out that in the present case, apart from MBBVPL gas pipeline which is under construction, the Hazira-Vijaipur-Jagdishpur (HVJ) Natural Gas Pipeline authorized to GAIL which is operational since 1989 is available for supply of Gas for the Bhopal and Rajgarh GA.

17. It is further argued that since the case of the Appellant is not covered either under Regulation 2(1)(g)(a) or under Regulation 14, the Board has correctly examined the case in the light of Regulation 12(2) and has accordingly found the Appellant not entitled to extension as sought by it.

18. Bare perusal of the notice dated 15th March, 2022 issued by the Appellant to Respondent-Board would reveal that it had invoked Force Majeure clause envisaged under Regulation 2(1)(g)(a) of the PNGRB

Authorization Regulations, 2008 and sought suspension of its obligations as per the Minimum Work Programme (MWP) on the ground that gas pipeline MBBVPL which it had identified as a source of natural gas for the Bhopal District, has not been completed and made operational on account of some restrictions imposed by Central Government as well as State Government which has left the Appellant without any source of natural gas for the said District. By no stretch of imagination can it be said that the Appellant had invoked the Regulation 12(2) of these Regulations. Therefore, the rejection of the notice by the Board vide impugned communication dated 14th July, 2022 on the ground that the requirements of Regulation 12(2) are not met, is not understandable at all. Why the Board proceeded to treat the notice under Regulation 12(2) is nowhere explained in the impugned communication. It has also been nowhere stated in the impugned communication as to why the Regulation 2(1)(g)(a) and Regulation 14 do not apply to the case of the Appellant. Hence, the said impugned communication of the Board appears to be totally perverse and cannot be sustained. To the further agony of the Appellant, the Board declined to correct a factual as well as legal error in the impugned communication in the Review Petition filed by the

Appellant and disposed off the same stating that the issues raised therein will be looked into on the regulatory side.

19. Before proceeding further to scrutinize the contentions of the Appellant regarding applicability of Force Majeure Clause to the instant case, we find it advantageous to quote Regulation 2(1)(g)(a) and Regulation 14 (11) (12) & (13) of PNGRB Authorization Regulations 2008 hereunder :-

“2. Definitions.

1. *In these regulations, unless the context otherwise requires,-*

- (ga) *“Force Majeure” shall mean and be limited to*
- (i) *war/hostilities;*
- (ii) *major riots or civil commotion;*
- (iii) *earthquake, flood, tempest, lightening or other natural physical disasters;*
- (iv) *restrictions imposed by Central Government or State Governments, that have arisen after last date of submission of bid, which prevents or delays the execution of obligations under these Regulations;*

14. Service obligations of authorized entity (post commissioning).

- (11) *In the event of authorised entity being rendered unable to perform any obligation required to be performed by it as per the work program, due to force majeure, the relative obligation of the entity affected by such force majeure shall be suspended for the period during which such force majeure lasts and the decision of the Board in this regard shall be final and binding on the entity.*
- (12) *Upon the occurrence of such force majeure and upon its termination, the entity alleging that it has been rendered unable as specified in sub-regulation (11), the entity must inform the Board giving full particulars of the force majeure and duly certified by*

statutory authorities, the beginning and end of the delay due to such force majeure immediately but not later than 15 days from the end of such force majeure.

(13) Time for performance of the relative obligation suspended by such force majeure shall stand extended by the period during which such force majeure lasts.

20. Admittedly, in the 9th bidding round with which we are concerned, the Respondent-Board had not designated any gas pipeline and it was left to the bidders to identify any gas pipeline near the concerned GA as a source of gas for the same. It is also not in the dispute that in the work programme submitted by the Appellant in its bid for the Bhopal and Rajgarh GA, which has been duly accepted by the Board, it had identified MBBVPL gas pipeline as source of gas for Bhopal District. We have already noted herein above that the said gas pipeline had been authorized by the Board on 7th July, 2011 and its construction was thereafter commenced by GITL. The period of its completion was extended in March, 2020 by the Board vide letter dated 21st June, 2019. Further, it appears that the GITL had, on account of some restrictions imposed by Central Govt. as well as State Govts., claimed Force Majeure for the said gas pipeline on 5th November, 2015 but this fact was not disclosed to the bidders in the 9th CGD bidding round which took place in the year 2018. It is also a fact that the said gas

pipeline has still not been made operational.

21. It is evident that the Appellant became aware in 2021-22 about the impossibilities of the completion of MBBVPL gas pipeline on account of certain Governmental restrictions and accordingly issued notice dated 15th March, 2022 to the Respondent-Board claiming Force Majeure. Regulation 2(1)(g)(a) specifying Force Majeure events have been already quoted hereinabove. The concept of “Force Majeure” needs some discussion.

22. The term “Force Majeure” originates from the Code Napoleon of France that translates to mean “Superior Force’ or ‘Greater Force”. This would indicate a drastic or a fundamental change in the substance of the contract that is brought about by an event which was neither anticipated by the parties nor under their control, resulting in non-performance of the contractual obligations.

23. The term “Force Majeure” has been defined in Blacks Law Dictionary as “an event or effect that can neither be anticipated nor controlled”. Force Majeure is a contractual provision to deal with uncertain situations due to which contractual obligations could not be performed and these situations cannot be pre-saged at the time of

entering into the contract. Generally, a Force Majeure clause provides a temporary reprieve to the parties from performing their obligations under the contract if the events mentioned in the clause are satisfied.

24. Although the term “Force Majeure” does not find mention in any provisions of the Contract Act, 1872, its doctrine can be found embodied in Section 32 of the Act which renders a contract void where an event upon which performance of the contract is contingent, becomes impossible. In order to invoke the doctrine of Force Majeure, the party doing so shall have to establish ;

- (i) There is a valid and subsisting contract between the parties.
- (ii) Some part of the contract is yet to be performed.
- (iii) The contract has become impossible to perform.

25. The consequences of the Force Majeure event will have to be ascertained and determined to find out whether it renders the contract altogether impossible, unlawful or impracticable to perform and thereby frustrates its performance. Whether it is established that the conditions have materially and substantially affected the parties as well as their obligations and where there is no way to perform the contract during the existence of such conditions, the contract is annulled and

both the contracting parties are discharged of their subsequent obligations. Under these circumstances, neither party has right to sue the other party for breach of such contracts.

26. In India, the Courts follow the contracts strictly in terms of the Force Majeure clauses. In a case where the contract must be rescinded on account of Force Majeure events, the burden to prove is on the party claiming it. Unless there is compelling evidence that a contract cannot be performed under any circumstances, the Courts do not favour party resorting to frustration of contract and its termination.

27. The concept of Force Majeure had come up before the Hon'ble Supreme court in **Satyabrata Ghose vs Mugneeram Bangur & Co., 1954 SCR 310** in which it was held that the word "impossible" has not been used in the sense of physical or literal impossibilities. The determination of whether Force Majeure event has actually occurred does not centre around its impossibilities alone. A mere "impracticality of performance" with regards to such matter of the contract will also suffice. It was held that when an untoward event or unprecedented change of circumstances impacts the very foundation of the contract

between the parties, this event will be considered as Force Majeure and the contract, therefore, would become impossible to perform.

28. Generally, Force Majeure Clauses are applicable without any restrictions, but at the same time, a party cannot hide its own negligence and malafide intention behind this clause. So where the non-performance is caused by usual and natural consequences and not by uncertain consequences which are beyond the control of the parties, the Force Majeure clause cannot be enforced in those causes. Further, the Force Majeure clause can also not be invoked simply because the contract has become financially and commercially more difficult to perform. The party taking shelter under the Force Majeure clause needs to convince the Court that the Force Majeure event was beyond its control and the event could not be stopped even after ensuring due diligence and taking all possible steps. Broadly speaking, in order to qualify as a Force Majeure event, it must pass following triple test :-

- (i) the event projected as Force Majeure should be unpractical and unforceable (i.e. unpracticality);
- (ii) the event must make the execution of the contractual obligations impossible (i.e. impossibility); and

(iii) the event must not be created on account of default or negligence of the party claiming it (i.e. externality).

29. Hon'ble Supreme Court has recently settled the law relating to Force Majeure in Energy Watchdog Vs. CERC (2017) 14 SCC 80 and has laid down following principles for its application :-

- a. *“Force Majeure would operate as part of a contract as a contingency under Section 32 of the Indian Contract Act 1872 (‘ICA’)*
- b. *Independent of the contract sometimes, the doctrine of frustration could be invoked by a party as per Section 56, ICA.*
- c. *The impossibility of performance under Section 56, ICA would include impracticability or uselessness keeping in mind the object of the contract.*
- d. *If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement it can be said that the promisor finds it impossible to do the act which he had promised to do.*
- e. *Express terms of a contract cannot be ignored on a vague plea of equity.*
- f. *Risks associated with a contract would have to be borne by the parties.*
- g. *Performance is not discharged simply if it becomes onerous between the parties.*
- h. *Alteration of circumstances does not lead to frustration of a contract.*
- i. *Courts cannot generally absolve performance of a contract either because it has become onerous or due to an unforeseen turn of events. Doctrine of frustration has to be applied narrowly.*
- j. *A mere rise in cost or expense does not lead to frustration.*

- k. *If there is an alternative mode of performance, the Force Majeure clause will not apply.*
- l. *The terms of the contract, its matrix or context, the knowledge, expectation, assumptions and the nature of the supervening events have to be considered.*
- m. *If the Contract inherently has risk associated with it, the doctrine of frustration is not to be likely invoked.*
- n. *Unless there was a break in identity between the contract as envisioned originally and its performance in the altered circumstances, doctrine of frustration would not apply.”*

30. The settled position, thus, is that the Force Majeure Clause is to be interpreted strictly and the parties to a contract cannot be excused from its performance on flimsy and unjustified grounds. We find it profitable to quote following paragraph from another recent judgement of Supreme Court in Halliburton Offshore Services Vs. Vedanta Limited and Anr. 2020 SCC Online Del 2068 :-

“It is the settled position in law that a Force Majeure clause is to be interpreted narrowly and not broadly. Parties ought to be compelled to adhere to contractual terms and conditions and excusing non-performance would be only in exceptional situations. As observed in Energy Watchdog (supra) it is not in the domain of Courts to absolve parties from performing their part of the contract. It is also not the duty of Courts to provide a shelter for justifying non-performance. There has to be a ‘real reason’ and a ‘real justification’ which the Court would consider

in order to invoke a Force Majeure clause.”

31. In the instant case, since the MBBVPL pipeline which was identified by the Appellant in the bid as source of gas for Bhopal District has still not been completed and its construction/commissioning has become almost impossible due to certain Governmental restrictions already noted hereinabove, the Appellant is left with no source of gas for the said district which has seriously affected to MWP. This is such an event which could not have been anticipated by the Appellant at the time of submission of its bid for the said GA, was beyond its control and can not be attributed to it. The event certainly qualifies as a Force Majeure event as per Regulation 2(1)(g)(a). Invocation of Force Majeure clause by the Appellant cannot be said to be unjustified. On the contrary, the conduct of the Board appears to be totally unjustified as well as unfair. It did not disclose at the time of inviting bids that GITL had claimed Force Majeure for MBBVPL in November, 2015 and there is very little prospect of the pipeline being commissioned. By accepting the Appellant's bid wherein MBBVPL had been identified as source of gas for Bhopal District, the Board reinforced the belief in the mind of

appellant that the said pipeline is going to be commissioned in near future. It is, therefore, the Board itself which has misled the appellant by concealing the material fact regarding the MBBVPL pipeline in the Application-cum-Bid Document. Thus, in our opinion, the case of the Appellant is clearly covered under clause (4) of Regulations 2(1)(g)(a) and it has become entitled for extension of time for fulfillment of its obligations under minimum work programme as envisaged under the sub Regulations (11) (12) & (13) of Regulation 14. Approach of the Board in stating that the Appellant could have taken gas supply from HVJ pipeline is not correct for the reason that it had not designated the said pipeline for source of gas to Bhopal-Rajgarh GA in the bid document and had left it for the bidders to choose any pipeline as source of gas for the said GA. Once the Appellant, in its bid, identified MBBVPL as source of gas for the said GA, it does not lie in the mouth of the Board to contend that the Appellant could have taken gas supply from some other pipeline.

32. Even if the notice dated 15th March, 2022 of the Appellant is treated under Regulation 12(2), as done by the Respondent-Board, then also the Board has erred in not providing any relief to the

Appellant as sought by it. This Tribunal had the occasion of interpreting the 3rd proviso of Regulation 12(2) of PNGRB Authorization Regulations, 2008 in Appeal No. 331 of 2022 titled AGP CGD India Private Ltd. Vs. P&NGRB decided on 26th April, 2024. After considering the relevant Regulations, contents of the application-cum-bid document prescribed for 9th& 10th bidding rounds etc. it was held as under :-

“18. So, even though, the Board had not designated any transmission pipeline for the 9th& 10th bidding rounds, still in view of Regulation 5(6)(g) it was the responsibility of each bidder to have a credible plan for sourcing natural gas for supply in the proposed CGD network and as per Schedule A, it was the responsibility of the Board to determine the geographical areas in such a manner as to ensure that each geographical areas either has availability of natural gas or a natural gas pipeline passing with such area or passing in its vicinity or a natural gas pipeline proposed to be laid either within or in vicinity of such area.

19. It does not appear that the Respondent-Board had done any such exercise envisaged under Schedule A to the Regulations. Therefore, it was completely left to the bidders to make such exercise and identify natural gas pipeline from which it proposed to source the natural gas for supply in the concerned CGD network.

20. Undisputedly, as noted herein above, the Appellant in its bid for the six geographical areas with which we are concerned in these six appeals, had identified natural gas pipeline from which it proposed to take gas for supply in the concerned CGD network. It goes without saying that the bids so submitted by the Appellant and other bidders were examined by the Respondent-Board and thereupon were approved. It is not the case of the Respondent-Board that the natural gas pipelines designated by the Appellant in its bids for these six geographical area involved herein were not proposed to be laid and were not supposed to pass through these geographical areas in their vicinity. The Board has also maintained eerie silence on the aspect as

to which natural gas pipeline was conceived by it for the six geographical areas in terms of Schedule A to these Regulations of 2008 when these geographical areas were determined.

21. Having regard to these facts and circumstances, we do not find it justified and plausible to accept the contention of the Board that the natural gas pipeline designated by the Appellant in its bid for the six geographical areas from which it proposed to take gas for supply of the CGD networks, cannot be termed as "Designated Transmission Pipeline" envisaged in the 3rd proviso to Regulation 12(2).

22. In view of the above noted Regulations and also considering the obligation of the selected bidders to maintain uninterrupted supply of natural gas to all customers within the CGD networks, it is difficult to consider a situation where the bidders in the 9th & 10th CGD round including the Appellant herein would have submitted their respective bids without doing ground work for identifying a natural gas pipeline passing through or in the vicinity of the concerned geographical area or proposed to be through or in the vicinity of the concerned geographical area. It is manifest that the Appellant had embarked upon such exercise and identified a natural gas pipeline proposed to be through the concerned geographical areas or in their vicinity to ensure smooth, uninterrupted supply of natural gas to the consumers within the CGD networks. Concededly, all the natural gas pipelines identified by the Appellant and designated by it in its bids had been duly authorized by the Board and, therefore, no fault can be found with the Appellant in designating these in its bids. However, unfortunately these pipelines were not commissioned for reasons known to either the Board or the Government of India.

23. Since no natural gas pipeline was designated by the Respondent-Board for 9th and 10th bidding rounds, it was, all the more necessary for the bidders in these two rounds to specify a gas pipeline in the bids from which they proposed to take gas for supply to the concerned CGD networks. In the absence of specifying any such gas pipelines in the bids, these would have been out-rightly rejected by the Board on the ground that the bidders have not specified the source of natural gas to be supplied in the CGD network as required under Regulation 5(6)(g) as well as clause 1.1.3 of the Application-bum-bid document.

24. The argument on behalf of the Respondent-Board that it has not scrutinized the bids is preposterous, to say the least. We wonder as to how, without examining the bids, the Board would find whether the bidder has a credible source of gas as mandated under said Regulation 5(6)(g) or that the gas pipeline identified in the bids is

existing/proposed to be laid in near future or that the gas pipeline runs through/ or in the vicinity of the CGD network. When a bidder identifies a gas pipeline in the bid from which it proposed to take supply of gas for the concerned CGD network and the bid is approved by the Board, it is indicative of the fact that the gas pipeline fulfils all the required parameters. In these circumstances, the Board is precluded from contending that such a gas pipeline cannot be termed as “Designated Gas Pipeline” envisaged under 3rd proviso to Regulations 12(2). Once it was left to the bidders in the 9th & 10th bidding rounds to identify the source of gas to be supplied to CGD networking, it does not lies in the mouth of the Board to say that the gas pipeline so identified by the bidder in the bid cannot be construed as “Designated Gas Pipeline” to attract the 3rd proviso of Regulation 12(2).

25. *It is also to be noted that the ENPL, the gas pipeline designated by the Appellant for sourcing of gas for Nellor geographical area and JMPL designated by the Appellant for sourcing of gas for UHS geographical area were later on cancelled by the Respondent-Board on 20th December, 2022 and 4th July, 2022 respectively, a fact which could not have been anticipated by the Appellant at the time of submission of bid for these two geographical areas.*

26. *Even otherwise also a minute and meaningful reading of the entire Regulation 12(2) would clearly reveal that it does apply to the geographical areas allotted in 9th& 10th bidding rounds also. The expression “Designated Transmission Pipeline” used in the 3rd proviso attached to said Regulation 12(2) has not been defined either in the Regulations or in the PNGRB Act. There is nothing in the entire proviso to suggest that such a transmission pipeline shall be designated only by the Board. A plain reading of the proviso would indicate that such a pipeline may be designated either by the authority inviting the bids i.e. the Board in the application-cum-bidding document or by the bidders in their bids. Such an interpretation would be in consonance with the Regulation 5 & clause 1.1.3 of the application-cum-bid document. Further explanation 2 attached to sub-Regulation (2) of Regulation 12 clearly specifies that this sub-Regulation would be applicable to all authorized entities irrespective of the year of bidding or authorization. Even though this explanation has been engrafted into the Regulations w.e.f. 7th September, 2021 yet its language makes it clear that it applies to the entities which have been authorized prior to engrafting of the explanation. The expression “authorized entities” used in the explanation is clearly indicative of the intention that the entire Regulation 12(2) including the 3rd proviso would apply to the entities which have been authorized in the past also i.e. before the said explanation has been attached to the Regulations. Therefore, the application of 3rd proviso of the said*

Regulation 12(2) to the authorized entities selected in 9th & 10th bidding rounds no longer remains debatable.

27. We may also refer to 4th proviso attached to Regulation 12(2) which reads as under :-

*“Provided also that in respect of those geographical areas where designated source of natural gas **in the bid** is other than from natural gas pipelines, including from an LNG terminal, the third proviso shall not apply.”*

28. Though this proviso has been brought into the Regulations w.e.f. 7th September, 2021 but it indicates the intention of the Board that the 3rd proviso would apply in all situations except where the designated source of natural gas in the bids for geographical areas is stated to be other than from natural gas pipeline. Thus, it is evident that the Board never intended to exclude those geographical areas from the purview of 3rd proviso where designated source of natural gas in the bid has been stated to be from a natural gas pipeline as has been done by the appellant in the cases under consideration.

29. There is another disturbing feature which has brought our attention and which demonstrates the inconsistent, unjust and casual approach of the Respondent-Board. Vide communication dated 12th April, 2022 addressed by the Board to M/s Gujarat Gas Ltd. in respect of Ferozepur, Faridkot -- Sri Muktsar Sahib Districts GEOGRAPHICAL AREAS, copies of which have been annexed in Appeal Nos. 636 of 2023 & 640 of 2023, the Respondent-Board had granted extension under the 3rd proviso to Regulation 12(2) to the Appellant on the ground of delay in flow of gas in the MBPL Gas pipeline designated in the bids submitted for the said GA. The order clearly indicates that the Board accepted the pipeline designated by the Appellant in its bids for the said geographical area as the “Designated Transmission Pipeline” envisaged under 3rd proviso to Regulation 12(2). The same pipeline was identified by Appellant herein as source of gas for BJJ Geographical Area (see Appeal No. 331 of 2022) but no extension, as given to Gujarat Gas Ltd., has been given to the Appellant herein. Hence, it is not understandable what lead the Board to take a U-turn later on and to state in the impugned communications to the Appellant that the 3rd proviso to Regulations 12(2) does not apply to bidders selected in 9th & 10th bidding rounds. The Board is expected to maintain consistency in its orders while interpreting the Regulations as well as the entitlement of the authorized entities unless a very strong and cogent ground is shown for taking a contrary stand. We do not find anything in the impugned communications to suggest that there

was any compelling reason for the Board to take a stand contrary to its own previous communication dated 12th April, 2022.

30. In the light of the above discussion, we hold that the natural gas pipeline referred to by the Appellant in its bids in respect of the geographical areas involved in these six appeals constitute "Designated Transmission Pipelines" for the purpose of 3rd proviso to Regulation 12(2) of PNGRB Regulations 2008 thereby entitling the Appellant for extension of exclusivity period from purview of common carrier or contract carrier and of MWP targets."

33. In view of the interpretation given by this Tribunal to the expression "Designated Transmission Pipeline" referred to in 3rd proviso to the Regulation 12(2) in the above noted judgment, the MBBVPL gas pipeline identified by the Appellant in its work programme submitted along with the bid as a source of natural gas for Bhopal District would constitute "Designated Transmission Pipeline" for the purposes of the said proviso. Since flow of natural gas in the said pipeline has been delayed and it has become almost impossible that the pipeline would become operational for supply of gas to the Bhopal District, the Appellant has become entitled to extension of exclusivity period from the purview of common carrier or contract carrier and of MWP targets. Consequently, the observations of the Board in the impugned order dated 14th July, 2022 that the Hazira-Vijaipur-Jagdishpur NGPL was available to the Appellant for supply of gas to the concerned GA is not tenable or acceptable.

34. Accordingly, the impugned orders dated 14th July, 2022 and 29th November, 2022 of the Board are hereby set aside and the appeal hereby allowed and pending applications disposed of accordingly. The Appellant shall identify an alternate source of natural gas for the Bhopal-Rajgarh GA and intimate the same in writing to the Board within two weeks and thereafter, the MWP as well as marketing exclusivity for the appellant in respect of said GA shall be stand extended accordingly.

Pronounced in the open court on this 8th day of May, 2024.

(Virender Bhat)
Judicial Member

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

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