IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI [APPELLATE JURISDICTION]

APPEAL NO. 159 OF 2016 & IA NO. 336 OF 2016 & APPEAL NO. 161 OF 2016 & IA NO. 337 OF 2016

Dated: 2nd June, 2017

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. B.N. Talukdar, Technical Member (P&NG)

IN THE MATTER OF:

CENTRAL U.P. GAS LIMITED)
7th Floor, UPSIDC Complex,)
A-1/4, Lakhanpur,)
Kanpur-208024) ...**Appellant**

AND

PETROLEUM & NATURAL GAS REGULATORY BOARD)
1st Floor, World Trade Center,)
Babar Road,)
New Delhi-110001) ...**Respondent**

Counsel for the Appellant(s) : Mr. K.K. Rai, Sr. Adv.
Mr. S.K. Pandey
Mr. Anshul Rai
Mr. Chandrashekhar

Counsel for the Respondent(s) : Mr. Prashat Bezboruah
Mr. Sumit Kishore
Ms. Aparna Vohra
Mr. Rakesh Dewan

J U D G M E N T

PER HON'BLE MR. B.N. TALUKDAR, TECHNICAL MEMBER (P&NG)

1. In these Appeals (Appeal No. 159 of 2016 and Appeal No. 161 of 2016) filed under Section 33 of the Petroleum and Natural Gas Regulatory Board Act, 2006, the Appellant, M/s Central U.P. Gas Limited has challenged the order dated 12.10.2015 passed by the Respondent, the Petroleum and Natural Gas Regulatory Board (the Board) encashing the 25% performance bank guarantee submitted by the Appellant in their authorization granted by the Board for city gas distribution network for Kanpur and Bareilly geographical areas respectively. Since facts in both the appeals are similar and issues are same, both were heard in this Tribunal together and accordingly dealt with in this common order. Appeal No. 159 of 2016 in respect of geographical area of Kanpur will be treated as the lead appeal. Counsel for the parties are agreed that judgment in Appeal No. 159 of 2016 will cover and decide Appeal No. 161 of 2016.

2. The Appellant, a company incorporated under the Companies Act, 1956 is a joint venture between India's two Navratna companies, GAIL (India) Ltd. and Bharat Petroleum Corporation Ltd. The company came into existence on 25th February, 2005.

3. The Respondent, Petroleum and Natural Gas Regulatory Board (the Board) is a statutory body constituted under the provisions of the Petroleum and Natural Gas Regulatory Board Act, 2006 ("PNGRB Act") to regulate "the refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas excluding production of crude oil and natural gas so as to protect the interests of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas and to ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country and to promote competitive markets and for matters connected therewith or incidental thereto".

4. The background of the appeal and the gist thereof as understood from the learned counsel of the Appellant and the documents submitted by the Appellant are as under:-

5. Both the authorizations to lay, build, operate or expand city or local natural gas distribution network for Kanpur and Bareilly were first granted by the Central Government to the Appellant and later the same were accepted by the Board vide its letter dated 22.04.2009 under the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to lay, build, operate or expand city or local natural gas distribution network) Regulations, 2008 (Authorization Regulations). In the authorization, year-wise certain physical targets were stipulated during the exclusivity period of 5 years which were to be met by the Appellant. These targets are in terms of domestic Piped Natural Gas (PNG) connections, laying of steel pipelines in inch-km and building up of Compressed Natural Gas (CNG) compression capacity in Kg/day.

6. As regards number of domestic PNG connection as targets, the Board amended the Authorization Regulations on 07.04.2014 replacing the number of connections with creation of infrastructure. The amended condition with regard to PNG domestic connection is as follows:-

> "Infrastructure for PNG domestic connections – The Board shall work out the target for infrastructure for PNG domestic connections as five percent of the households of the respective geographical area to be achieved by the successful bidder during the first five years from the date of grant of authorization in Schedule D as under, namely:-
>
> a) The successful bidder shall achieve fifteen percent, fifty percent, seventy percent and one hundred percent of this target by the end of second year, third year, fourth year and fifth year respectively; and

b) The Board may consider carry forward of the target from one year to another within the period of five years."

7. Under Regulation 13 of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to lay, build, operate or expand city or local natural gas distribution network) Regulations, 2008, the Board monitors the progress of the CGD network project. While monitoring, the Board issued a letter dated 25.06.2013 to the Appellant regarding non-fulfillment of achieving the targets and asked to reply with details within five working days.

8. The Appellant after asking for extension of the date for submission of details sought by the Board, made its various submissions on 19.07.213 with regard to non-achievement of milestones in the geographical area of Kanpur and Bareilly. The Board, thereafter on 20.12.2013 issued notice under Regulation 10 of the PNGRB (Exclusivity for City or Local Natural Gas Distribution

Network) Regulations, 2008 to explain the status of achievement of project milestone on 09.01.2014. The Appellant appeared on 09.01.2014 before the Board and made their submissions with regard to difficulties faced by them in achieving the milestones fixed by the Board but the same were not addressed by the Board.

9. The Board issued another notice on 01.07.2015 under the provisions of Regulation 16 of CGD Authorization Regulations to explain the status of achievement of the project milestones in geographical area of Kanpur alongwith other cities and to also explain the cause of default, if any, in achievement of the targets and called for formal hearing on 30.07.2015. The Appellant appeared before the Board on 30.07.2015 and again made submissions with regard to difficulties faced by them in achieving the milestones fixed by the Board but the same were again not addressed by the Board.

10. The Board, during hearing on 30.07.2015 further asked the Appellant to submit its Financial/Capex outlay plans

and the same, as stated by the Appellant submitted vide its letter dated 08.10.2015 to the Board.

11. The Board thereafter on 12.10.2015 without discussing the practical difficulties faced by the Appellant in reaching the targets set out by the Board, issued the impugned order to the Appellant encashing 25% of the performance bank guarantee i.e. Rs. 1,50,00,000/- (Rupees One Crore Fifty Lakhs only) under the provision of Regulation 16 (1) (c) (i) of the Authorization Regulations. Hence the appeal by the Appellant to this Tribunal.

12. We have heard Mr. K.K. Rai, Senior Advocate appearing for the Appellant. We have perused the written submissions filed by the Appellant. Gist of the submissions is as under:-

- While exercising the power to encash bank guarantee, the Board has to be reasonable and rational. Bare perusal of the Regulation 16 (1) (c) indicates that it is not mandatory for the Board to encash the bank guarantee. The Regulation reads as

"the Board may encash". Regulation 16 (1) (c) of the Authorization Regulations reads as under:-

> "16. …
>
> (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
>
> ……
>
> …"

Above Regulation gives discretion to the Board to apply mind from case to case basis and accordingly take action under the Regulation.

- The Appellant has questioned the very exercise of power of encashment of bank guarantee under Regulation 16 i.e. intent and pre-conditions of Regulation 16, and not the terms of the performance bank guarantee.

- The Board failed to appreciate that the Appellant as a service provider could only set up infrastructure for PNG supply to the domestic consumer. It could not force the consumer to buy gas.

- The Board itself realized the practical difficulties of enforcing targets for number of domestic PNG connections and accordingly amended the Authorization Regulation on 07.04.2014 to replace the target for number of PNG connection by creation of infrastructure.

- The compression capacity already created in the geographical area of Kanpur is surplus to sale of present CNG volumes. From the following tabulations, it is evident that the growth in number of CNG vehicles in Kanpur is following a downward trend since 2012-13. The CNG stations in Kanpur are well spread out and there is no queuing problem in the stations. Hence, increase in compression capacity will only lead to lesser capacity utilization.

Compression Capacity Vs. Utilization in Kanpur

Financial Year	Total Compression capacity (Kg/day)	Total Sales (Kg/day)	% capacity utilization
Up to 31.03.2009	80000	36852	46.07%
2009-10	104000	40349	38.80%
2010-11	144000	47346	32.88%
2010-11	144000	47346	32.88%
2011-12	152000	59151	38.92%
2012-13	152000	68497	45.06%
2013-14	152000	76709	50.47%
2014-15	152000	72920	47.97%
2015-16 (till 30.09.2015)	160000	79045	49.40%

Growth of CNG vehicles and CNG sales in Kanpur

Financial Year	No. of CNG vehicles	Annual Vehicle growth (%)	Yearly CNG Sales (Kg)	CNG Sales Growth (%)
Up to 31.03.2009	8105	4.78	13451060	20.52
2009-10	8988	10.89	14727309	9.49
2010-11	13111	45.87	17281416	17.34
2011-12	19793	50.96	21590257	24.93
2012-13	27676	39.83	25001500	15.80
2013-14	33048	19.41	28090469	12.36
2014-15	37675	14.00	27251256	-2.99

Increase in number of CNG stations in Kanpur

Financial Year	Cumulative No. of CNG Stations in Kanpur
Up to 31.03.2009	7
2009-10	8
2010-11	10
2011-12	11
2012-13	11
2013-14	12
2014-15	14
2015-16 (Till 30.09.2015)	15

- The Board while encashing the bank guarantee did not appreciate the following difficulties faced by the Appellant in achieving target of Inch-km of steel pipeline:-

- In the year 2012, the Appellant had planned to lay a steel pipeline from GAIL's nearest tap off at Achalganj for connectivity of pipeline for gas distribution in Unnao. This project could not materialize because the proposed pipeline route fell under the jurisdiction of Protected Forest. Permission from Forest Department has taken a lot of time and even now, in principle permission from Forest Department is still awaited.

- In a CGD network, Inch-km of MDPE pipeline also plays an important role in providing domestic PNG connections. In addition to steel pipeline network of 62.72 kms in Kanpur, the total length of MDPE pipeline network infrastructure created by Appellant is 290.82 kms. The importance of including MDPE pipeline network in total CGD business has also been acknowledged by PNGRB. It is observed that the

parameter of "Inch-Km steel pipeline" has been replaced with "Inch-Km steel pipeline/MDPE pipelines" in the latest 6th round of bidding invited by PNGRB in October, 2015. If the same parameter is used for evaluation of performance of the Appellant, there may not be a reason to penalize the Appellant for its performance.

- The Board while encashing the bank guarantee did not appreciate the following difficulties faced by the Appellant in achieving target of domestic PNG connections:-

  - Provision of PNG connection is much more convenient in apartments/flats as compared to row houses because of the structural damage caused in row houses for laying PNG infrastructure is much more as compared to apartments/flats. In Kanpur, a majority of the population is residing in row-houses, as

compared to Delhi, Mumbai and other metro cities, where majority of population resides in high rise flats (apartments). It is observed that 80% of the population in Kanpur resides in row-houses whereas only 20% of the population has opted for high rise flats. Hence the PNG connections are low in Kanpur. Further the occupants of many high rise flats are tenants and they are unable to attain required NOCs from their owners. Hence conversion rate in flats is also low in Kanpur.

- Size of bungalows/ row house is another area of concern in Kanpur. Most of the kitchens in bungalows/ row-houses are at the back of the house or in the middle of the house, in these cases, either extra GI pipe is required or a suitable path for piping is not available, due to which also customers refuse to take PNG connection. To connect their kitchens with PNG,

additional GI / copper pipe is required and the charges for extra GI or Copper pipe have to be borne by customers. Sometimes customers are not interested in paying that additional amount and are reluctant to take PNG connection.

- Free availability of LPG and return of subsidy are the biggest constraints in developing PNG as an alternate fuel because people still trust LPG more than PNG. It is also apprehended that PNG supply may be interrupted due to frequent digging jobs being carried out by the District authorities. In case they opt for PNG they may not be left with any back up whereas in case of LPG, families have Double Bottling Cylinders. Multi utility of LPG is another stated reason for not opting for PNG. LPG cylinders can also be used in geysers in contrast to PNG. Further, as per the Gazette Notification LPG supply of consumers using PNG shall be stopped, people

don't prefer to surrender their LPG cylinder and want to keep them as back-up option.

- The Board being a Regulatory Board, must act in a manner to promote business of city gas distribution and should not discourage the entities by penalizing for no fault of their own. The Board which also acts as quasi-judicial body must apply its mind judiciously and consider all the factors before arriving at a conclusion. In this respect, reliance is placed on the Supreme Court's order in **Kranti Associates (P) Ltd. Vs. Masood Ahmed Khan, (2010) 9 SCC 496** wherein, the court summarized the laws relating to the decision making process of the adjudicating authorities.

- The Board has not exercised its power as regulator who ought to have first suggested remedial measure only upon failure to comply with the remedial

measure and upon finding that this was deliberate, an action could have been taken.

- It would be against the intent of the Petroleum and Natural Gas Regulatory Board Act of primary objective of making gas available to the public at large which could only be achieved if the Board and the Appellant worked together, identify the areas of problems and find solutions to it. The aims of the Board should be to promote the company and not to only penalize it.

- City Gas Distribution Project is still at a nascent state in India. The terms and conditions set out for the Appellant were in 2009. The Board themselves have made various changes in the regulations with regard to the commitments of the City Gas Entities after identifying various problems in implementing the earlier norms. These amendments have been carried out to make the regulations and norms workable. When the Board itself identified the problems, it

amended its own norms and the same yardstick could be adopted in case of the Appellant and the unrealistic targets could be modified keeping practical difficulties faced by the Appellant in mind.

- It has been consistently trying to persuade the Board regarding the unrealistic targets as the Board is a Statutory body looking after the activities of all the entities. It was only after the impugned order, that the Appellant came to know that the Board is not convinced with the submissions of the Appellant with regard to unrealistic targets.

13. We have heard Mr. Prashant Bezboruah, counsel for the Board. We have perused the written submissions filed by the Board. Gist of the submissions is as under:-

- The Board has encashed 25% of the performance bank guarantee under the provision of Regulation 16 (1) (c) (i) of the Authorization Regulations because of breach of authorization occurred on the part of the

Appellant with respect to laying infrastructure and providing PNG domestic connections. The performance of the Appellant has been abysmal since inception of authorization. The encashment has been done judiciously and in the interest of the public.

- The purpose of the PBG in terms of Regulation 9 (3) of the Authorization Regulations is for timely commissioning of the proposed CGD network as per the prescribed targets and meeting service obligations during the operating phase of the project. This has admittedly not been done by the Appellant even over a period of long six years since authorization.

- It is pertinent to mention that the encashed PBG amount has also been replenished by the Appellant in terms of the proviso to Regulation 16 (1) (c) (i) and (ii) of the Authorization Regulations.

- The Appellant's allegations of violation of principles of natural justice under section 13 (3) of the PNGRB Act, 2006 has no merit as the Board gave repeated opportunities to the Appellant to fulfill its obligations.

- As regards the allegation of the Appellant that the targets were unrealistic, it is submitted that the targets were discussed with the Appellant and accepted by the Appellant. If the Appellant felt that the targets were unrealistic, it should have challenged those immediately after it was granted authorization on 22.04.2009 by the Board or at least within a reasonable time thereafter.

- The timing of the challenge to the targets is also suspect. The Appellant has challenged the targets to be unrealistic after more than six years that too after encashing the PBG by the Board vide order dated 12.10.2015. This proves that the targets set in the authorization never aggrieved the Appellant prior to encashment of the PBG. In relation to delay and

laches, the judgment of the **Supreme Court in the case of Leelawati and Ors. Vs. State of Haryana and Ors. (2012) 1 SCC 66 paras 14 and 15 pages 69 and 70** is relied on.

- The reasons submitted by the Appellant for not achieving the targets are not satisfactory. The Appellant's allegation is that the difficulties raised by the Appellant in the hearing on 09.01.2014 were not addressed by the Board is baseless. The minutes of the hearing held on 09.01.2014 clearly show that the issues raised by the Appellant were dealt with in that hearing itself and the Appellant was accordingly asked by the Board to make sincere efforts to achieve the targets.

- The entire Scheme of the PBGRB Act, 2006 and the Regulations framed thereunder provide for the protection of public interest as well as the protection of the interest of entities as important mandates of the PNGRB. However, where an entity consistently

defaults and in fact, its defaults are detrimental to public interest, the Board being the sectoral Regulator has to necessarily apply the law and comply with its mandate under the Act. It is also submitted that public interest is paramount and must be protected especially in relation to CGD Network projects, which have a far reaching impact on the public, environment and Government finances/resources. The fact of the matter is also that the Board had given numerous opportunities over many years to the Appellant to achieve its targets, which it has failed to do.

- There can be no question of violation of natural justice while encashing bank guarantees, which are absolute, unconditional and irrevocable as per the settled provision of law. In relation to position of law relating to bank guarantee encashment, reliance is placed on a recent judgment of the **Division Bench of the High Court of Delhi passed in CM No. 570 of 2016 in WP (C) No. 125 of 2016 – M/s Siti**

Energy Ltd. Vs. PNGRB. It is directly relevant for the present matter.

- 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 Supreme Court of India.

  - General Electric Technical Services Co. Inc. Vs. Punj Sons (P) Ltd., (1991) 4 SCC 230 para 9 page 237;
  - Centax (India) Ltd. Vs. Vinmar Impex Inc., (1986) 4 SCC 136 para 5 page 139;
  - U.P. Co-operative Federation Ltd. Vs. Singh Consultants & Engineers (P) Ltd. (1998) 1 SCC 174 para 21 page 186 and para 34 page 190;
  - Svenska Handelsbanken Vs. M/s Indian Charge Chrome (1994) 1 SCC 502 paras 86 and 88 page 530;
  - U.P. State Sugar Corporation Vs. Sumac International Ltd. (1997) 1 SCC 567 para 12 page 574 and para 14 page 575;
  - Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company (2007) 8 SCC 110 para 14 page 117;

- Vinitec Electronics Pvt. Ltd. Vs. HCL Infosystems (2008) 1 SCC 544 para 11 page 547 and para 12 page 548;

- Jagdish Mandal Vs. State of Orissa (2007) 14 SCC 517 para 22 page 531;

- Michigan Rubber (India) Ltd. Vs. State of Karnataka (2012) 8 SCC 216 para 24 page 229;

- The Board has amended the Regulations prospectively in public interest because a number of entities were bidding for GA's with unrealistic number of PNG connections, which they were subsequently no achieving. These entities were quoting extremely unrealistic and high number of PNG connections just to win the bid/GA and subsequently were giving all kinds of excuses not to achieve their targets. The result of this was that in many GA's, the consumers were suffering and the CGD network was not being developed to its full potential. Further, these entities were granted exclusivity and therefore no other entity could also function in those areas till the exclusivity period was over.

- It is also submitted that in any case, the Appellant would be governed by the Regulations that existed at the time when it was granted authorization. Any change in the Regulations could not be applied retrospectively to the Appellant.

- The Appellant's stand that increase in compression capacity would lead to lesser capacity utilization is not correct if an overall perspective of the CGD network is taken. It is submitted that if the compression capacity had been built by the Appellant within the five (5) year period, then that capacity would have immediately been available for use by many more customers. If the capacity is increased only after waiting for the number of customers to increase, then there would be a delay in the provision of CNG/PNG to customers, which would defeat the very purpose of developing CGD networks.

- Insofar as the decreasing trend in number of CNG vehicles is concerned, this is also due to the limited

number of CNG stations in the GA. If the Appellant does not build CNG stations/compression capacity across various areas in the GA then it acts as a disincentive for vehicle owners to convert to CNG/purchase CNG vehicles. This is for the reason that a customer would prefer to go to a pump station that is close to his/her house or on the way of his/her office rather than to go out of the way to get CNG.

- It is pertinent to highlight that the authorization dated 22.04.2009 only mentions steel pipeline and not MDPE pipelines. Therefore, the revised criteria for the 6th round of bidding would not apply to the Appellant retrospectively but would only be prospective for the 6th round bidders.

- The size of row houses and bungalows is also another flimsy reason given by the Appellant. Many other entities in GA's which also have row houses/bungalows have achieved their targets. Delhi

city is a prime example of this where there are a number of large bungalows and row houses.

14. From the above submissions made by the rival parties and the arguments and counter arguments made by their respective counsel, we summarize the case and our views on the same are as under:-

15. The authorization for CGD network in Kanpur geographical area granted to the Appellant by the Central Government was accepted by the Board on 22.04.2009. In this authorization, certain physical targets were stipulated which were to be completed by the Appellant during the exclusivity period of 5 years and the targets were fixed year-wise. These targets are in terms of number of domestic PNG connections, laying of steel pipe lines in inch-km and building up of CNG capacity in kg/day.

16. Above targets were to be achieved by the Appellant by the end of the exclusivity period i.e. by 2013-14. Having failed to achieve the targets, the Board encashed 25% of the

PBG submitted by the Appellant under provision of Regulation 16 (1) (c) (i). As per the Appellant, the Board should not have encashed the PBG since the Appellant faced lot of difficulties in the GA of Kanpur while implementing the project which were beyond the control of the Appellant. These problems and constraints ought to have been taken into consideration prior to taking the decision of encashing the PBG by the Board. This very dispute between the rival parties arising out of encashment of PBG is the crux of the instant case.

17. Let us now examine the case in terms of its merits. The Appellant claims that it made all sincere efforts to complete the project in time, but because of extraneous problems and constraints which were beyond the control of the Appellant, it could not achieve the targets within the stipulated time period. When the targets were fixed for the GA of Kanpur, the city of Kanpur was expected to develop at a particular pace, but development did not take place as per expectation. For example, as regards creation of compression capacity, the compression capacity created

in Kanpur till September, 2015 was already surplus vis-à-vis the sale of CNG volumes. There was a downward trend in the growth of CNG vehicles in Kanpur since 2012-13 even though the CNG stations in Kanpur were well spread out for the convenience of customers and there was no queuing problem in the stations. Hence, increase in compression capacity would have led to further lesser capacity utilization. The contention of the Board is the otherway. Had the Appellant enhanced the compression capacity, the capacity would have been available for many more customers. If to increase compression capacity the entity has to wait for increase in number of customers, then the very purpose of CNG network development would be defeated. Wide spreading the CNG stations across various areas in the GA of Kanpur would have encouraged the CNG customers to use this facility having found it closer to their houses or offices or enroute avoiding a long distance travel to buy CNG.

18. Similarly as above, in regards to the targets of laying of inch-km steel pipelines and number of domestic PNG customers, the Board did not accept the reasons given by the Appellant for not achieving the targets. Specially in regards to the amendments made by the Board with respect to the targets of these two parameters, the Board's contention is that amendments become necessary in due course of implementation of projects depending on various factors to facilitate the industry. Amendment to include MDPE pipeline alongwith steel pipeline and replace number of domestic PNG connections by creation of infrastructure was made prospectively and the same could not have been applicable for the Appellant since its authorization was prior to these amendments.

19. With respect to the Appellant's contention that the Board as a regulator ought to have suggested remedial measures first and then taken action on failure to take the measures. We have examined minutes of two hearings held on 09.01.2014 and 30.07.2015. During the hearing on 09.01.2014, when the Appellant brought the issue of

non-availability of land for installing CNG compression facilities, one of the members of the Board suggested an alternative to study i.e. first floor installation of compressor to overcome the constraint. Here we note that the Board put forward a suggestion to help the Appellant.

20. On the issue of high charges being claimed by local authorities and requirement of multiple permission from different agencies raised by the Appellant, the Chairperson assured the entity that he would take up these matters at the level of Chief Secretary, Government of Uttar Pradesh. The Appellant was advised to make sincere efforts to achieve the targets and it was also stated that the Board would provide another opportunity for hearing before finalizing any action against the Appellant for not fulfilling the commitments. Here also, we note that the Board came forward to help the Appellant.

21. The hearing on 30.07.2015 took place pursuant to the show cause notice dated 01.07.2015 served by the Board to the Appellant under provision of Regulation 16. In this

hearing also, the Board observed that the achievements made by the Appellant in all the physical parameters were very grave being highly unsatisfactory to the Board. In the said hearing, the Appellant was ordered by the Board to submit its Financial/Capex outlay plans for the current financial year with details of inventory i.e. meters, valves, pipes, MDPE etc. for providing PNG connections during the year. The Appellant was also directed to submit quarter-wise catch-up plan for PNG domestic connections alongwith evidence of marketing campaigns carried out and also its plan in future.

22. As claimed by the Appellant, these were submitted on 08.10.2015 but the same were admittedly not considered by the Board since it did not receive the same prior to issue of the impugned order dated 12.10.2015. This issue of non-receipt of the letter of the Appellant dated 08.10.2015 by the Board became a debatable point between the rival parties in this court. As per this court's order, the Board submitted its records and demonstrated that the said letter was received at the Board only on

23.10.2015 subsequent to the impugned order of 12.10.2015.

23. Having examined above, let us now go through the relevant regulations pertaining to authorization for CNG network so that the issue of encashment of PBG by the Board could be properly examined.

24. Grant of authorization is issued to the selected entity after furnishing the performance bank guarantee. The entity is required to furnish this performance bank guarantee within 15 days of issue of the letter of intent (LOI). The performance bond is furnished for guaranteeing the timely commissioning of the proposed CGD network as per the prescribed target and also for meeting the service obligation by the selected entity during the operating phase of the project. After furnishing the performance bank guarantee and completing the other required formalities, the entity is granted the authorization. Furnishing of performance bond is covered under

Regulation 9 and grant of authorization is covered under Regulation 10.

25. In the instant case, the reason for the Board to encash 25% of PBG has been non-compliance of the terms and conditions pertaining to infrastructure build-up and PNG domestic connections. These physical activities need to be completed by the authorized entity as per the approved time schedule and Regulation 13 of the CGD Authorization Regulations authorizes the Board to monitor the progress of these activities and advise remedial action. Regulation 13 of the said Regulations reads as under:

> **"13. Post-authorization monitoring of activities (pre-commissioning).**
>
> *(1)* An authorized entity shall provide, on a quarterly basis, a progress report detailing the clearances obtained, targets achieved, expenditure incurred, works-in-progress and 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 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.

26. The consequences of the default leading to termination of the authorization are clearly dealt with in Regulation 16. Regulation 16 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 in 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 authorization shall be as provided in Schedule G;

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

27. Clause (c) of Regulation 16 (1) above is material because encashment of PBG is done under this provision.

28. The 5-year exclusivity period for the CGD network in the GA of Kanpur ended on 21.04.2014. in the impugned order dated 12.10.2015, the Board evaluated the performance of the Appellant till 31st of March, 2015 which counted for about 6 years from date of authorization i.e. 22.04.2009. The exclusivity period was for 5 years. At the end of around 6 years, the Appellant achieved the following:

Geographical area of Kanpur		
Parameter	Cumulative Targets (from FY 2009-10 to 2013-14)	Achievement (Jan-Mar'15)
Cumulative Domestic Connections (No.)	70000	6238 (8.91%)
Cumulative Steel pipeline length (inch-Km)	569	371.36 (65.26%)
Cumulative CNG Compression Capacity (Kgs/Day)	240000	152000 (63.33%)

Note: Figures in the parentheses are percentage of the targets.

29. From the above tabulation, it is clearly seen that in number of domestic PNG connections, the Appellant only

achieved 9%, laying of steel pipeline length 65% and in creation of compression capacity 63%. These achievements were far below the targets which were also admitted by the Appellant. Considering this performance of the Appellant, which was not found to be satisfactory by the Board, the action by the Board i.e. encashment PBG by 25% as per Regulation 16 (1) (c) (i) is found to be in order.

30. Let us now bring in the legal aspects of encashment of bank guarantee.

31. The law relating to Bank Guarantees has been well settled by the Supreme Court in several judgments. Unless there is fraud of the beneficiary or irretrievable harm or injury the Courts are not to interfere with the encashment of Bank Guarantees. The contract between the Bank and the beneficiary is held to be an independent contract irrespective of the dispute between the bank's customer and the beneficiary. The Delhi High Court has in a recent judgment in ***Siti Energy Limited & Anr vs. PNGRB***

dated 02/02/2016 in W.P. (c) 125/2016 where challenge to the validity of Regulations 7 and 18 of the said Regulations was raised, had an occasion to deal with the application praying that Respondent Board may be restrained from encashing Performance Bank Guarantee. The Delhi High Court reiterated the principles laid down by the Supreme Court with regard to the said issue. Following are the relevant observations of the Delhi High Court.

> "25. The law relating invocation of bank guarantees is no longer res integra. The law is well settled that the interference by the Courts is permissible only where the invocation of the bank guarantee is against the terms of the guarantee or if there is any fraud. In the absence of the same, the bank is liable to pay the guaranteed amount without any demur whatsoever and the bank is bound to honour the guarantee irrespective of any dispute raised by is customer since a bank guarantee is an independent and a separate contract. It is also a well settled principle that fraud, if any, must be of an egregious nature, which would vitiate the very foundation of such a bank guarantee and the beneficiary seeks to take advantage of the situation. Allowing encashment of bank guarantee would result in irretrievable harm or injustice to one of the parties concerned has also been recognized by the Courts as a justifiable ground for interference, however, the harm or injustice contemplated must be of such an a exceptional and irretrievable nature as would

override the terms of the guarantee [vide ***U.P. Cooperative Federation Ltd. vs. Singh Consultants and Engineers (P) Ltd. (1988) 1 SCC 174; Vinitec Electronics Private Ltd. vs. HCL Infosystems Ltd. (2008) 1 SCC 544; Himadri Chemicals Industries Ltd. vs. Coal Tar Refining Company (2007) 8 SCC 110; Mahatama Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engg. Coop. Ltd. (2007) 6 SCC 470.]*** In a recent decision ***M/s. Adani Agri Fresh Ltd. vs. Mahboob Sharif & Ors. (2015) SCC OnLine SC 1302***, the Supreme Court while reiterating the principles of law laid down in the above decisions further explained that the fraud, if any, must be of an egregious nature as to vitiate the underline transaction."

32. We observe that the Appellant in none of its submissions nor during any hearing before this court has alleged any fraud exhibited by the Board. Having regard to the principles laid down by the Supreme Court, we are of the opinion that this is not a case warranting our interference particularly when 25% of the PBG has already been encashed. On this ground alone, the Appeal deserves to be dismissed.

33. During the course of hearing in the court, Mr. K.K. Rai, learned counsel for the Appellant had repeatedly mentioned about the role of a regulator which is different

from the role of a court/tribunal. He has relied upon Regulation 13 (3) of the Authorization Regulations which reads as under:-

> "(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."

Here, the learned counsel emphasized upon advising remedial actions.

34. Learned counsel for the Appellant also submitted a Note dated 12.04.2017 on Role of Regulator on behalf of the Appellant. In this Note, he also submitted the definition of the word "remedial" as defined under Black's Law Dictionary, 8th edition at page 1319 which reads as below:

> "**remedial,** adj. 1. Affording or providing a remedy; providing the means of obtaining redress <a remedial action >, 2. Intended to correct, remove, or

lessen a wrong, fault, or defect <a remedial statute>, 3. Of or relating to a means of enforcing an existing substantive right <a remedial right>"

35. We also note some other salient points of the Note submitted by the learned counsel for the Appellant which are reproduced below:-

(i) The role of a regulator has to be pro-active to promote the industry and not to act as a deterrent as done in the present case. **The Hon'ble Supreme Court of India in Lafarge Umiam Mining Pvt. Ltd. Vs. Union of India & Ors. (2011) 7 SCC 338 in para 122 (i.2)** had held as follows:

"(i.2) The difference between a regulator and a court must be kept in mind. The court/tribunal is basically an authority which reacts to a given situation brought to its notice whereas a regulator is a proactive body with the

power conferred upon it to frame statutory rules and regulations. The regulatory mechanism warrants open discussion, public participation and circulation of the draft paper inviting suggestions."

(ii) The relationship between the regulator and the regulated should essentially move from one of industry's dos and don'ts to cooperation for the purpose of exploring path-breaking solutions. The regulator ends up facilitating ideas as much as regulating them. The regulator should not act as a deterrent for a sector.

(iii) Achieving good regulatory outcomes is almost always a cooperative effort: by the regulatory and other regulators, the regulated, and often the broader community. Governance arrangements for regulators can be important to foster such cooperative efforts and build the legitimacy of any

necessary, strong enforcement action. For these reasons, governance arrangements require careful consideration to ensure they promote, rather than hinder, the efficient achievement of policy objectives and public confidence in the operations of government agencies.

36. The learned counsel in his Note also has mentioned that the Board in the present case is not acting as a regulator but it is acting only as an inspector with the sole motive to punish the entity and not promoting the industry as the regulator ought to have done. It has forgotten its role as a facilitator which is also mandate of the PNGRB Act and regulations framed thereunder.

37. While perusing the above Note submitted by the Appellant, in addition to Regulation 13 (3) of CGD Authorization Regulations, we have also kept in mind the objective of forming the Petroleum and Natural Gas

Regulatory Board which in the PNGRB Act, 2006 reads as under:-

> "An Act to provide for the establishment of Petroleum and Natural Gas Regulatory Board to regulate the refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas excluding production of crude oil and natural gas so as to protect the interests of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas and to ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country and to promote competitive markets and for matters connected therewith or incidental thereto."

38. We have dealt with the appeal in terms of both merit as well as the settled law related to encashment of bank guarantee. Based on our discussions and observations herein above, both the appeals i.e. Appeal No. 159 of

2016 an Appeal No. 161 of 2016 are dismissed. Needless to say that IA No. 336 of Appeal No. 159 of 2016 and IA No. 337 of Appeal No. 161 of 2016 do not survive and are disposed of, as such.

39. Keeping in mind the objective of forming the Petroleum and Natural Gas Regulatory Board as per the PNGRB Act, 2006, the Board while taking its independent decision, may examine the points/suggestions made by the Appellant regarding role of a regulator and consider the ones as found relevant and deemed applicable for monitoring CNG network projects in future.

40. Pronounced in the Open Court on this **2nd day of June, 2017.**

B.N. Talukdar
[Technical Member (P&NG)]

Justice Ranjana P. Desai
[Chairperson]

√ **REPORTABLE / ~~NON-REPORTABLE~~**