

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

**Appeal No. 147 of 2016 &
IA No. 316 of 2016**

Dated: 20th September, 2019

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

In the matter of:-

MAHANAGAR GAS LIMITED)
MGL House, G-33 Block,)
Bandra-Kurla Complex,)
Bandra (East))
Mumbai – 400 051) **...Appellant**

AND

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

2. **GAIL (INDIA) LTD.**)
Gail Bhawan,)
16 Bhikaji Cama Place,)
R.K. Puram, New Delhi-110066)

3. **ONGC LTD.**)
Jeevan Bharti, Tower-II,)
124 Indira Chowk,)
New Delhi-110001) **...Respondents**

Counsel for the Appellant(s) : Mr. Gaurav Banerji, Sr. Adv.
Mr. Trinath Tadakamalla
Ms. Riddhi Sancheti
Mr. Vyom Shah
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Counsel for the Respondent(s) : Mr. Sumit Kishore
Ms. Aparna Vohra for R-1

Ms. Rimali Batra
Mr. Ravi Prakash,
Mr. Nitish Gupta
Ms. Iti Agarwal for R-2

Mr. J. P. Cama, Sr. Adv
Mr. Sunil Kumar Jain
Mr. Shaantanu Jain
Mr. Kaushik Chaudhary
Mr. T.N. Durga Prasad
Mr. Punya Garg for R-3

JUDGMENT

Per Hon'ble Mr. B. N. Talukdar, Technical Member, (Petroleum and Natural Gas)

1. In this Appeal, the Appellant, Mahanagar Gas Ltd., under Section 33 of the Petroleum and Natural Gas Board Act, 2006, has challenged the order dated 15th October, 2015 passed by the Petroleum and Natural Gas Regulatory Board ("the Board") in case No. Legal/124/2015 filed by the Appellant. The petition was filed by the Appellant to the Board under Section 25 read

with Section 12 (1) (b) of the Petroleum and Natural Gas Regulatory Board Act, 2006. The complaint to Respondent No.1/the Board was in the form of clarification regarding the applicability of the Tariff Order dated 30th December, 2013 passed by the Board in respect of the Uran-Trombay Natural Gas Pipeline owned by Respondent No.3/Oil and Natural Gas Corporation Ltd. (ONGC). The Board dismissed the Appellant's petition holding that ONGC was transporting Respondent No.2/Gas Authority of India (GAIL)'s gas from Uran to Trombay for onward sale by GAIL to its customers.

2. The Appellant, Mahanagar Gas Ltd. (MGL) is a company registered under the provisions of the Indian Companies Act, 1956 established in the year 1995. The Appellant's main shareholders are Respondent No.2/GAIL and the British Gas (BG) Group. It is a city gas distribution company and is undertaking the supply, sale and distribution of Compressed Natural Gas ("CNG") for the automotive sector as well as it is a supplier of Piped Natural Gas ("PNG") to the domestic and commercial consumers in and around the city of Mumbai. It is

an ISO 9001:2008, ISO-14001 and OHSAS 18001 certified organization.

3. The Respondent No.1/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 Respondent No.2/Gas Authority of India (GAIL) was incorporated in August, 1984 as a Central Public Sector Undertaking (PSU) under the Ministry of Petroleum & Natural Gas (MoPNG). This company is mandated to work in the

hydrocarbon sector in the areas of exploration and production and processing, storage, transportation, distribution and marketing and also import of natural gas. The company was initially given the responsibility of construction, operation & maintenance of the Hazira – Vijaypur – Jagdishpur (HVJ) pipeline Project.

5. The Respondent No.3/Oil and Natural Gas Corporation Ltd. (ONGC) is a Public Sector Undertaking of the Government of India, under the administrative control of the Ministry of Petroleum and Natural Gas. It is India's largest public sector oil and gas exploration and production company. It produces around 70% crude oil and around 60% of natural gas of India's total oil and gas production respectively. It is the owner and operator of the Uran-Trombay natural gas pipeline.
6. Before examining the case, it is necessary to give the gist of facts of the case as submitted by the Appellant. The entire case pertains to a natural gas pipeline which runs from Uran to Trombay in Maharashtra. The line is owned and operated by ONGC and has been in existence since 1978-79. The length of

the pipeline is 24 km and its diameter is 18 inch. ONGC, through this pipeline, supplies the natural gas from its gas processing plant at Uran to Trombay and GAIL purchases this gas from ONGC at Trombay for onward sale to the Appellant through a 7.7 km long pipeline of 18 inch diameter alongwith a few other entities through separate pipelines. Since the Uran-Trombay natural gas pipeline was becoming very old (more than 30 years), ONGC replaced this pipeline in 2008 with an upgraded new Uran-Trombay pipeline of 20 inch diameter and was commissioned on 30th May, 2008.

7. GAIL entered into a Gas Sales Agreement (**“GAIL-ONGC Contract”**) with ONGC on 7th July, 2006. The said agreement of July, 2006 covers the sale of gas by ONGC to GAIL from various sale/delivery points, and the price that GAIL agreed to pay for the said gas.
8. While the agreement between GAIL and ONGC was signed on 7th July, 2006, as of 19th July, 2006, the Schedule A of the said agreement dealing with custody transfer points was still under discussion with GAIL, and was to be finalized subsequently.

9. Subsequently, on 5th October, 2007, the residual portion of the July, 2006 agreement, i.e. inter alia the Schedule A to the said agreement was signed between GAIL and ONGC. The Schedule A to this agreement consists of a tabular representation of delivery points, custody transfer points, custody transfer measurement system, frequency, typical pressure etc., and the same is set out separately for each "production area" and each "region".

10. In respect of Western offshore region and production area, Uran, the delivery point for the Trombay Sector is stated to be Trombay Terminal, whereas for the Thal Sector, Taloja Sector and MSEB Sector, it is stated as Uran Terminal. The present appeal concerns the Trombay Sector and the corresponding delivery point is Trombay Terminal. The contract between GAIL and ONGC mentions that there shall be transmission charges in terms of Article 15.4 which were agreed at Rs.12/kcm for the Uran-Trombay segment. Accordingly, as per the Appellant, the natural gas that is sold by ONGC to GAIL at Trombay is moved through an ONGC-owned pipeline running

from Uran northwards to Trombay (**“Uran-Trombay Pipeline”**). At “Trombay Terminal”, ONGC *delivers* the gas to GAIL which in the context of the July, 2006 agreement is the sale point between GAIL and ONGC. From Trombay, GAIL brings the gas to MGL’s delivery point at CGS Wadala, Mumbai through the GAIL Trombay pipeline network.

11. On 5th June, 2009, the Appellant entered into a long term Gas Supply and Transportation Contract with GAIL for the supply of Administered Price Mechanism (APM) natural gas in order to meet its gas requirements. To ensure that the costs of Compressed Natural Gas (CNG) and Piped Natural Gas (PNG) are not very high, it is imperative that gas is made available to the Appellant at a reasonable price and keeping this objective in mind, the Government allocated APM gas to the Appellant. A high price of gas would effectively mean that the price of CNG and PNG also would be higher.
12. In September, 2009, ONGC under Regulation 19(1) of the PNGRB (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations,

2008 (“**Authorization Regulations**”) approached the Board seeking a declaration of the Uran-Trombay pipeline as a dedicated pipeline. The Board responded on 4th December, 2009 and directed ONGC to instead apply under Regulation 17(1) of the Authorization Regulations to declare the pipeline as a common carrier pipeline since the pipeline was not a dedicated pipeline within the meaning of Regulation 2(1)(f)(i) of the Authorization Regulations.

13. ONGC thereafter submitted a fresh application in June, 2010 for acceptance of Central Government’s authorization under Regulation 17 of the Authorization Regulations with the Uran-Trombay pipeline as a common carrier pipeline. Such acceptance of authorization was granted by the Board on 3rd May, 2011. The said letter of 3rd May, 2011 from the Board inter alia states:

3.....(b) The capacity of Uran-Trombay natural gas pipeline network, length 24 Kms and 20 inch diameter is equal to 6.0 MMSCMD as indicated by ONGCL. The Board has decided to declare the Uran-Trombay natural gas

pipeline network as common carrier with common carrier capacity of 1.5 MMSCMD in terms of the PNGRB (Guiding Principles for Declaring or Authorising Natural Gas Pipeline as Common Carrier or Contract Carrier) Regulations, 2009."

14. As per the Appellant, all the above information (para 12 & 13) was brought to the knowledge of the Appellant only during the proceedings before the Board. Upon perusal of the aforesaid correspondences which transpired between the Board and ONGC, the Appellant submits that the application of ONGC as well as the Board's acceptance of the Uran-Trombay pipeline as a common carrier pipeline was erroneous since the said pipeline was catering to a specified consumer, namely GAIL, and was therefore a dedicated pipeline. The Board ought to have followed the process under Section 20 and 21 of the Act if it wanted to declare the Uran-Trombay Pipeline as a common carrier, in which case, the Appellant would have had an opportunity to object at that time itself.

15. ONGC applied for fixation of transportation tariff under Section 22 of the Act, in August, 2010 and in furtherance to the correspondence with the Board, a revised tariff proposal was submitted by ONGC in February, 2012, to the Board. Based on this proposal, the order dated 30.12.2013 was passed by the Board fixing the provisional initial unit pipeline tariff for Uran-Trombay pipeline as Rs.5.70 per MMBTU, to apply retrospectively from 20th November, 2008. The 2013 Order at paragraph 3.6 records (in respect of the "*Volume of natural gas to be considered as divisor*") that:

"The Authorization Regulations of PNGRB contain a specific mandate to build extra capacity for common carrier use for pipelines which are coming up after establishment of the PNGRB. A specific mandate to build extra capacity for common carrier use is also contained in some authorizations issued prior to the appointed day by the Central Government. This new pipeline (the new 20" UTNGPL which is a replacement of the old 18" pipeline) was constructed without any obligation to build common carrier capacity for other short terms shippers of gas as

there was no such requirement from the Central Government while authorizing the said pipeline."

...

It is noteworthy that all the pipelines that were in operation prior to the appointed day have not "built" any mandated "extra capacity" as there was no requirement for the same, rather the factual position is that capacities have been created based on pure commercial considerations. Therefore, in such cases the common carrier capacity for access purposes has been computed through an arithmetical back-working as a consequence of conversion of existing unutilized capacity to common carrier usage and for that reason it cannot be equated with "agrees to build extra capacity" as per the regulations."

16. Soon after the passing of the 2013 Order, ONGC raised a debit note on GAIL for recovery of transportation tariff on the basis of the tariff fixed by 2013 Order with effect from 20th November, 2008 for transportation of gas from Uran to Trombay, which is the delivery point of the gas.

17. GAIL passed on the demand onto the Appellant. Thereafter, correspondence ensued between the Appellant and GAIL where GAIL made a demand on the Appellant on the basis of the demand raised by ONGC for an amount representing tariff purportedly worked in accordance with the 2013 Order and the Appellant resisted such levy.
18. A demand of Rs.174 crores was raised by ONGC to GAIL as transportation charges @ Rs. 226/- per thousand SCM for its Uran-Trombay pipeline for the period 20th November, 2008 to 31st March, 2014 based on provisional tariff order issued by the Board. GAIL in turn, raised a debit note to the Appellant for recovery of transportation charges an amount of Rs.75,44,21,143/- on April 08, 2014 for the period November, 2008 to March, 2014.
19. The Appellant, thereafter was persistently in communication with GAIL, and was protesting the debit notes raised by GAIL for payment of transportation tariff fixed by the Board w.e.f. 20th November, 2008. Failing to get any favourable response

from GAIL, the Appellant wrote to the Board on 04.11.2014 to obtain clarity on the imposition of transportation tariff to the Appellant by GAIL. As per the Appellant, ONGC wrongly interpreted and applied the tariff order passed by the Board in seeking payment from GAIL, towards transportation tariff purportedly calculated in accordance with the 2013 order of the Board. As per the Appellant, ONGC could not have raised any debit note to claim the transportation tariff from GAIL, since ONGC was carrying its own gas from Uran to Trombay and the delivery point for supplying gas to GAIL was Trombay and not Uran.

20. In response to the above letter of the Appellant dated 04.11.2014, the Board replied on 14th November, 2014 stating that:

“The transportation tariff for a common carrier pipeline is determined as per the PNGRB Act and Regulations framed by PNGRB there-under”

The Board also stated that the *“dispute can be settled by it only on receipt of complaint made u/s 24 or 25 of the Act.”*

21. Even after the Board wrote to the Appellant on 14th November, 2014, GAIL had been following up with the Appellant for payment of the purported tariff demanded by ONGC to GAIL. The Appellant responded to GAIL notifying GAIL of its correspondence with the Board. GAIL in turn wrote to the Appellant on 3rd January, 2015 stating that it would now encash the L/C's provided by the Appellant to GAIL. The Appellant replied to this letter on 7th January, 2015.

22. Left with no other option, the Appellant filed a complaint before the Board under Section 25 of the Act against the Board, GAIL and ONGC on 18th February, 2015. The grievance of the Appellant raised before the Board was that ONGC was wrongly interpreting and applying the 2013 Order of the Board in seeking payment from GAIL and consequently the Appellant. Since the 2013 Order could only ever apply to a common carrier and not to the gas of ONGC being sold to

GAIL at Trombay. The Appellant made the following prayers in its complaint before the Board:

- (i) Declare/clarify that the order dated 30th December, 2013 only fixes "*transportation tariff*" to be paid by a third party user (shipper/marketer) for the utilization of the Pipeline as a "*common carrier*" by such third party to transport its gas;
- (ii) Declare/clarify that the order dated 30th December, 2013 cannot be read, interpreted or applied such that ONGC can charge the tariff fixed thereunder (Rs.5.70/MMBTU) even for the gas that it sells (i.e. transfers custody of and title to) to GAIL at Trombay, whether retrospectively or going forward;
- (iii) Declare/clarify that the reading, interpretation and application of the order dated 30th December, 2013 by ONGC is against the PNGRB Act and the regulations framed thereunder;

- (iv) Declare/clarify that GAIL cannot pass on the demand towards such tariff to the Appellant, and the demands made should be quashed;
 - (v) Declare/clarify that without prejudice, and on a separate note that ONGC is in breach of regulations that require it to charge a provisional tariff, which it did not charge, and should therefore not be allowed to take advantage of its own breach, and should not be allowed to charge tariff on this ground as well.
23. By an interim order dated 4th March, 2015, with respect to the complaint, the Board had restrained GAIL from taking any coercive steps against the Appellant to enforce payment of the alleged outstanding amount provided the L/C was kept alive by the Appellant.
24. Finally, after receiving the reply from ONGC on 21.04.2015 to the complaint of the Appellant and also examining all the communications amongst the entities, the Board passed the impugned order dated 15.10.2015 dismissing the Appellant's

complaint that ONGC was erroneously charging retrospectively or prospectively the transportation tariff for its own gas that it sells to GAIL at Trombay, with a cost that the petitioner would pay an amount of Rs.5 lakh to ONGC. Hence the present appeal by the Appellant to this Tribunal on being aggrieved on the impugned order of the Board dated 15.10.2015.

25. We have heard Mr. Gourab Banerjee, learned senior counsel appearing for the Appellant and perused the written submissions. The gist of submissions assailing the impugned order is as under:

- (i) The Board dismissed the Appellant's complaint in a mechanical manner and without any application of mind and on a completely wrong factual basis. ONGC delivers its own gas to GAIL at Trombay in the Uran-Trombay pipeline thereby selling the gas to GAIL at Trombay. Hence transportation tariff fixed by the Board by the Tariff Order dated December, 2013 cannot apply to this gas sold at Trombay.

- (ii) ONGC is transporting its own gas from Uran to Trombay for which agreement exists between ONGC and GAIL for transportation tariff at a contractual rate. Hence transportation tariff fixed by the Board considering it as a common carrier pipeline cannot apply. ONGC cannot charge retrospectively or prospectively this tariff for the sale of gas that it sells to GAIL at Trombay and the demand raised by GAIL on the Appellant with regard to said tariff cannot become applicable to the Appellant.
- (iii) The petitioner was never provided an opportunity of hearing or making representation during the process of tariff determination of the said pipeline.
- (iv) The impugned order wrongly records the delivery point of gas for Trombay sector to be at Uran whereas the recorded delivery point in the contract is at Trombay which is also pleaded to be so by ONGC and GAIL.
- (v) The Board erred in holding that :

".....the price of gas is applicable ex-land fall point (Uran) and the gas of ONGC (R-3) is delivered to

GAIL (R-2) at the delivery point, i.e., Uran and at this delivery point, GAIL (R-2) is deemed to be in exclusive control and possession of ONGC's gas under Article 19.1 of the GSA.....we conclude that ONGC(R-3) was transporting GAIL's gas from Uran to Trombay for onward sale by GAIL to other entities and the transportation tariff would be applicable on GAIL from the date of notification of the Tariff Regulation".

- (vi) Article 19.1 of the ONGC – GAIL Contract which categorically records that the title and risk in ONGC's gas shall pass to GAIL at the "Delivery Point" when the gas enters the pipeline of GAIL :

"Title and risk in the Seller's GAS shall pass from Seller to Buyer at the offtake pipeline flange at the inter-connection of Seller's Gas gathering and delivery system and Buyer's Pipeline at the Delivery Point. Upon delivery at the Delivery Point, Buyer shall be deemed to be in exclusive control and

possession of Seller's Gas and shall be fully responsible for an shall indemnify Seller against any damages or injury resulting from the transportation, handling or use of the Seller's Gas."

(vii) Transportation tariff in a common carrier pipeline is applicable only if another entity, other than owner, uses the common carrier capacity to transport gas as shipper. Since ONGC is transporting its own gas from Uran to Trombay, common carrier transportation tariff cannot apply in this sector. The question of who should pay transportation rate to whom is dealt with at Section 21(2) of the Act which reads as under :

"An entity other than an entity authorized to operate shall pay transportation rate for use of common carrier or contract carrier to the entity operating it as an authorized entity."

(viii) Above aspect under (vii) may be relied on Delhi High Court's Order dated 1st June, 2012 in IGL Vs PNGRB [2012 ELR(Delhi)1013] which reads as under :

"23. The word "transport" and the expression "transportation rate/transportation tariff" connote the cost of movement from one place to another. The goods which are moved generally are not of the transporter..... The provision for fixation, only of transportation rate, clearly connotes that the transportation rate is the rate to be charged by the transporter for the goods of the others. In the present case, the transportation is to be of the gas belonging to another entity by the common carrier or by the marketeer also having own distribution network. We are therefore inclined to accept the contention of the senior counsel for the petitioner that the transportation rate provided for in the Act is the rate to be charged by one entity under the Act from another for transporting/carrying/moving gas of other.... This position is fortified from [Section 21\(2\)](#)."

Above decision was confirmed by Supreme Court on 1st July, 2015 in PNGRB Vs. IGL [2015(9)SCC209].

- (ix) Application of common carrier transportation tariff which is several times higher than the contractual rate between ONGC and GAIL would be highly impacting the Appellant. Additionally transportation tariff that has been imposed retrospectively w.e.f. November 20, 2008 has also resulted in a substantial liability to the Appellant. This retrospective tariff is against the views of APTEL that the tariff order may be made effective from the date of authorization.
- (x) Considering that ONGC is transferring custody of gas to GAIL at its Trombay unit, tariff approved by the Board for ONGC's Uran-Trombay pipeline may already have been part of the domestic gas price notified by the Government of India (as transfer pricing between ONGC and GAIL is applicable at custody transfer point). It would mean that the tariff fixed by the Board would be an additional transportation tariff for the same sector of pipeline which would be finally passed on to the gas customers via GAIL.

26. The Board has submitted a short counter affidavit wherein, it has stated that the Board has adjudicated upon the controversy which had arisen between the parties to this appeal and while exercising this jurisdiction, the Board discharges the functions as Civil Court to the extent, as specified in Section 13 of the Act. Besides no interest of the Board is involved in the matter directly or indirectly. The Board has not submitted any specific parawise reply and has stated that the reasons and grounds of arriving at the conclusion which have been made the basis of the impugned order are explicit in the impugned order itself.
27. We have heard Ms. Rimali Batra, learned counsel appearing for Respondent NO. 2, GAIL and perused the submissions. The gist of GAIL's submissions is as under: -
- (a) The Board has erred in finding that the 'delivery point' of gas is at Uran and not at Trombay being contrary to the express terms of the contract between GAIL and ONGC.
 - (b) Under clause 4.1 of the GSA dated 07.07.2006 signed between GAIL and ONGC, the purchase of ONGC's gas takes place at the delivery point and the delivery point as

mentioned on Schedule A of the said GSA is Trombay terminal for the Uran-Trombay sector.

- (c) Under clause 19 of the GSA, the title and risk in ONGC's gas passes to GAIL at the offtake pipeline flange at the interconnection of seller's gas gathering and delivery system and buyer's pipeline at delivery point i.e. Trombay terminal. Seller in this case is ONGC and buyer is GAIL.
- (d) During the hearing held on 16.09.2015, on the Board's specific question on delivery point, ONGC's officer admitted that title of gas supplied by ONGC gets transferred to GAIL at Trombay i.e. the delivery point.
- (e) The Board's finding that ONGC sells and delivers gas to GAIL at Uran at the price as applicable ex-land fall point i.e. Uran is factually wrong and contradictory to the Board's own observations on the impugned order as under: -

"It is not in dispute that GAIL has been receiving gas from ONGC at Trombay and then GAIL brings it to another pipeline owned by it for onward sale/supply to the petitioner (MGL) and other

entities. The Petitioner (MGL) receives gas at the delivery point at CGS Wadala, Mumbai."

- (f) The Board misinterpreted the facts pertaining to the delivery point and custody transfer of natural gas and passed the impugned order erroneously. The Board has failed to appreciate that the delivery point is the point at which deliveries of gas are made by the seller to the buyer and it is at this point that the title transfer/ownership of the gas changes from the seller (ONGC) to the buyer (GAIL) at the delivery point. The Custody Transfer Point is only the measurement/metering facility and as such the title transfer/ownership transfer of the gas does not pass on from ONGC to GAIL at the Custody.
- (g) The Board has failed to appreciate that supply of natural gas to GAIL at Trombay is as per GSA dated 07.07.2006 for sale of gas and not a contract for transportation of gas on common carrier or contract carrier basis and in view of the recent order passed by the Hon'ble Supreme Court in the matter PNGRB Vs. IGL & Ors. (Civil Appeal No. 4910 of 2015), the

transportation tariff fixed by this Hon'ble Board for Uran-Trombay Pipeline is not applicable to GAIL as there is no Gas Transportation Agreement between GAIL and ONGC for transportation of the gas on common or contract carrier basis using the Uran-Trombay pipeline.

- (h) The Petroleum and Natural Gas Regulatory Board Act, 2006 empowers as entity (owner of the pipeline) to use a certain portion of natural gas pipeline for its requirement. The relevant Section 21 of the Act reads as under: -

"21. Right to first use, etc:-

- (1) The entity laying, building, operating or expanding a pipeline for transportation of petroleum and petroleum products or laying, building, operating or expanding a city or local natural gas distribution network **shall have right to first use for its own requirement and the remaining capacity shall be used amongst entities as the Board may after issuing a declaration under section 20,***

determine having regard to the needs of fair competition in marketing and availability of petroleum and petroleum products throughout the country."

A bare perusal of the above section reveals that the entity laying, building, operating or expanding a pipeline, necessarily has a right of first use over the capacity in a pipeline for its own requirement. The phrase "own requirement" means and includes usage of the capacity of his pipeline for carrying and delivering his goods (i.e. the title of the goods belong to the owner, and the goods may be petroleum, petroleum products or natural gas) to his customers or to do such other thing which is expressly permitted by law and not prohibited by law. It is submitted that the entity has an inherent right to sell natural gas to its customers at the terms and conditions which are mutually agreed by and between the entity (i.e. GAIL) and the buyer (i.e. customer/consumer) in accordance with the provisions of "the Act" and Regulations notified thereunder. Hence for the gas

transported by ONGC to GAIL does not attract common carrier transportation tariff.

- (i) Marketing of gas by the authorized entity to its customers is an activity which is unregulated under the Act. The Board does not have the authority to regulate the terms and conditions of the agreements entered into by authorized entity with its consumers to sell gas on delivered basis. On this issue, it may be referred to Section 11 of the PNGRB Act, 2006 and also Regulation 2 of the PNGRB (Affiliate Code of Conduct for Entities Engaged in Marketing of Natural Gas and Laying, Building, Operating, or Expanding Natural Gas Pipeline) Regulations, 2008. In this respect, the Board failed to consider the extant law settled by the Supreme Court in a very recent landmark judgment **PNGRB Vs. IGL & Ors.**, in Civil Appeal No. 4910 of 2015 wherein the Apex Court upheld the judgment passed by the Delhi High Court ruling that the Board is not empowered to fix/regulate the maximum retail price at which gas is to be sold by entities to consumers.

- (j) The Board in exercise of its statutory power can only fix transportation tariff in respect of third party suppliers of gas, who seeks to use the excess capacity on common carrier and contract carrier principle under Section 11 (e) of the Act. In this case, ONGC carries its own gas upto Trombay and delivers the same to GAIL at Trombay.
- (k) GAIL entered into a GSA dated 07.07.2006 with ONGC wherein Clause 15.4 reads as follows: -

"Clause 15.4:

In addition to Price of Gas, Buyer shall pay transportation charges in respect of Gas supplies through pipelines owned, operated and maintained by the Seller as given in Schedule-D.

Schedule-D to the said GSA reads as under:

Schedule-D

"Details of pipelines owned, operated/maintained by ONGC on which transportation charges are being collected by GAIL and to be reimbursed to ONGC.

Sr. No.	Asset/Plant	Line Segment
1.	Ahmadabad	Ramol to Navagam
2.	Hazira	16 th HP ONGC – KRIBHCO

3.	Hazira	14 th P ONGC – KTRIBHCO
4.	Uran	Uran Trombay
5.	Uran	Uran MSEB 12 th Phase 1
6.	Tripura Asset	ADB – EPS to Dukli

Above would mean:

- a) There is no benchmark figure qua transportation charges in the said GSA.
 - b) GAIL was to reimburse the transportation charges provided it is collected from the downstream customers on the line segment mentioned in Schedule D to the said GSA. In this issue, the line segment is Uran-Trombay.
- (I) The Uran-Trombay pipeline of ONGC is not a common carrier but merely a captive pipeline of ONGC being used by ONGC for selling/conveying its own gas. The Board has not followed the regulatory procedure for declaring the Uran-Trombay pipeline as a common carrier, instead, the Board only issued a letter dated 03.05.2011 to ONGC and at para 3 (b) of the said letter has stated that “the

Board has decided to declare the Uran-Trombay natural gas pipeline network as a common carrier with common carrier capacity of 1.5 MMSCMD in terms of the PNGRB (Guiding Principles for Declaring or Authorizing Natural Gas Pipeline as Common Carrier or Contract Carrier), Regulations, 2009.”

28. We have heard Mr. J.P. Cama, learned senior counsel appearing for Respondent No. 3, ONGC and perused the written submissions. The gist of ONGC’s reply submissions is as under: -

(a) In the appeal, relief has been sought by the Appellant, MGL against ONGC. There is no privity of contract between the Appellant and ONGC. The Appellant therefore, cannot challenge the transportation tariff which ONGC is charging its contracting parties by Contract and Law. The present appeal by the Appellant seeking relief directly against ONGC is ex facie not maintainable in prayers of appeal. In this context, reliance is drawn to the judgment of the Apex Court in

Essar Oil Ltd Vs. Hindustan Shipyard Ltd,. [(2015 10 SCC 642]

- (b) The decision of the Board to declare the Uran-Trombay pipeline as a common carrier in terms of the PNGRB (Guiding Principles for Declaring or Authorizing Natural Gas Pipeline as Common Carrier), Regulations, 2009, is final and binding on all concerned.
- (c) The Appellant is a joint-venture company of GAIL. It is the concealed attempt of the Appellant to help GAIL to wriggle out of the GSA between ONGC and GAIL. The GSA dated 07.07.2006 signed between ONGC and GAIL states at Article 15.4 as below: -

“In addition to Price of Gas, Buyer shall pay transportation charges in respect of Gas supplies through pipelines owned, operated and maintained by the Seller as given in Schedule-D.”

Schedule D includes the Uran-Trombay pipeline. GAIL did not raise any objection against the Board's order dated

03.05.2011 and 30.12.2013 for declaration as common carrier and the tariff order respectively.

- (d) For a common carrier pipeline viz Uran-Trombay pipeline, if GAIL is allowed to charge transportation tariff as per agreement between GAIL and ONGC, then for the same pipeline, there would be varying tariff for different needs. In that case, the pipeline will no longer remain as common carrier but it would be a dedicated pipeline.
- (e) When the Uran-Trombay pipeline was upgraded from 18 dia to 20 dia, ONGC could have insisted to get a still higher price than the Board's determined tariff, but GAIL claimed only the tariff determined by the Board though it was lower than ONGC's rate raised vide letter dated 24.09.2009. GAIL only requested ONGC vide its letter dated 14.12.2009 to get the rate fixed by the Board. Now GAIL's contention that the Board cannot fix the transportation tariff for the Uran-Trombay pipeline is in contradiction with its earlier stand. It is therefore, estopped at law from raising such a contention.

- (f) The Board's error (as stated by the Appellant) in calling Uran as delivery point in place of Trombay is immaterial since GAIL has to pay for the transportation tariff since the pipeline is a common carrier pipeline.
- (g) In regards to calling the Uran-Trombay pipeline as dedicated pipeline in the definition of 'natural gas pipeline' in the PNGRB (Authorizing Entities to Lay, Build, Operate or Expand Natural Gas pipelines) Regulations, 2008, it is stated at clause 2 (f) (i) as below:
- "dedicated pipeline laid to transport natural gas to a specific customer to meet his requirement and not for resale." Thus even if gas is being delivered through a line to a single customer still this line cannot be considered as dedicated line if the customer is reselling the gas, as in this case, GAIL is reselling to the Appellant.
- (h) Section 11 of the Act which requires the Board to fix the transportation rate makes no distinction between own gas and third-party gas. The Clause 4(2)(b) of the PNGRB Affiliated Code of Conduct clearly specifies that

“That there is no preferential access allowed by the entity to itself or its affiliates for the regulated activity.”

- (i) If GAIL contends that the Board’s rate is not applicable, then ONGC has an absolute right under its contract with GAIL to charge a contractual rate. However, ONGC is binding itself to the statutory transportation rate.
- (j) In the context of the present appeal, reliance may also be drawn on the following judgments :
 - (a) P. M. Abubakar Vs. State of Karnataka & Ors.
(2017) 1 SCC 302; Para : 38;
 - (b) State of Haryana and others Vs. M.P. Mohla
(2007) 1 SCC 457; Paras : 27 & 28;
 - (c) Ram Chandra Singh Vs. Savitri Devi & Ors.
(2004) 12 SCC 713; Paras : 13, 14, 16 & 23;
 - (d) Lily Thomas & Ors. Vs. UOI & Ors.(2000) 6
SCC 224; Para : 6;
 - (e) New Bombay Ispat Udyog Ltd. Vs. Maharashtra
State Electricity Distribution Co. Ltd. and
Maharashtra Electricity Regulatory Commission
(Appeal No. 55 of 2009); Paras : 16, 17, 22,
27 & 29;

(f) Kumaran Silks Trade (P) Ltd. (2) Vs. Devendra & Ors. (2006) 8 SCC 555; Para:4.

29. In the instant appeal, the Appellant has challenged two different orders passed by the Board. This is evident from the prayers of the appeal memo. The Appellant has challenged the order dated 15.10.2015 where the Board held that the tariff order dated 30.12.2013 would apply to the Uran-Trombay pipeline of ONGC for supplying gas to GAIL at Trombay. Secondly, it has challenged the order dated 3.5.2011 whereby Uran-Trombay pipeline was declared as common carrier by the Board. However, in the rejoinder to the reply of ONGC, filed by the Appellant, it stated that it is not challenging the order dated 3.5.2011 passed by the Board. It was also submitted by the Appellant that if the Tribunal decides after hearing the arguments that the Appellant is trying to challenge the order dated 3.5.2011 under the garb of challenging the order dated 15.10.2015, the Tribunal may reject the Appellant's challenge to the order dated 3.5.2011 when the appeal is finally heard. In the aforesaid terms, this Tribunal passed the order on 27.5.2016 in respect of the order of the Board dated 3.5.2011. While hearing the arguments,

we have not noticed any argument advanced by the Appellant trying to challenge the order dated 3.5.2011 under the garb of challenging the order dated 15.10.2015 and hence we are not dealing with the order dated 3.5.2011 in this proceeding.

30. The subject matter of the appeal pertains to a natural gas pipeline owned and operated by ONGC. ONGC's source of gas to supply to GAIL is its Western offshore gas fields and ONGC transports through its Uran-Trombay gas pipeline from its Uran terminal to Trombay terminal. After Trombay, GAIL supplies the gas to its customers including the Appellant through its Trombay pipeline sub-network. GAIL supplies the gas to the Appellant at CGS Wadala, Mumbai.
31. Coming to the challenge to the order of 25.10.2015 passed by the Board, in light of the rival contentions urged by the parties, the following main issues would emerge for our consideration :
- (a) Whether ONGC carries its own gas through the Uran-Trombay pipeline to deliver to GAIL at Trombay; or

(b) Whether ONGC carries third party GAIL's gas to deliver at Trombay through the common carrier Uran-Trombay pipeline.

(c) In the above cases, what should be the transportation tariff that ONGC should charge from GAIL?

32. While dealing with the above issues, it would be necessary to refer to the relevant provisions of the PNGRB Act, 2006, the PNGRB regulations and also the contract signed between ONGC and GAIL. The Appellant does not have any contract signed with ONGC. Gas Supply Agreement (GSA) between ONGC and GAIL was signed on 7.7. 2006. The Uran-Trombay pipeline of ONGC was declared as Common Carrier by the Board on 3.5.2011. The provisional initial transportation tariff for the pipeline was fixed by the Board on 30.12.2013.

33. The contract signed between ONGC and GAIL on 7.7.2006 is a Gas Sale Agreement (GSA) and not a Gas Transportation Agreement (GTA) as noted from the said agreement. We refer below the relevant Clauses of the agreement for subsequent discussions.

The clause (B) under RECITALS of the contract reads as under: -

“(B). Seller wishes to sell and Buyer wishes to purchase the seller’s Gas made available by the Seller at the Custody Transfer Points (as hereinafter defined).”

Custody Transfer Point is defined under Definitions at 1.1(ccc) as under :-

“Custody Transfer Point” means the point of measurement where the Gas quantity Delivered is getting measured as set forth on Schedule-A.”

The ‘Delivery Point’ in the Contract is defined separately at 1.1(t) as under: -

“‘Delivery Point’ means the point at which the parties agree deliveries of Seller’s Gas shall be made under this Agreement as set forth on Schedule-A.”

34. We also note in Article 15 of the Contract at Clause 15.4 that price of gas and the transportation of gas are two different identities and the buyer is required to pay the seller both. The Clause 15.4 reads as under :-

“15.4. In addition to Price of Gas, Buyer shall pay transportation charges in respect of Gas supplied through pipelines owned, operated and maintained by the seller as given in Schedule D.”

In all above cases, Seller is ONGC and buyer is GAIL.

35. Another aspect of the contract would need to be referred when the issues are discussed in totality. This aspect is the title and risk, which is defined in Article 19 of the contract, which reads as follows :-

ARTICLE 19 : TITLE AND RISK

“19.1. Title and risk in the Seller’s Gas shall pass from Seller to Buyer at the offtake pipeline flange at inter-connection of seller’s Gas gathering and delivery system and Buyer’s pipeline at the Delivery Point. Upon delivery at the Delivery Point, Buyer shall be deemed to be in exclusive control and possession of Seller’s Gas and shall be fully responsible for and shall indemnify Seller against any damages or injury resulting from the transportation, handling or use of the Seller’s Gas.”

36. The Board after issuing the authorization to ONGC declaring the Uran-Trombay pipeline as common carrier on 3.5.2011, fixed the provisional initial unit tariff on 30.12.2013 at Rs. 5.70/MMBTU with retrospective effect from 20.11.2008, i.e., the date of notification of the PNGRB (Determination of Natural Gas Pipeline Tariff) Regulations, 2008. On this decision of the Board, the Appellant had a strong objection and appealed to the Board praying for certain clarifications/declarations with the main contention that ONGC cannot charge the Appellant the transportation tariff fixed by the Board. The Board in its final impugned order upheld its earlier decision on tariff fixation dated 30.12.2013 stating the following :

"It is also established that the price of gas is applicable ex-land fall point (Uran) and the gas of ONGC (R-3) is delivered to GAIL (R-2) at the delivery point, i.e., Uran and at this delivery point, GAIL (R-2) is deemed to be in exclusive control and possession of ONGC's gas under Article 19.1 of the GSA. Besides, in addition to price of gas, GAIL has always been obliged to pay the transportation

charges for transportation of gas from Uran to Trombay under Article 15.4 of the GSA and therefore, we conclude that ONGC(R-3) was transporting GAIL's gas from Uran to Trombay for onward sale by GAIL to other entities and the transportation tariff would be applicable on GAIL from the date of the notification of the Tariff Regulation".

37. On the above decision of the Board, the Appellant has strong objections. The Appellant's contention is that the Board can fix the transportation tariff for a shipper who is a third party user. It has to be entity other than the owner of the common carrier pipeline for becoming eligible for the tariff fixed by the Board. ONGC is carrying its own gas from Uran to Trombay since delivery point is Trombay. Hence, the tariff fixed by the Board for the common carrier pipeline cannot apply in this case to ONGC. Respondent No. 2/GAIL also has the same view as that of the Appellant. As brought to the notice of ours by both the Appellant and GAIL, we have examined the following Sections of the PNGRB Act, 2006 and the regulatory provisions thereof :

Section 2(j) of the Act :

(j) "common carrier" means such **pipelines for transportation** of petroleum, petroleum products and natural gas by more than **one entity** as the Board may declare or authorise from time to time on a nondiscriminatory open access basis under sub-section (3) of section 20, but does not include pipelines laid to supply-

(i) petroleum products or natural gas to a specific consumer; or

(ii) crude oil;

Explanation. - For the purposes of this clause, a contract carrier shall be treated as a common carrier, if –

(a) such contract carrier has surplus capacity over and above the firm contracts entered into; or

(b) the firm contract period has expired.

Section 2(m) of the Act :

(m) "**contract carrier**" means such pipelines for transportation of petroleum, petroleum products and natural gas by more than one entity pursuant to firm contracts for at least one year as may be declared or authorised by the Board from time to time under sub-section (3) of section 20;

Section 2(zn) of the Act :

(zn) "**transportation rate**", in relation to **common carrier or contract carrier** or a city or

*local natural gas distribution network, means **such rate for moving each unit of petroleum, petroleum products or natural gas as may be fixed by regulations.***

Section 21(2) of the Act :

“(2) An entity other than an entity authorized to operate shall pay transportation rate for use of common carrier or contract carrier to the entity operating it as an authorized entity.”

38. Both the Appellant and GAIL at the same time point out that as per Section 21 of the Act, ONGC definitely can use the pipeline as the first right user to transport its own gas. We have noted Section 21 as below :

21. Right of first use, etc:-

*(1) The entity laying, building, operating or expanding a pipeline for transportation of petroleum and petroleum products or laying, building, operating or expanding a city or local natural gas distribution network **shall have right of first use for its own requirement and the remaining capacity shall be used amongst entities as the Board may, after issuing a declaration under Section 20,** determine having regard to the needs of fair competition in marketing and availability of petroleum and petroleum products throughout the country.”*

39. As per both the parties, ONGC has the first right to transport gas for its own requirement which ONGC has done by

transporting the gas to the delivery point, i.e, Trombay to supply to GAIL. The Board, however, has considered that the delivery point is Uran and not Trombay in the impugned order. We notice that on this delivery point issue, all the parties other than the Board, unequivocally agree as Trombay. However, as regards the Board's consideration that the delivery point is Uran, the Appellant and GAIL have brought to our notice a contradictory statement made by the Board in its impugned order. The Board in its impugned order states in one of the para as follows :

"It is not in dispute that GAIL has been receiving gas from ONGC at Trombay and then GAIL brings it to another pipeline owned by it for onward sale/supply to the Petitioner (MGL) and other entities. The Petitioner(MGL) receives gas at the delivery point at CGS Wadala, Mumbai."

40. On the above context of delivery point, we also note the following contradictions in the GSA between ONGC and GAIL and the impugned order:

- (i) As it appears in the contract between ONGC and GAIL :

Schedule A of the Sales Agreement dated 7th July
between Oil and Natural Gas Corporation and GAIL
Western Offshore Region

Delivery Point	Custody Transfer Point	Custody Transfer Measurement System	Frequency of Measurement	Tolerance in Quantity Measurement	Frequency of Calibration	Frequency of Quality Testing	Typical Pressure (Kg/cm2g)
URAN TERMINAL	URN-GTP-01 (Thai Sector)	Orifice Meter with Flow comp	Continuous	As per AGA-3&8	Quarterly	Continuous	23-38
URAN TERMINAL	URN-GTP-02 (Taloja Sector)	Orifice Meter with Flow comp	Continuous	As per AGA-3&8	Quarterly	Continuous	23-38
TROMBAY TERMINAL	<u>URN-GTP-03 (Trombay Sector)</u>	Orifice Meter with Flow comp	Continuous	As per AGA-3&8	Quarterly	Continuous	18-38
URAN TERMINAL	URN-TTP-01 (MSEB)	Orifice Meter with Flow comp	Continuous	As per AGA-3&8	Quarterly	Continuous	23-38

Above clearly shows that for Trombay Sector, the delivery point is Trombay Terminal and for all other Sectors, it is Uran Terminal.

(ii) As it appears in the impugned order of the Board:

Schedule-A

Delivery	Custody Transfer	Custody Transfer	Frequency of	Tolerance in	Frequency	Frequency of	Typical
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Point	Point	Measurement System	Measurement	Quantity Measurement	of Calibration	Quality Testing	Pressure (Kg/cm2g)
URAN TERMINAL	URN-GTP-01 (Thai Sector)	Orifice Meter with Flow comp	Continuous	As per AGA-3&8	Quarterly	Continuous	23-38
URAN TERMINAL	URN-GTP-02 (Taloja Sector)	Orifice Meter with Flow comp	Continuous	As per AGA-3&8	Quarterly	Continuous	23-38
<u>URAN TERMINAL</u>	<u>URN-GTP-03 (Trombay Sector)</u>	Orifice Meter with Flow comp	Continuous	As per AGA-3&8	Quarterly	Continuous	18-38
URAN TERMINAL	URN-TTP-01 (MSEB)	Orifice Meter with Flow comp	Continuous	As per AGA-3&8	Quarterly	Continuous	23-38

It is noted from above tabulation that for Trombay Sector, the delivery point is shown as Uran Terminal instead of Trombay terminal which contradicts the recording in the contract between ONGC and GAIL.

41. Against all the relevant arguments of the Appellant/GAIL, ONGC's main consideration is that the Uran-Trombay pipeline is a common carrier and not a dedicated pipeline. That the pipeline is not a dedicated pipeline, ONGC has quoted clause

2(1)(f)(i) of the PNGRB Authorisation Regulations, 2008 which reads as under:

“dedicated pipeline laid to transport natural gas to a specific customer to meet his requirement and not for resale.”

As per ONGC, thus even if gas is being delivered through a line to a single customer still this line cannot be considered as dedicated line if the customer is reselling the gas, as in this case, GAIL is reselling to the Appellant.

42. ONGC has also cited Section 11 of the Act which requires the Board to fix the transportation rate. It does not make any distinction between own gas and third party gas. ONGC also has cited Clause 4(2)(c) of the PNGRB Affiliated Code of Conduct Regulations which states as under:

“That there is no preferential access allowed by the entity to itself or its affiliates for the regulated activity.”

43. We, however, have not gone into depth of the regulations and the Section of the Act as referred to by ONGC in its arguments saying that Uran-Trombay pipeline is not a dedicated pipeline but a common carrier pipeline since no party has declined to

accept that the Uran-Trombay pipeline is a common carrier pipeline as declared by the Board. The main contention of the Appellant and GAIL is that ONGC is carrying its own gas to Trombay to deliver it to GAIL at Trombay through the common carrier Uran-Trombay pipeline and hence tariff determined by the Board is not applicable.

44. From the arguments of the rival parties and considering the relevant Sections of the PNGRB Act, 2006, relevant regulations and the relevant clauses of the contract between ONGC and GAIL and our preliminary observations as above, our main observations would now be as follows.
45. ONGC is the producer of the gas and also the owner of the Uran-Trombay pipeline who transports gas through this pipeline to GAIL for onward transmission by GAIL to its customers by its own pipeline network. In the contract between ONGC and GAIL, it is mentioned that GAIL would pay not only the price of gas but also the transportation charges to ONGC.
46. The Uran-Trombay pipeline is a common carrier pipeline owned and operated by ONGC which no party has contested to. ONGC is entitled to claim transportation tariff from the

shippers/customers of the gas as fixed by the Regulator Board for carrying the shippers'/customers' gas. The PNGRB Act, 2006 also entitles ONGC to transport its own gas for its own requirement as the first right user. Since the Uran-Trombay pipeline is declared as Common Carrier, there needs to be at least one more entity to use the pipeline as shipper/customer while the transporter remains the ONGC. It is also understood that while ONGC can claim the transportation tariff from a third party user of its common carrier line, it cannot fix or claim the price that the shipper collects from its customers.

47. The contract between ONGC and GAIL clearly defines the delivery point where the gas carried by ONGC is delivered to GAIL and from this point the title and risk in the seller, i.e., ONGC's gas get transferred to the buyer, i.e., GAIL. The delivery point mentioned in the contract between ONGC and GAIL is mentioned as Trombay and on this issue, there is no controversy among the rival parties viz., the Appellant, ONGC and GAIL. The Board, however, in its impugned order, has recorded as Uran and not Trombay to be the delivery point. Hence, the question arises whether on declaration of the Uran-Trombay pipeline as Common Carrier, the contract which was

signed between ONGC and GAIL much before the declaration of common carrier gets nullified. No party has brought to our notice either through its written submission or oral arguments in the Court saying that declaration of the Uran-Trombay pipeline overrides the contract between ONGC and GAIL.

48. It emerges now that the issues we framed in para 31 above, would get addressed once the issue of controversy on the delivery point is resolved. For resolving this issue, in our considered opinion, the appropriate authority would be the Respondent No.1, i.e., the Board. Moreover, the Board only in its impugned order has recorded the delivery point as Uran and not Trombay as recorded in the contract between ONGC and GAIL. The matter, hence, needs to be referred back to the Board and the impugned order deserves to be set aside. Hence, the following order.

ORDER

- (a) Having regard to the facts and circumstances of the case and our observations as stated supra, the impugned order dated 15.10.2015 is set aside.

(b) The matter is remanded to the Respondent No. 1, the Board. The Board is directed to give personal hearing to all the parties and pass a reasoned order. The Board will pass order within 03 (three) months from today.

(c) The Board shall pass order independently and in accordance with law.

49. The appeal is disposed of in the aforesaid terms. Needless to say that IA No. 316 of 2016 does not survive and is disposed of, as such.

50. There is no order as to cost.

Pronounced in the Open Court on this 20th day of September, 2019.

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

(Justice Manjula Chellur)
(Chairperson)

√REPORTABLE/~~NON-REPORTABLE~~