

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 14th October, 2015.**

+ **W.P.(C) No.9448/2015 & CM No.22080/2015 (for stay)**

GAIL (INDIA) LTD.

....Petitioner

Through: Mr. Balbir Singh, Sr. Adv. with Mr.
Yoginer Handoo, Adv.

Versus

**PETROLEUM & NATURAL GAS REGULATORY BOARD
& ANR**

..... Respondents

Through: Mr. Prashant Bezorruah, Adv. for R-1.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition seeks to restrain the respondent No.1 Petroleum and Natural Gas Regulatory Board (PNGRB) from encashing the Performance Bank Guarantee (PBG) No.1501271BGP00289 dated 27th March, 2015 issued by respondent No.2 IDBI Bank Limited (Bank) at the instance of the petitioner in favour of the respondent No.1 PNGRB.

2. It is the case of the petitioner,

(i) that pursuant to the competitive bids invited by PNGRB, the petitioner, vide letter dated 25th April, 2012 of PNGRB, was granted authorization for laying, building, operating or expanding the Natural Gas Pipeline from Surat (Gujarat) to Paradip (Odisha) spanning 1500

Kms excluding the spur-lines;

(ii) in terms of Regulation 9 of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations, 2008 (PNGRB Regulations) framed by the PNGRB in exercise of powers under Section 61 of the Petroleum and Natural Gas Regulatory Board Act, 2006 (PNGRB Act), the grant of the said authorization was subject to the petitioner achieving a financial closure as per Regulation 10 thereof;

(iii) Regulation 10 of the PNGRB Regulations requires the authorised entity to achieve financial closure within a period of 120 days from the date of authorization and if internally financing the project, to within the said 120 days submit “the approval of its Board of Directors for the detailed feasibility report of the project alongwith its financial plan”;

(iv) the said period of 120 days, for the petitioner was ending on 30th October, 2012;

(v) the Board of Directors of the petitioner in its 303rd Meeting held on 26th October, 2012 approved and accorded the laying and operating

of the pipeline aforesaid at an estimated cost of Rs.10281.01 crores and the petitioner, vide its communication dated 30th October, 2012 to PNGRB, informed PNGRB of the same, thus fulfilling the requirement of Regulation 10 supra;

(vi) however PNGRB vide its communication dated November, 2012, received by petitioner on or about 19th November, 2012, directed the petitioner to submit a detailed and clear financial closure report;

(vii) that though the petitioner submitted a detailed and clear financial closure report on 20th December, 2012 but the PNGRB was not satisfied therewith and asked the petitioner to make an elaborate presentation and which was made by the petitioner on 31st January, 2013;

(viii) however PNGRB still, vide communication dated 2nd May, 2013, asked the petitioner to furnish the source of funds in respect of the financial closure;

(ix) the petitioner informed PNGRB that it does not take particular project finance but avails Debt of Capex on Company's balance sheet and requested PNGRB to treat the same as a financial closure but the

PNGRB was still not satisfied and asked the petitioner the particulars of the equity sharing by other companies for the purpose of completion of financial closure;

(x) the petitioner informed PNGRB that discussions with potential Joint Venture (JV) partners were in progress and no JV agreement had been finalised till then;

(xi) the petitioner in the meeting on 10th September, 2013 again attempted to satisfy PNGRB of having achieved the financial closure and further informed that the net worth of the petitioner was Rs.24,000 crores and the projected capital expenditure required for the project aforesaid could be easily financed from its internal generation and external borrowings and that the petitioner was thus fully capable to finance the project;

(xii) PNGRB, vide communication dated 8th October, 2013 directed the petitioner to submit detailed status and execution plan of the project, without insisting on financial closure and wherefrom the petitioner gathered that the financial plan of the petitioner had been accepted by PNGRB;

(xiii) however PNGRB issued show cause notice dated 30th

September, 2013 to the petitioner alleging non-compliance of Regulation 10(4) and 10(5) of the PNGRB Regulations concerning financial closure;

(xiv) that again the process of the petitioner satisfying PNGRB of its financial capability commenced, with the petitioner contending that the financial closure had already been achieved;

(xv) however PNGRB, vide communication dated 30th September, 2015, has threatened the petitioner with invocation of PBG.

3. The petition came up first, post-lunch on 1st October, 2015 on listing on urgent mentioning. The matter was posted for hearing on 8th October, 2015 and the respondent No.2 Bank restrained from remitting the monies under the PBG to PNGRB. On 8th October, 2015, the senior counsel for the petitioner was heard at length but whereafter on his plea for grant of one week's time to satisfy PNGRB and the Ministry, the matter was adjourned to today, continuing the interim order. Today, the senior counsel for the petitioner has stated that the petitioner has been unable to prevail upon PNGRB to recall its decision to invoke the PBG. The senior counsel for the petitioner has been heard further and he has during the hearing, also handed over the copy of the draft resolution from the minutes of the 346th Meeting of

the Board of Directors of the petitioner held on 13th October, 2015 and which has been taken on record. The counsel for the respondent No.1 PNGRB appearing on advance notice has relied on *General Electric Technical Services Company Inc. Vs. Punj Sons (P) Ltd.* (1991) 4 SCC 230, *Centax (India) Ltd. Vs. Vinmar Impex Inc.* (1986) 4 SCC 136 and *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd.* (1985) 1 SCC 260 in relation to the encashment of bank guarantee and interim stay.

4. I have considered the rival contentions.
5. Regulation 10 of the PNGRB Regulations supra is as under:

“10. Capacity booking, natural gas tie-up and financial closure:

- (1) *The authorised entity shall achieve agreement for transport of natural gas with any entity equal to at least fifty percent of the natural gas pipeline volume bid as specified in clause (d) to sub-regulation (1) of regulation 7 for each of the first five years following the commissioning of the natural gas pipeline.*
- (2) *The agreement specified under sub-regulation (1) shall be entered into a transparent manner and be based on the principle of at an arm's length:*

Provided that up to ten percent of the throughput in the natural gas pipeline specified under sub-regulation (1) may be booked on firm and mutually agreed terms without insisting on physical delivery

of natural gas.

- (3) The entity shall submit copy of the agreement specified under sub-regulation (1) to the Board within a period of ninety days of the date of the issue of the authorization.*
- (4) The authorized entity shall obtain the financial closure of the project from a bank or financial institution within a period of one hundred and twenty days from the date of the authorization.*
- (5) In case of an internally financed project, the entity shall submit the approval of its Board of Directors' for the detailed feasibility report (hereinafter referred as DFR) of the project alongwith its financial plan within one hundred and twenty days of the authorization:*

Provided that the Board may ask the entity to submit any further details or clarifications on the financial closure.

- (6) In case the entity fails to meet the requirements at sub-regulation (1) to (5), the authorization of the entity for laying, building, operating or expanding natural gas pipeline shall be cancelled and the performance bond shall be encashed and the Board reserves the right to re-award the authorization in a transparent manner and the entity shall have no right whatsoever against the Board for seeking any compensation or remedy on this account."*

6. Clause 7 of Schedule D of the authorization dated 25th April, 2012

aforesaid granted by PNGRB to the petitioner is as under:

"7. The entity shall submit a detailed and clear financial closure report to the Board within a period of one

hundred and eighty days from the date of authorization issued by the Board under regulation 9 of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations, 2008.”

and Clause 17.5 of the terms and conditions of the contract accepting which bid was made by the petitioner is as under:

“17.5 Financial Closure

The entity shall be required to achieve financial closure of the project based on the numbers quoted by them in the financial bid. Failure to achieve financial closure within the stipulated period may result in the termination of the grant of authorization. The entity shall furnish all the documents as required to satisfy PNGRB that the financial closure has been achieved in line with the requirements, which shall include the following:

- a) Complete Board agenda items with Annexures detailing total CAPEX, OPEX, year-wise financing plan and detailed feasibility Report (DFR).*
- b) Copy of all documents submitted to Financial institutions seeking financial assistance.*
- c) To establish the actual date of achieving financial closure, all documents executed by the company in respect of financial assistance for the project to be provided by the lenders by way of loans, bonds, security arrangements etc.”*

7. The senior counsel for the petitioner has not even contended that the

PBG furnished was conditional and that the conditions precedent for invocation thereof have not been satisfied or that the invocation of the PBG is not in terms thereof. A perusal of the PBG, encashment whereof is sought to be stayed, shows that the respondent No.2 Bank had agreed to pay a sum of Rs.20 crores to PNGRB at the request of the PNGRB and had further agreed that the decision of PNGRB, as to whether the petitioner had failed to or neglected to perform its duty and obligation under the authorization and / or whether the service is free from deficiencies and defects and is in accordance with or not, of the terms and conditions of the authorization and as to the amount payable to PNGRB to be final and binding on the Bank. The PBG of which stay of encashment is sought is absolute and unconditional and with respect to which PBGs the Supreme Court in plethora of judgments has held that no stay of encashment can be granted. Reference, besides to the judgments cited by the counsel for PNGRB, may also in this regard be made to *U.P. Co-operative Federation Ltd. Vs. Singh Consultants & Engineers (P) Limited* (1988) 1 SCC 174, *Svenska Handelsbanken Vs. M/s. Indian Charge Chrome* (1994) 1 SCC 502, *U.P. State Sugar Corporation Vs. Sumac International Ltd.* (1997) 1 SCC 567 and *Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company* (2007) 8 SCC

110. The settled legal position is that no stay of encashment of bank guarantee can be granted by the Courts except on finding a fraud of egregious nature having been practised in obtaining of the bank guarantee so as to vitiate the underlying transaction. The contract of Bank Guarantee in *Vinetec Electronics Private Limited Vs. HCL Infosystems* (2008) 1 SCC 544 has been reiterated to be an independent one between the Bank and the beneficiary *de hors* the contract between the beneficiary and the person at whose instance the Bank has given the guarantee.

8. The senior counsel for the petitioner has neither made out nor argued that PNGRB, in the matter of obtaining the said PBG from the petitioner, has played any fraud of egregious nature.

9. The counsel for PNGRB is thus right in his contention that this petition is liable to be dismissed on this ground alone.

10. However, for the sake of completeness, the arguments of the senior counsel for the petitioner may also be noticed.

11. The entire case made out is that the stand of PNGRB, of the petitioner having not satisfied the requirements of the clauses aforesaid of the tender documents and the authorization and of Regulation 10(4) supra is erroneous.

12. Notice in this regard may first be taken of the letter dated 30th

September, 2015 of PNGRB which according to the senior counsel for the petitioner is the letter of invocation of PBG. The stand of PNGRB in the said letter is, (a) that the Board of Directors of the petitioner in the meeting held on 26th October, 2012 had accorded approval for the project aforesaid with an estimated cost of Rs.10281.01 crores including foreign exchange component of Rs.393.73 crores; (b) that the petitioner, in its letter dated 20th December, 2012 supra, stated that its Board envisaged that other equity partners may also be inducted to participate in the project, wherein, the petitioner would be the lead partner with more than 50% equity, thus creating uncertainty on mode of financing the project, whether internally by the petitioner or externally by Bank or Financial Institutions; (c) petitioner vide subsequent letter dated 21st May, 2013 informed that the petitioner did not take particular project finance but avails of debt for Capital Expenditure on Company's Balance Sheet but did not present any status update on equity sharing; (d) that though PNGRB vide its letter dated 11th June, 2013 requested the petitioner to submit details of equity partners and their contribution / share towards the project but petitioner vide letter dated 15th July, 2013 replied that discussions were in progress with different potential JV partners and no JV agreement had been finalised till then; (e) that though

as per PNGRB Regulations, approval of the Board of Directors would suffice for an internally financed project but since the petitioner had informed that its Board of Directors envisaged other equity partners, it could not be treated as an internally financed project and hence the Board approval could not be construed as financial closure, in the absence of any details of other equity partners to be inducted to participate in the project with the petitioner as the lead partner and there is thus an uncertainty about the equity sharing pattern of the project; and, (f) that since the petitioner inspite of ample opportunity had failed to achieve financial closure, the petitioner was in breach of authorization and accordingly in accordance with Regulations, 25% of the PBG, amounting to Rs.5 crores, was being encashed from the PBG aforesaid.

13. The senior counsel for the petitioner has drawn attention to the minutes of the meeting of the Board of Directors of the petitioner held on 26th October, 2012 which is as under:

“Item No.14

Sub: Laying of Surat-Paradip Pipeline (SPPL) authorised to GAIL by PNGRB through bidding route

The Board discussed the agenda in detail. It was informed that HOA/MoU for transportation of natural gas for at least 50% of volume as per PNGRB regulations is in progress. It was also informed that a number of initiatives are taken for

sourcing long term gas for the project. Some of the oil PSUs have expressed interest to take equity and participate in the project. In the event of formation of JV, GAIL as lead partner will need to have more than 50% equity stake in the JV and if GAIL's share of equity exceeds Rs.1000 crores, necessary Government approval would be sought. It was decided by the Board that financial commitment for the project should synchronize with tie-up of gas source and signing of requisite HOA/MoU with consumers.

The Board after detailed discussions approved the agenda and passed the following resolutions:

“RESOLVED THAT approval of the Board be and is hereby accorded for laying and operating cross-country pipeline from Surat (Gujarat) to Paradip (Orissa) (SPPL) with an estimated cost of Rs.10,281.01 crores (including IDC & escalation) with estimated foreign exchange component of Rs.393.73 crores.”

to contend that same satisfies the requirement of Regulation 10(4) &

(5). Attention was next invited to the resolution passed by its Board by circulation on 15th June, 2015 and which is as under:

“RESOLVED THAT, the financing of Surat Paradip Pipeline Project as approved by Board in its 303rd Meeting shall be done on the basis of internal generations and borrowings based on the strength of GAIL's Balance Sheet subject to following:

- (i) Extension of authorization by PNGRB for further 36 months linked to development of dharmat RLNG terminal as gas source.*
- (ii) Approval of PNGRB for creation of lien or charge or hypothecation on the assets of the natural gas pipeline to secure finances.”*

14. Two questions arise for consideration. One, whether there can be judicial review under Article 226 of the Constitution of India of the conclusion of the PNGRB of the petitioner having not achieved the financial closure and / or having not satisfied the conditions of Regulation 10 supra and if the answer to the same is in the affirmative, two, whether the conclusion of PNGRB in this respect can be said to be so arbitrary and illogical as to be struck down in writ jurisdiction and axiomatically the encashment of the PBG be stayed.

15. The Bank, in the Bank Guarantee, of invocation whereof stay is sought, has absolutely, irrevocably and unconditionally undertaken to PNGRB that the decision of the PNGRB as to whether the petitioner has failed to or neglected to perform or discharge its duties and obligations under the authorization and as to the amount payable by the bank to the PNGRB under the guarantee shall be final and binding on the bank. Supreme Court in *National Highway Authority of India Vs. Ganga Enterprises* (2003) 7 SCC 410, also concerned with the relief of refund of the bid security forfeited by NHAI held that it is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India; the dispute regarding forfeiture of bid security is regarding the term of offer and thus

contractual in respect of which a writ Court is not the proper forum; invoking Bank Guarantee and / or enforcing the bid security is not in exercise of any statutory right; forfeiture of earnest / security in no way affects any statutory rights; such earnest / security is given and taken to ensure that a contract is performed; the law regarding enforcement of an on demand Bank Guarantee is very clear; if the enforcement is in terms of the guarantee then Courts must not interfere with the enforcement of Bank Guarantee; the Court can interfere if the invocation is against terms of the guarantee or if there is any fraud; if the guarantee is rightly invoked, there is no question of directing refund. Accordingly, the writ petition was dismissed. Supreme Court in ***Jagdish Mandal Vs. State of Orissa*** (2007) 14 SCC 517 held that judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and *mala fides* but cautioned that a Court, before interfering in a tender or contractual matter in exercise of power of judicial review, should pose to itself the questions whether the process adopted or decision made by the authority is *mala fide* or intended to favour someone or whether the process adopted or decision made is so arbitrary and irrational that the Court can say that the decision is such that no reasonable authority acting reasonably and in accordance with relevant law

could have reached and whether public interest is affected. It was further held that if the answers to the said questions are in the negative then there should be no interference under Article 226. This view has been reiterated in *Michigan Rubber (India) Ltd. Vs. State of Karnataka* (2012) 8 SCC 216 and in *Maa Binda Express Carrier Vs. North-East Frontier Railway* (2014) 3 SCC 760. Applying the said test to the present controversy, no case for exercise of power of judicial review of the decision of PNGRB to invoke the Bank Guarantee for Rs.20 crores in the sum of Rs.5 crores only is made out. It cannot be lost sight of that instead of 120 days from the grant of authorization on 25th April, 2012, more than 4 years have since lapsed.

16. Though the expression ‘financial closure’ is not defined in the PNGRB Act or PNGRB Regulations supra copy of which was handed over during the course of hearing by senior counsel for petitioner but is commercially understood as the process of completing all project related financial transactions, finalising and closing the project financial accounts, so that it is definitely known that the project will not be held up for the reason of financial constraints.

17. The senior counsel for the petitioner stated that Regulation 10(4) supra applies, in case of the project finance being obtained from a Bank or a

Financial Institution and is not applicable in the present case, since the petitioner intends to internally finance the project aforesaid.

18. The only question for consideration thus is whether the petitioner, by submitting the documents aforesaid, has satisfied the conditions of Regulation 10(5) supra.

19. The contention of the senior counsel for the petitioner is that once the Board of Directors of the petitioner has decided to undertake the said project, the same is sufficient.

20. However that is not the requirement of Regulation 10(5). What Regulation 10(5) requires is the approval of the Board of Directors of the detailed feasibility report of the project along with its financial plan. The same is understood by me, as an approval by the Board of Directors of the allocation of the project, cost from its internal funds. The senior counsel for the petitioner inspite of repeated asking could not show that the Board of Directors has at any time agreed so. Even in the meeting held on 13th October, 2015, during the hearing of this petition, all that the Board of the petitioner has agreed is as under:

“Item No.346.15

Sub: Financial Closure of Surat – Paradip Pipeline (SPPL)
Project

“RESOLVED THAT the financing of Surat Paradip Pipeline Project as approved by Board in its 303rd meeting of Board shall be done based on the strength of GAIL’s Balance Sheet”. ”

21. In my opinion, the conclusion reached by the PNGRB, of Regulation 10(5) having not been satisfied, cannot be said to be wholly illogical or which no reasonable person could have reached. It cannot be lost sight of that the petitioner, in the communication dated 17th September, 2013 stated that “it is to assure the Hon’ble Board that GAIL has already done the financial closure of SPPL and is capable to finance the said project internally and with external borrowings”. No details of external borrowings have been given. Before that, in the communication dated 20th December, 2012 enclosing the minutes of the meeting of the Board of Directors held on 26th October, 2012, it was stated that “GAIL’s Board has also envisaged that other equity partners may also be inducted to participate in the project, wherein, GAIL would be the lead partner with more than 50% equity”. Thereafter, in the resolution passed by the Board of Directors of the petitioner by circulation on 15th June, 2015, it was again stated that the financing of the said project “shall be done on the basis of internal generations and borrowings based on the strength of GAIL Balance Sheet....”. It is thus not clear as yet, whether the petitioner intends to involve

other partners in the project and whether it intends to borrow externally, to meet the project cost and if so, from what source. Merely because the petitioner may have reserves of Rs.24,000 crores, as is repeated / asserted during the hearing, would not be sufficient for the purposes of Regulation 10(5) supra, without the Board of Directors of the petitioner being ready to earmark the said reserves to meet the project cost. Similarly, the argument of the senior counsel for the petitioner that the time for completion of the project being of three years, the same can be meted out from the annual earnings of the petitioner, is also of no avail, without the petitioner satisfying the PNGRB of the certainty of such finance and of the same being not already allocated for some other project.

22. Thus, neither a case for grant of an injunction restraining encashment of PBG is made out nor otherwise any merit is found in the claim of the petitioner.

23. The petition is accordingly dismissed.

24. It is however clarified that none of the observations herein, which are made only for the purposes of examining, whether a case for restraining encashment of PBG is made out, would have any sway on the claim, if any of the petitioner in arbitration or suit, against the respondents for wrongful

encashment of the PBG.

No costs.

RAJIV SAHAI ENDLAW, J.

OCTOBER 14, 2015

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(corrected & released on 18th November, 2015)