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

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Pronounced on: 11.04.2017

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LPA 842/2015 & CM No.28035/2015

GAIL (INDIA) LTD

..... Appellant

Through Mr.Sanjay Jain, ASG with  
Mr.Yoginder Handoo, Mr.Darpan Sachdeva &  
Ms.Rhea Verma, Advocates.

versus

PETROLEUM & NATURAL GAS  
REGULATORY BOARD & ANR.

..... Respondents

Through Mr.Prashant Bezboruah and  
Mr.Rakesh Dewan, Advocates for R-1/PNGRB.

**CORAM:**

**HON'BLE THE CHIEF JUSTICE**

**HON'BLE MR. JUSTICE JAYANT NATH**

**JAYANT NATH, J.**

1. The present Letters Patent Appeal is filed seeking to impugn the order dated 14.10.2015 passed by the learned Single Judge in a Writ Petition filed by the appellants seeking a Writ of Certiorari for setting aside the decision dated 30.9.2015 and Writ of Mandamus commanding the respondents not to encash the bank guarantee dated 27.3.2015.
2. Some of the relevant brief facts are that respondent No.1 Petroleum and Natural Gas Regulatory Board (PNGRB) invited application-cum-bid for grant of authorization for laying, building, operating or expanding the Natural Gas Pipelines from Surat (Gujarat) to Paradeep (Odisha) spanning

1500 kms excluding the spur-lines. The appellant was the successful bidder and was granted authorization by respondent No.1 for the said project vide communication dated 25.04.2012.

3. The respondent No.1 Board in terms of the Petroleum and Natural Gas Regulatory Board Act, 2006 (PNGRB Act, 2006) is authorized to frame various regulations. One of the regulations which is relevant for the present petition is the PNGRB (authorizing entities to lay, build, operate or expand natural gas pipelines) (Regulations, 2008) (hereinafter referred to as Regulations).

4. The said Regulation 10 of the PNGRB Regulations reads as follows:-

“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 subregulation (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 subregulation (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 eighty 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.”

5. Hence, as per Regulation 10(4) the appellant was obliged to obtain financial closure of the project from a bank or financial institution within a period of 180 days from the date of the authorization. The controversy here revolves around as to whether the appellant has obtained financial closure as per the above regulation. As per the respondent No.1 the appellant has failed to do the needful and hence has sought encashment of the performance bond/bank guarantee as provided in regulation 10(6).

6. The appellant had given a Performance Bank Guarantee dated 27.3.2015 for a sum of Rs.20 crores as security for due observance and performance of the terms and conditions of the authorisation granted to the appellant to lay build, operate or expand the natural gas pipeline as per letter of authorization dated 19.3.2012.

7. The respondent No.1 has noted that there has been a breach of authorization with respect to achieving of financial closure and hence 25% of the PBG is sought to be encashed i.e. for a sum of Rs.5 crores from the PBG.

8. The learned Single Judge by the impugned order noted that there has been no contentions raised by the senior counsel for the appellant that the Performance Bank Guarantee (hereinafter referred to as PBG) that was furnished was conditional and that the conditions precedent for invocation thereof have not been satisfied or that the invocation of the bank guarantee is not in terms of the bank guarantee. It also noted that the PBG of which stay of encashment is sought is absolute and unconditional. The order relies upon various judgments of the Supreme Court including *U.P.Co-operative Federation Limited vs. Singh Consultants & Engineers (P) Limited (1988) 1 SCC 174*. The order also notes that normally encashment of bank guarantee can be granted only on finding of a fraud of egregious nature and that in the present case there is no allegation or argument of any fraud having been played by respondent No.1. The order further noted that what the appellant has sought to argue is that the conclusion reached by respondent No.1 that the appellant has failed to achieve financial closure is a palpably erroneous conclusion apparent from the record. The order noted that though the term 'financial closure' is not defined in the Act or the Regulations but in commercial sense it was argued by the Appellant that the process of completing all project related financial transactions, finalizing and closing the project financial accounts can be termed as financial closure. The order rejected the contention of the appellant that once the Board of Directors of the appellant have decided to undertake the project the same would tantamount to financial closure. The learned Single Judge held that the Board

of Directors have to approve the allocation of the project, and cost from internal funds. It noted that no details for external borrowings have been given by the appellant. It also noted that as per the Minutes of Meeting of the Board of Directors held on 26.10.2012 the Board of the Appellant had envisaged that other equity partners may also be inducted to participate in the project and GAIL would be the lead partner. The order also noted that it is not clear as to whether the appellant intends to involve other partners in the project or whether it intends to borrow externally to meet the project cost and if so from what source.

9. Hence, the submission of the appellants were rejected and the writ petition was dismissed.

10. We have heard learned counsel for the parties. Learned ASG has strenuously relied upon Clause 10(5) of the Regulations to contend that in internally financed projects the appellant has to only submit approval of its Board of Directors and detailed feasibility report alongwith its financial plans which it is submitted has been done by the appellant. Reliance is also placed on a report submitted by Deloitte to submit that the appellant seeks to carry on the project on a standalone basis.

11. We may note the relevant terms of the performance bank guarantee which reads as follows:-

“2. We, the Bank, hereby undertake to pay PNGRB an amount not exceeding Rs.20,00,00,000/- (Rupees Twenty Crores Only) against any breach with respect to timely commissioning of the proposed NG Pipeline as per prescribed targets and also meeting service obligations by the authorized entity during the operating phase of the project, including failure to extend the validity of this guarantee or to give a fresh guarantee in lieu of the existing one. The PBG is

valid for a period of three years initially, which shall be extended up to the economic life of the project in a block of minimum three years at the request of bidder.

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4. We, the Bank, hereby agree that the decision of PNGRB as to whether the Authorized Entity has failed to or neglected to perform or discharge his duties and obligations under the said 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 said Authorization and as to the amount payable to PNGRB by the Bank hereunder shall be final and binding on the bank.”

12. Hence, as per the Bank Guarantee the decision of respondent No.1 as to whether the appellant has failed to or neglected to perform or discharge his duties and obligations under the said authorization and as to the amount payable to respondent No.1 by the bank shall be final and binding on the bank.

13. The Supreme Court in ***General Electric Technical Services Company Inc. vs. Punj Sons (P) Ltd. and Another, (1991) 4 SCC 230*** regarding encashment of bank guarantee held as follows: -

“9. The question is whether the Court was justified in restraining the Bank from paying to GETSCO under the bank guarantee at the instance of respondent-1. The law as to the contractual obligations under the bank guarantee has been well settled in a catena of cases. Almost all such cases have been considered in a recent judgment of this Court in *U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.*, [1988] 1 SCC 174 wherein Sabyasachi Mukherji, J., as he then was, observed (at 189) 'that in order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guar- antee, there should be serious

dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise, the very purpose of bank guarantees would be negated and the fabric of trading operations will get jeopardised'. It was further observed that the Bank must honour the bank guarantee free from interference by the Courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice, the Court should interfere. In the concurring opinion one of us (K. Jagannatha Shetty, J.) has observed that whether it is a traditional bond or performance guarantee, the obligation of the Bank appears to be the same. If the documentary credits are irrevocable and independent, the Bank must pay when demand is made. Since the Bank pledges its own credit involving its reputation, it has no defence except in the case of fraud. The Bank's obligations of course should not be extended to protect the unscrupulous party, that is, the party who is responsible for the fraud. But the banker must be sure of his ground before declining to pay. The nature of the fraud that the courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else.

14. As per the legal position for passing an order to restrain invocation of a bank guarantee there has to be a good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties.

15. As rightly concluded by the learned Single Judge in the present case there is no allegation or averment regarding any fraud having been played in the present petition by the appellants. Hence, in terms of the settled legal position the appellants have failed to make out any ground for passing of an order quashing the decision of respondent No. 1 to invoke the bank guarantee in view of the conclusion of respondent No.1 that the appellant has failed to attain financial closure.

16. However, the crux of the argument of the appellant is that the appellants have attained 'financial closure'. As rightly held by the learned single judge it is not for this court to sit in judgment on the decision of respondent No.1 as to whether on the facts and circumstances of the case the conclusion of respondent No.2 that the appellant has failed to achieve financial closure is an erroneous or a wrong decision. However, for the purpose of complete adjudication of the dispute, we have gone into some of the contentions of the appellant in little greater detail.

17. On 16.10.2012 respondent No.1 Board informed the appellant/GAIL apart from other aspects that the appellant is required to obtain the financial closure in terms of Regulation 10(4). This was reiterated by respondent No.1/PNGRB by its communication of November 2012 where it was pointed out that the appellant/GAIL is to give detailed and clear financial closure report to the PNGRB/respondent No.1 Board. In response there to the appellant on 20.12.2012 pointed out that approval has been accorded for laying the pipeline at the estimated costs of Rs.10,281.01 crores in the 303<sup>rd</sup> meeting of Board of Directors of the appellant/GAIL held on 26.10.2012. The extract of the minutes of the said meeting were enclosed. It also stated that the Board envisaged that other equity partners may also be inducted to participate in the project wherein the appellant would be the lead partner with more than 50% equity. The respondent Board on 9.1.2013, however, again advised the appellant that the appellant has not submitted financial closure details of the project from a bank or financial institution and the necessary process may be expedited. Correspondence of this nature has continued.

18. It may not be necessary to refer to all the communications that were exchanged between the parties. It may, however, be noted that on 17.9.2013 the appellant again wrote a communication to respondent No.1 Board reiterating that in its 303<sup>rd</sup> meeting held on 26.10.2012 the Board has considered the financial closure of the project. It also noted that the company has a Debt Equity Ratio of 0.38:1 with its net worth approximately of Rs.24,000/- crore and that the project can be easily financed by the appellant from its internal generation and external borrowings. Appellants were called for discussions on 10.9.2013. In the discussions, the appellant again reiterated that a copy of the resolution of the Board has already been handed over. The Record Note of Discussion of the meeting noted the submission of the appellant that the appellant company does not take particular project finance and instead avails debt for capex on company's balancesheet. It also noted the submission of the appellant that earlier the appellant had envisaged possibility of inclusion of other equity partners with the appellant having 50% equity but there was no concrete proposal for setting up a JV at present. Hence, the Note records the insistence of the appellant that they have achieved financial closure. The Note also records the various apprehensions and pleas raised on behalf of respondent No.1 Board. It may also be noted that, at this stage, the appellant also submitted a financial appraisal report prepared by Deloitte where it is stated that the appellant has indicated its plan to develop the project on a stand alone basis on its books.

19. On 30.12.2013 the respondent Board not satisfied by the explanations of the appellant issued a Show Cause Notice to the appellant stating that it had failed to comply with the requirements of Regulation 10(4) and 10(5) of the Regulations. Other allegations were also made. In the reply the

appellants again reiterated that they do not take particular project finance and instead avail of debt for capex on company's balancesheet. The net worth of the appellant is Rs.24,000/- crores and that the capital expenditure can be financed by the appellant from internal generation and external borrowings. On 6.6.2014 the respondent Board accorded an opportunity of personal hearing to the appellant. In the Minutes of the hearing the observations of the respondent No.1 were noted that regulations provided only two distinct categories of financing i.e. internal and external. Hence, a clear and unambiguous resolution is to be passed by the Board categorizing the project as the internally financed one. It further noted that there is no clarity that the project was internally financed. This position has remained unchanged subsequently.

20. Hearing was again accorded to the appellant on 24.4.2015. Finally on 30.9.2015 the respondent No.1 passed an order encashing the bank guarantee in part, pointing out that despite several communications, hearings and discussions the appellant has failed to have a categorical slotting of the project either as internally financed or externally financed. The Board concluded by the said order that the financial closure of the project is yet to be achieved by the appellant and hence decided to encash 25% of the PBG amounting to about Rs.5 crores.

21. The settled legal position is that judicial review of administrative action has limited scope. The Supreme Court in ***Jagdish Mandal vs. State of Orissa and Others, (2007) 14 SCC 517*** held as follows:-

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is

made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions

i) 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 : 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tendered/contractor or distribution of state largesse (allotment of sites/shops, grant of licences,

dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

22. Hence, the only ground on which the appellant could succeed is if it was able to show that the decision taken by respondent No.1 is so arbitrary and irrational that such a decision no responsible authority would have reached.

23. In our opinion, the above factual details would show as rightly held by the learned Single Judge that there is no clarity in the stand of the appellant as to whether it seeks to carry on the project from internal financial sources or through external sources. The resolution of the Board dated 26.10.2012 being the 303<sup>rd</sup> resolution notes that other PSUs have expressed interest in equity participation in the project and that GAIL would be the lead partner and would need more than 50% stake in the joint venture. Subsequently, in the reply dated 20.01.2014 to the show cause notice the appellant took a stand that the project can be financed by GAIL from its internal generation and external borrowings. Again no details are given as to how the external borrowings are to be tied up as is required by Regulation 10(4). This position has continued. Hence, it is clear from these facts that the appellants have failed to take a clear stand. There is no categorical averment that the joint venture route of financing has been completely abandoned. Repeatedly reference is made to internal financing/external borrowings. No details of external borrowings have been given to respondent No.1. In the light of these facts the conclusion reached by respondent No.1 that the appellants have failed to comply with the provision of Regulation 10(4) and 10(5) of the Regulations appears to be a plausible conclusion. The said conclusions

cannot be said to suffer from any material illegality. The conclusions cannot be termed to be arbitrary or irrational.

24. There are no grounds which would warrant interference by this court. There is hence no merit in the present appeal and the same is dismissed.

**(JAYANT NATH)**  
**JUDGE**

**CHIEF JUSTICE**

**APRIL 11, 2017**

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