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

Decided on : 04th May, 2020

\+ W.P.(C) 3038/2020 & CM APPLs. 10585-586/2020

MAHANAGAR GAS LTD. .... Petitioner

Through: Dr. A.M. Singhvi, Senior Advocate
Mr. Ciccu Mukhopadhyay, Senior Advocate
Mr. Saurav Agarwal, Advocate
Mr. Trinath Tadakamalla, Advocate
Mr. Akhil Sachar, Advocate
Ms. Rashi Goswami, Advocate
Mr. Avishkar Singhvi, Advocate

versus

PETROLEUM & NATURAL GAS REGULATORY BOARD & ORS ..... Respondents

Through: Mr. Utkarsh Sharma, Advocate for R-1/PNGRB.
Mr. Aashish Gupta, Advocate with Mr. Shashwat Kumar, Mr. Aditya Mukherjee, Mr. Krishna Tangirala & Mr. I. Zuberi, GM (Marketing) for R-3/ONGCL.
Mr. Tushar Mehta, Solicitor General with Mr. Yoginder Handoo, Advocate for GAIL

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G E M E N T (ORAL)

% **04.05.2020**

CM APPL.10585/2020 (exemption)

Allowed, subject to all just exceptions. Application is disposed of.

W.P.(C) 3038/2020 and CM APPL. 10586/2020 (Order XXXIX Rules 1 & 2 CPC)

1. This writ petition is directed against an order, dated 18th March, 2020, passed by the Petroleum and Natural Gas Regulatory Board (hereinafter referred to as "PNGRB").

2. A brief reference of facts may be apposite.

3. The Gas Authority of India Limited (GAIL) takes delivery of gas, from the Oil and Natural Gas Corporation Limited (ONGCL) at Trombay and supplies part of the said gas to the petitioner, as well as to other customers, at various delivery points.

4. The Uran Trombay Natural Gas Pipeline (UTNGPL) is owned and operated by the ONGCL. ONGCL supplies gas to GAIL, via the UTNGPL.

5. ONGC and GAIL entered into a Gas Supply Agreement (GSA), dated 7th July, 2006, for supply of natural gas at various delivery points. Under the GSA, ONGCL is the seller and GAIL is the buyer.

6. The gas, delivered by the ONGCL to GAIL at Trombay was delivered to the petitioner's delivery point, at the City Gas Station (CGS) Wadala through the Trombay Pipeline Network, under a long-term Gas Supply and Transportation Contract (GSTC) dated 5th June, 2009, which required the petitioner to pay GAIL fixed monthly transmission charges of ₹1,17,62,527/–, as per Article 10.2 (a) of the GSTC. The GSTC further provided that the price charged by ONGCL on GAIL – consisting of the gas price and contractual transportation charges from Uran to Trombay would be passed on to the petitioner.

7. On 30th September, 2009, ONGC moved an application, before the Petroleum and Natural Gas Regulatory Board (PNGRB), under Regulation 19(1) of the Petroleum and Natural Gas Regulatory Board (Authorising Entities to Lay, Build, Operate, or Expand Natural Gas Pipelines) Regulations, 2008 (hereinafter referred to as "the Authorisation Regulations"), seeking declaration of the UTNGPL as a dedicated pipeline. Dedicated pipelines, it is averred, do not fall within the purview of the PNGRB Act, 2006, and the PNGRB does not, therefore, have the power to determine the transportation tariff for the said pipeline.

8. *Vide* a letter dated 4th December, 2009, the aforesaid application, of ONGCL, under Regulation 19 (1) of the Authorisation Regulations, was dismissed by the PNGRB, on the ground that GAIL was reselling the gas to downstream consumers. The writ petition avers that this ground of rejection was incorrect in law.

9. On 30th June, 2010, ONGC submitted a fresh application, to the PNGRB, under Regulation 17 of the Authorisation Regulations, for declaration of the UTNGPL as a Common Carrier Pipeline (CCP). This application was allowed, by the PNGRB, *vide* letter dated 3rd May, 2011, specifying the common Carrier capacity of the UTNGPL as 1.5 Million Metric Standard Cubic Meter per Day (MMSCMD).

10. The writ petition avers that this order, too, was incorrect, as the UTNGPL was supplying gas only to one consumer, i.e. GAIL and was, therefore, a dedicated pipeline. In any case, the writ petition points out that, to the extent of supply beyond 1.5 MMSCMD, the UTNGPL continued to remain a dedicated pipeline.

11. *Vide* Tariff Order dated 30th December, 2013, the PNGRB fixed the Provisional Initial Unit Pipeline Tariff (PIUPT), for the UTNGPL, as ₹5.70/Metric Million British Thermal Unit (MMBTU), retrospectively with effect from 20th November, 2008, under Section 22 of the PNGRB Act.

12. Till the passing of the aforesaid Tariff Order, GAIL was paying transportation charges, to ONGC, at the contractually agreed rate of ₹12/KCM, which was being passed on to the petitioner. However, after the passing of the aforesaid Tariff Order, dated 30th December, 2013, ONGCL started demanding, from GAIL, transportation tariff at the rate of ₹5.70/MMBTU, in substitution of the contractually agreed transportation charges of ₹12/KCM, and also demanded differential arrears, retrospectively *w.e.f.* 20th November, 2008, for the gas earlier transported, by it, to GAIL through the UTNGPL. A debit note was raised, in this regard, by ONGCL on GAIL, for recovery of transportation tariff on the basis of the Provisional Tariff Order dated 30th December, 2013 of the PNGRB.

13. This demand was communicated, by GAIL, to the petitioner, by way of e-mail dated 31st March, 2014, whereby the petitioner was informed that ONGC would be charging transportation charges as per the Provisional Tariff Order, dated 30th December, 2013 (*supra*), retrospectively. Predictably, a demand followed, from GAIL to the petitioner, for payment of transportation charges on the basis of the demand raised by ONGC. The petitioner resisted the demand by way of email dated 2nd April, 2014. GAIL, however, responded on 3rd April, 2014, stating that it was merely demanding the amount from the petitioner, in order to pay the same to ONGCL.

14. A further debit note, dated 8th April, 2014, was raised, by GAIL on the petitioner.

15. The petitioner wrote, to PNGRB, on 4th November, 2014, questioning the applicability of the provisional Tariff Order, dated 30th December, 2013, issued by the PNGRB, and contending that the tariff fixed thereby could apply only on gas transported by the ONGCL while acting as a "common carrier", i.e. as a transporter who transported gas to other entities, too, on their orders.

16. The PNGRB responded, *vide* a communication dated 14th November, 2014, asserting that the transportation Tariff, for the Common Carrier Pipeline, had been determined as per the PNGRB Act, 2006 and its Regulations, and any dispute, in connection therewith, could be settled only on receipt of a complaint under Section 24 or Section 25 of the PNGRB Act.

17. On 3rd January, 2015, GAIL wrote to the petitioner, asserting that, in the event of non-payment, by the petitioner, of the outstanding amount, GAIL would encash the Letter of Credits (hereinafter referred to as "L/Cs") furnished by the petitioner to it.

18. Left with no option, the petitioner filed a complaint, before the PNGRB, with respect to the Provisional Tariff Order, dated 30th December, 2013. In the said complaint, *vide* interim order dated 4th March, 2015, the PNGRB directed all parties to maintain *status quo* with respect to demand of transportation charges, and issued notice to the ONGCL. The complaint was, however, subsequently dismissed, by the PNGRB, *vide* order dated 15th October, 2015, on the ground that the "delivery point" for the gas flowing through the UTNGPL was Uran and not Trombay, and hence transportation tariff, in terms of the Provisional Tariff Order, was payable.

19. As, at the time, the Appellate Tribunal for Electricity (APTEL) was non-functional, the petitioner moved this Court by way of WP (C) 10589/2015. The said writ petition was disposed of, by a learned Single Judge of this Court, *vide* order dated 30th November, 2015, which merits reproduction *in extenso*, thus:

> "1. This order is in continuation of the previous orders dated 16th November, 2015 and 24th November, 2015.
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> 2. The learned ASG appearing for respondent no.3 ONGC states that during the pendency of the matter before respondent No.1 Petroleum and Natural Gas Regulatory Board (PNGRB), there was no stay against the respondent no.3 ONGC recovering revised tariff from respondent no.2 GAIL (India) Ltd. and the interim order was only against the respondent no.2 GAIL (India) Ltd. recovering the dues as per the impugned revised tariff from the petitioner. It is further

informed that GAIL (India) Ltd. has however not paid revised tariff to ONGC.

3. The counsel for the respondent no.2 GAIL (India) Ltd. states that gas arrangement with respondent no.3 ONGC is to reimburse to respondent no.3 ONGC whatever amount the respondent no.2 GAIL (India) Ltd. has collected from its customers.

4. In these circumstances and particularly since the Appellate Tribunal for Electricity (APTEL) as Appellate Authority of PNGRB is likely to be functional within two months, it is deemed appropriate to dispose of this petition with the following directions:-

A. The petitioner to prefer an appeal before APTEL as Appellate Authority of PNGRB within two weeks from today.

B. APTEL as Appellate Authority of PNGRB, upon becoming functional, shall take up the appeal and/or the application for interim relief as expeditiously as possible.

C. The appeal, if filed within two weeks, shall be considered on merits without going into the aspect of limitation.

D. The petitioner to within three weeks submit to respondent no.2 GAIL (India) Ltd. an undertaking of its Board of Directors to pay to respondent no.2 GAIL (India) Ltd. the disputed amounts, if ultimately found due from the petitioner to respondent no.2 GAIL (India) Ltd.

4. Needless to state that the Appellate Authority shall decide without being influenced by any observation of this Court.

5. Needless to state that all parties shall have liberty to raise all issues as raised in this petition before the Appellate Authority.

6. Interim order shall continue till the Appellate

Authority orders otherwise.

No costs."

20. The undertaking, as required by order dated 30th November, 2015, extracted above, of the learned Single Judge passed in WP (C) 10589/2015, was furnished by the petitioner to GAIL on 28th December, 2015 and remains valid and operational till date.

21. Additionally, points out Dr. A.M.Singhvi, learned Senior Counsel appearing for the petitioner, the interests of the GAIL have been protected by the fact that there exist two L/Cs, aggregating to total amount of ₹ 100 crores, furnished by the petitioner in favour of GAIL.

22. Referring to the facts, the petitioner, as directed by this court in its order dated 30th November, 2015, filed Appeal 147 of 2016, before the APTEL, challenging the order, dated 15th October, 2015 (*supra*) of the PNGRB.

23. During the pendency of the said Appeal No.147 of 2016, GAIL fixed the final tariff of the UTNGPL, on 1st November, 2018, as ₹34.73/MMBTU, w.e.f. 1st April, 2019.

24. *Vide* judgement dated 20th September, 2019, the APTEL allowed the aforesaid Appeal 147 of 2016, of the petitioner by way of remand to the PNGRB, holding that the PNGRB had erroneously treated the "delivery point", for the Trombay Sector, as Uran, instead of Trombay. The PNGRB was, therefore, directed to redecide the issue of applicability of the Provisional Tariff Order *de novo*, after correcting the error regarding fixation of "delivery point".

25. *Vide* the impugned order, dated 18th March, 2020, the PNGRB has again dismissed the petitioner's complaint. While doing so, it has acknowledged the error in treating the delivery point, for the gas, as Uran, instead of Trombay. Even so, the complaint of the petitioner has been dismissed on a new ground, viz., that ONGCL was carrying its own gas from Uran to Trombay for supplying to GAIL and other customers at the delivery point, i.e. Trombay.

26. Aggrieved thereby, the petitioner has preferred a fresh appeal, challenging the said order, dated 18th March, 2020, before the APTEL, on 20th April, 2020, with an application praying for listing thereof. However, *vide* an email dated 22nd April, 2020, the petitioner was informed that the Petroleum and Natural Gas (PNG) Bench of the APTEL was not functional due to want of quorum, as the Technical Member, required to sit in the said Bench, had not yet joined.

27. In the interregnum, *vide* "Notice for invocation of Letter of Credit", dated 24th April, 2020, GAIL has demanded, from the petitioner, ₹ 250,27,19,410/–, with 14 days, failing which encashment of the L/Cs, furnished by the petitioner, has been threatened.

28. In view of the fact that no Technical Member for the PNG Bench of the APTEL has joined, the petitioner re-approached this court by means of the present writ petition, praying that the operation of the impugned order, dated 18th March, 2020 of the PNGRB be kept in abeyance till the APTEL is in a position to hear the appeal preferred by the petitioner before it.

29. To a query from the Bench, learned Senior Counsel Dr. A.M. Singhvi, appearing for the petitioner, as well as learned Solicitor General Mr. Tushar Mehta, appearing for GAIL, were *ad idem* that a Technical Member has been appointed for the PNG Bench of the APTEL, thereby completing the quorum. However, it is submitted that the said Member would continue to hold his present office for another month and would, therefore, be in a position to assume office as a Member of the APTEL only towards the beginning of June, 2020.

30. Dr. Singhvi, learned Senior Counsel for the petitioner also points out that the undertaking, furnished by the petitioner on 28th December, 2015, pursuant to order, dated 30th November, 2015 (*supra*), of this Court in WP (C) 10589/2015 continues to operate. Additionally, as already been noted hereinabove, he submits that the interests of GAIL have been protected by two L/Cs aggregating to a total sum of ₹ 100 crores, which have been furnished by the petitioner.

31. Dr. A.M. Singhvi, learned Senior Counsel also asserts that in fact the ground, on which the PNGRB has proceeded with the impugned order, dated 18th March, 2020, dismissing the petitioner's complaint, stands covered in favour of the petitioner by the judgment of this Court in ***Indraprastha Gas Ltd. vs. Petroleum and Natural Gas Regulatory Board***[1]**,** which was upheld by the Hon'ble Supreme Court in ***Petroleum and Natural Gas Regulatory Board vs.***

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[1] **2012 ELR (Delhi) 1013**

Indraprastha Gas Ltd.[2]

32. Mr. Tushar Mehta, learned Solicitor General appearing for GAIL is, with commendable fairness, agreeable to the above arrangement, merely submitting that the undertaking, furnished by the petitioner on 28th December, 2015, should continue to operate, during the currency and pending disposal of the appeal/application for interim relief by the APTEL.

33. Mr. Aashish Gupta, learned counsel appearing for ONGLC, while acknowledging that the fact situation that arises is similar to that which presented itself before the learned Single Judge of this Court in WP (C) 10589/2015, voices a difficulty being faced by this client (ONGCL), to which, according to him, GAIL owes over ₹ 300 crores, which has to be collected from the petitioner. Mr Gupta, therefore, prays that the petitioner be directed to pay at least part of the said amount, which his client is willing to secure, by furnishing Bank Guarantee or by such other means as this court may deem appropriate.

34. Having heard learned Counsel at length and perused the record, it becomes obvious that the situation, that exists today, insofar as the dispute between the petitioner and the respondents is concerned, is identical to that which presented itself before the learned Single Judge on 30th November, 2015 in WP (C) 10589/2015.

35. To my mind, the interests of consistency – which is

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[2] **2015 (9) SCC 209**

fundamental to proper administration of justice – would demand that this court follows the same approach as was adopted by the learned Single Judge on 30th November, 2015 in WP (C) 10589/2015, which has been accepted by all parties.

36. I am additionally persuaded in this regard by the fact that APTEL, in its order dated 20th September, 2019 found that the order, dated 30th December, 2013 of the PNGRB, was not sustainable, as it had erroneously treated the delivery point for delivery of gas, as Uran instead of Trombay. As the facts stated hereinabove reveal, the PNGRB has, in the presently impugned order dated 18th March, 2020 acknowledged this error but proceeded to reject the petitioner's complaint on another ground. The petitioner has, therefore, had to approach this court twice, on account of the error committed by the PNGRB and cannot, therefore, be placed in a position worse than that in which it found itself on 30th November, 2015, before the learned Single Judge in WP (C) 10589/2015.

37. Insofar as the merits of the controversy between the petitioner and the respondents is concerned, it would not be appropriate for this court to express any opinion, even tentative, thereupon, while the APTEL is *in seisin* of the appeal preferred by the petitioner.

38. Accordingly, the present writ petition is disposed of in the following terms:

(i) The appeal and the applications of the petitioner for interim relief, if any, preferred by the petitioner therein, presently pending before APTEL, shall be taken up by the APTEL within a period of two weeks of its PNG Bench becoming functional.

(ii) The petitioner shall furnish a fresh undertaking to GAIL, in the same terms as those contained in the undertaking furnished on 28th December, 2015, consequent to the directions issued by this court vide its order, dated 30th November, 2015 in WP (C) 10589/2015, within a period of ten days from today. Till the furnishing of the said undertaking, the earlier undertaking, furnished on 28th December, 2015, shall continue to operate.

(iii) Pending the decision of the APTEL, on the appeal, preferred by the petitioner, or the application filed therewith for interim relief, no coercive steps shall be taken against the petitioner, consequent upon the impugned order, dated 18th March, 2020, passed by the PNGRB.

39. It is clarified that this court has not expressed any opinion, one way or the other on the controversy, or the merits of the appeal, preferred by the petitioner before the APTEL, which would be decided uninfluenced by any observation contained in this judgement.

40. All issues are left open and all parties would be at liberty to raise all defences before the APTEL.

41. With these observations and subject to the directions aforesaid, this writ petition is disposed of, with no orders as to costs.

42. Pending applications also stand disposed of.

C. HARI SHANKAR, J.

MAY 04, 2020
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