

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI

(APPELLATE JURISDICTION)

**APL NO 122 OF 2015 & IA NO. 194 OF 2015 &
IA NO. 898 OF 2017 & IA NO. 575 OF 2021**

Dated: 07th July, 2021

**Present: Hon'ble Mr. Justice R.K. Gauba, Judicial Member
Hon'ble Dr. Ashutosh Karnatak, Technical Member (P&NG)**

In the matter of:

GAIL Gas Limited

Through its Chief Operating Officer
Gail Gas Limited
13th & 14th Floor
Jubilee Tower
B-35 & 36, Sector- 1
Noida – 201 301 (UP)

.... **Appellants**

Versus

1. Petroleum & Natural Gas Regulatory Board

1st Floor, World Trade Center
Babar Lane, Barakhamba Road
New Delhi – 110 001

2. M/s Sanwariya Gas Limited

(Formerly known as M/s Saumya DSM Infratech Limited)
Through its Director
Having its registered office at
D-80, Sector – 60
Noida – 201 301 UP

3. Union of India

Through its Secretary
Ministry of Petroleum and Natural Gas
Shastri Bhawan
New Delhi – 110 001

.... **Respondents**

Counsel for the Appellant (s):	Mr. Sacchin Puri, Sr. Adv. Mr. Ajit Puddusery Mr. Kamil Khan Mr. Sandeep Kumar
Counsel for the Respondent (s):	Mr. Raghavendra Shankar Ms Pinki Mehra Mr. Mohit Budhiraja Ms. Shipra Malhotra for R-1 Mr. Shiv Kumar Pandey Mr. Awanish Kumar Mr. Chandrashekhar Chakllabi Mr. Anshul Rai for R-2

J U D G M E N T

PER HON'BLE DR. ASHUTOSH KARNATAK, TECHNICAL MEMBER

- (1) This matter has been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.
- (2) The Appellant GAIL Gas Ltd. has filed an appeal under Section 33(1) of the Petroleum and Natural Gas Regulatory Board Act, 2006 ("**PNGRB Act**") challenging the majority order dated 02.03.2015 by 3:1:1 ("**Impugned order**") passed by the Ld. Petroleum and Natural Gas Regulatory Board ("**PNGRB**") wherein the 03 members out of 05 members of the PNGRB Board held that :-

“the authorization including the Board’s letter dated 26.09.2011 in favour of GAIL Gas (R-4) for the CGD network of Geographical Area (GA) of Firozabad is quashed but the

authorization for this GA in favour of GAIL (R-3) still holds good.

The complaint/petition with regard to issue direction to the Board (R-2) to grant authorization to the petitioner for the charge area of Govardhan and Vrindavan as the area contiguous to the GA of Mathura is dismissed.

GAIL (R-3) can submit a proposal under the relevant Authorizing Regulations 2008 to the Board, if it intends to renunciate the authorization in favour of another entity and in that case, it shall provide all the information as may be called for by the Board. ”∴ (“Impugned judgment”)

- (3) In the Present Appeal, GAIL Gas has prayed to:-
- (a) Allow the present appeal and quash and set aside the order dated 02.03.2015 to the extent it quashes the authorization in favour of the Appellant of the Firozabad GA,
 - (b) Grant Cost of the present appeal.
 - (c) pass such order and further order/ orders as are deemed fit and proper in the facts and circumstances of the case.

(4) **Facts of the Case**

- i) The Appellant, GAIL Gas Ltd. is a wholly-owned subsidiary of GAIL (India) Ltd., incorporated on 27.05.2008 for implementing

downstream gas distribution projects and City Gas Distribution across the country.

- ii) Respondent No.1 Petroleum and Natural Gas Regulatory Board (herein referred to as PNGRB), is a statutory body constituted under the provisions of the Petroleum and Natural Gas Regulatory Board Act, 2006 (“PNGRB Act”) notified via gazette notification dated 31st March 2006. On appointed day i.e 01.10.2007, all the provisions of the Act, except Section 16, which provided the power to the Board for granting authorization to entities for laying pipelines etc., were brought into force by the Central Government by notification in the Gazette.
- iii) In the Public Interest Litigation (PIL) of M C Mehta vs UOI & ors. filed before the Hon’ble Supreme Court, various orders pertaining to the effects of pollution on the Taj Mahal were passed including directions for shifting of industries in the area to an eco-friendly fuel and to stop the usage of coke. Vide order dated 10.04.1996, the Hon’ble Court tasked GAIL (India) Ltd. to supply gas to the

area so that the industries could switch over to the eco-friendly fuel without further delay. Vide letter dated 27.07.1997, the Central Government directed GAIL (India) Ltd. to take up the secondary distribution of gas in the Taj Trapezium Zone (TTZ) and principal, 0.6 MMSCMD gas was allocated, which was to be later taken by joint venture company to be set up by GAIL (India) Ltd., and was directed to take necessary action for the same.

- iv) Further pursuant to the Hon'ble Supreme Court's orders, the Central Pollution Control Board delineated the Taj Trapezium Zone which comprised six districts including Agra, Mathura, Firozabad, Hathras, Etah and Bharatpur.
- v) On 12.06.2009, Respondent No. 2 i.e M/s Sanwariya Gas was granted authorization by PNGRB through a bidding process for setting up the City Gas Distribution network in the Mathura GA, though part of TTZ which did not include the Charge Areas of Vrindavan, Govardhan.

vi) GAIL, vide its letter dated. 17.10.2008, submitted an application Under Regulation 17 of Petroleum and Natural Gas Regulatory Board (Authorising Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008 for acceptance of Central Governments authorization under Section 17(2) of the PNGRB Act. Further vide letter dated 18.03.2011, GAIL (India) Ltd. informed the Board that GAIL (India) Ltd. has incorporated a Wholly Owned subsidiary Company to carry out all the CGD activities and transferred the Agra Firozabad CGD assets to GAIL Gas Ltd. and to issue the authorization in favour of GAIL Gas Ltd. instead of GAIL (India) Ltd.. It is relevant to mention herein that the Board of Directors of GAIL (India) Ltd. in their 287th Board Meeting held on 06.04.2011, had approved the transfer of local distribution project in the Agra-Firozabad area to GAIL Gas Ltd. In line with the decision, GAIL (India) Ltd. and the Applicant, GAIL Gas Ltd, entered into a Business Transfer Agreement dated 31.10.2011 for transfer of

the entire distribution network of GAIL (India) Ltd. in the Agra-Firozabad area. Under the Agreement the date of transfer was 16.11.2011.

vii) PNGRB issued the letter dated 26.09.2011 accepting the authorization granted by the Central Government earlier and granted exclusivity to the Appellant, a wholly-owned subsidiary of GAIL (India) Ltd., for the Taj Trapezium zone which included charge areas like Firozabad, Fatehpur Sikri, Bharatpur, Govardhan and Vrindavan excluding the geographical area of Mathura and Agra. The entire allocation of APM gas of 1.1 MMSCMD for distribution to Agra and Firozabad industries was also transferred by the Ministry of Petroleum and Natural Gas (MOP&NG) vide letter dated 29.09.2011 from GAIL (India) Ltd. to GAIL Gas Ltd.

viii) In 2013 Respondent No. 2 (M/s Sanwariya Gas) challenged the acceptance of authorization dated 26.09.2011 before the Hon'ble Delhi High Court which was dismissed on the ground of lack of

territorial jurisdiction. Thereafter it again filed Writ Petition No 2809 of 2013 before the Hon'ble Delhi High Court which was dismissed after noticing that Member (Legal) has been appointed to the Board and it has an effective alternative remedy under the PNGRB Act with liberty to the Respondent No 2 (M/s Sanwariya Gas) to approach the Board. The Respondent No. 2 (M/s Sanwariya Gas) thereafter filed LPA No. 332 of 2014 against the order of the Single Judge of the Hon'ble High Court and when the said LPA came up for admission, the Division Bench of the High Court, after noticing that the Respondent No. 2 (M/s Sanwariya Gas) had an effective alternative remedy dismissed the LPA vide Order dated 15.07.2014 thereby upholding the order passed in the Writ Petition. Respondent No. 2 (M/s Sanwariya Gas) thereafter filed Special Leave Petition No. 2370 of 2014 before the Hon'ble Supreme Court which was dismissed vide order dated 12.09.2014 with the direction that the PNGRB would render its decision in the matter uninfluenced by the

affidavit filed by it before the High Court. Thereafter the Respondent No. 2 (M/s Sanwariya Gas) filed the present complaint under Section 25 of the PNGRB Act before Respondent No.1 (PNGRB) wherein it sought the following reliefs:

- i) *“Quash the authorization of Respondent No 4 for Geographical area of Firozabad including the letter dated 26.09.2011 of Respondent No 2 purportedly authorising Respondent No 4 for CGD network in the geographical area of Firozabad.*
 - ii) *Direct Respondent No 2 to grant authorization to the petitioner for the charge area of Govardhan and Vrindavan as the area contiguous to be a geographical area of Mathura.*
 - iii) *Direct the Respondents to enforce the policy for Development of Natural Gas Pipelines and City or Local Natural Gas Distribution Networks framed by Respondent No 1.*
 - iv) *Condone the delay in filing this complaint, if any.*
 - v) *Pass any other order that is deemed fit and proper under facts and circumstances of the case.”*
- ix) The said complaint was disposed of by the PNGRB on 02.03.2015 by passing three separate orders. Vide all three orders, PNGRB unanimously dismissed the complaint filed by Respondent No. 2, In the “Impugned order” passed by three Members of the Board, the relief sought by the Respondent No.2 (M/s Sanwariya Gas) that the charge areas of Govardhan and

Vrindavan may be carved out from the Firozabad GA and authorised to them on the principle of contiguity was rejected. However, in the said Impugned order the authorization dated 26.09.2011 concerning TTZ Area in favour of the Appellant was quashed on the reasoning that the same had been granted by the then Chairman of PNGRB in the exercise of the powers delegated to him which was found to be bad by the Hon'ble Delhi High Court. It was further held that the authorization in favour of GAIL still holds good. The Members also held that GAIL can submit a proposal under the relevant Authorizing Regulations, 2008 to the Board, if it intends to renunciate the authorization in favour of another entity and in that case it shall provide all the information as may be called for by the Board. The Chairman wrote a separate dissenting order whereby after taking into consideration the fact that the area had been originally allocated by the Hon'ble Supreme Court for distribution of gas and that the Appellant is a wholly-owned subsidiary of GAIL and thus the

subsidiary could not be said to have a separate existence from GAIL with regard to TTZ held that the authorization in favour of the Appellant did not call for any interference. The Chairman also referred to Section 9(c) of the PNGRB Act to hold that any irregularity in the procedure of the Board not affecting the merits of the case does not render the action invalid disagreed with the order passed by the majority. In a separate order, another Member held that the Complainant having been authorised through a bidding process in the Mathura GA does not have the locus - standi to raise authorization of Firozabad GA to the Appellant as a dispute between entities and hence the complaint to be dismissed with costs.

- x) Being aggrieved by the impugned order dated 02.03.2015, the present appeal is being filed before this Hon'ble Tribunal. It may also be noted that the said impugned order was also challenged by Respondent No. 2 before this Tribunal through Appeal bearing No. 125/2015. The said appeal has been withdrawn by

Respondent No. 2 vide order dated 26.08.2020. Thus the only issue required to be deal with now with the present Tribunal is concerning the quashing of authorization by PNGRB of Firozabad GA given by Respondent No. 1 (PNGRB) vide letter dated 26.09.2011.

- (5) Contentions of the Appellant i.e GAIL Gas in the present Appeal. are:-
- i) That PNGRB has erred in concluding that the acceptance of the authorization vide letter dated 26.09.2011 in favour of Appellant was issued by Chairman and not by the Board. PNGRB has accepted the Central Government authorization and granted exclusivity to the Appellant i.e GAIL Gas Limited for Firozabad Geographical area. The letter dated 26.09.2011 has been issued by the Secretary, PNGRB. No record to the contrary was produced during the hearing before the PNGRB and/or before this Hon'ble Tribunal. Further after filing the present Appeal by Appellant, PNGRB encashed the Bank Guarantee dated 23.11.2015 submitted by GAIL Gas at the time of authorization,

on the ground of Appellant not meeting its target, which was challenged before this Hon'ble Tribunal in Appeal no. 88 of 2016. The said appeal was disposed of vide order dated 03.11.2017 and did not interfere with the impugned order wherein PNGRB invoked Bank Guarantee deposited by GAIL Gas for Firozabad GA for not achieving the targets. The said Judgement dated 03.11.2017 was not challenged by either of the parties wherein PNGRB itself took the stand with respect to the authorization dated 26.09.2011 by the Chairman as being valid and final.

- ii) The Appellant which is a 100% subsidiary of GAIL(India) Ltd. is also under its control and there is no occasion for the PNGRB of piercing the veil and PNGRB did not attempt to conclude who is in actual control of the Appellant before holding that Appellant cannot be termed as 100 % subsidiary.
- iii) PNGRB has no occasion to pass the Sue-Motu order concerning letter dated 26.09.2011.

- iv)** PNGRB in its order have not paid heed to the principle of Promissory Estoppel. Appellant acted on the letter dated 26.09.2011 and made a huge investment to the tune of 290 crores in the projects and having it induced to do so PNGRB could not have withdrawn the said permission. Appellant has relied on the Hon'ble Supreme Court Judgement titled as M/s Motilal Padampat Sugar Mills Co. Ltd. Vs State of Uttar Pradesh & Ors. Cited as (1979) 2 SCC 409.
- v)** PNGRB erred in holding that it has the power under Section 12(1)(b)(v) of the PNGRB Act as it only pertains to complaint inter - se relating to the contravention of any of the provisions of the PNGRB Act and not to an order passed by the PNGRB itself.
- vi)** No power to the PNGRB under section 25 of the PNGRB Act to review its own order. Further, no justifiable reason and/or ground to review acceptance of authorization after 4 (four) years.
- (6) Contentions of Respondent No. 1 (PNGRB) through written submission dated 23.03.2021 are that:-

- i) GAIL (India) Ltd. requested PNGRB to issue the authorization of Firozabad TTZ in favour of the Appellant instead of GAIL (India) Ltd.
- ii) That the Chairperson of the Board accepted the Central Government's Authorization and issued the letter dated 26.09.2011 which authorized the Appellant to supply gas in the Firozabad GA in TTZ which is ultra vires in terms of section 16,17 of the Act and Regulation 17 of the Authorization Regulation & was correctly quashed by Majority members in PNGRB order dated 02.03.2015.
- iii) The contention of the Appellant that it had been authorized by virtue of Hon'ble Supreme Court's direction to supply the natural gas to the TTZ Area cannot be regarded as having authorized in 1996 an entity that only came into existence 12 years later. Further, the submission that the authorization of GAIL /the Appellant stands on some different footing qua all other authorizations by virtue of Supreme court orders dated

10.04.1996 and 30.12.1996 has already been considered and rejected by this Hon'ble Tribunal in its judgement dated 03.11.2017 in Appeal no. 88 of 2016.

“12.... Both the Supreme Court orders dated 10.04.1996 in (2012) 8 SCC 123 and Dated 30.12.1996 in (1997) 2 SCC 353 quoted by the Appellant were primarily concerned with the safety of the Taj Mahal from the point of view of pollution because of use of coke and coal by the industries. The Supreme Court ordered the industries to switch over to eco-friendly fuel viz natural gas. The Supreme Court did not deal with the use of gas for domestic cooking i.e. use of PNG. The Supreme Court also recorded that it was told to the Supreme Court that the expertise to supply gas to the industrial units was available with GAIL. The Supreme Court accordingly entrusted the job to GAIL. The Supreme Court did not in any manner mention that GAIL would be outside any control of any regulatory authority or the Government of India in future for supply of gas in the Taj Trapezium area. There is also no indication in both the orders that in future, no regulatory authority would be authorized to impose any additional conditions on GAIL in respect of supply of gas to the industrial units in Taj Trapezium area...

...14. These directions also do not indicate that the Supreme Court wanted to keep GAIL outside the regulatory control of the Board”

- iv) The acceptance of authorization could only be issued by PNGRB in favour of GAIL and not in favour of GAIL Gas as GAIL was the entity that has received the authorization from the Central Government for distribution of natural gas to industrial units in the

Firozabad GA which included five charge areas of Vrindavan, Fatehpur Sikri, Bharatpur, Goverdhan and Firozabad.

- v) Only the entity authorized by the Central Government at any time before 01.10.2007 can:
- a) Obtain the benefit of the legal fiction engrafted in the proviso to section 16.
 - b) Furnish the particulars of the activities undertaken by it regarding laying, building, operating or expanding any city or local natural gas distribution network to the Board under the proviso to Section 17(2).
 - c) Make an application in the format specified in Regulation 17 read with Schedule H of the Authorization Regulations and seek a grant of exclusivity for a GA from the Board.
- vi) GAIL and GAIL Gas are identical and mutually interchangeable entities as a matter of law are contrary to the well-settled principle

that even a parent company and its wholly-owned subsidiary are separate and distinct legal entities in the eyes of law.

- vii) The acceptance of authorization in favour of GAIL Gas Ltd. was Ultra Vires Regulation 10(4) Read with 10(5) of the Authorization Regulations.

- viii) The fact that GAIL (India) Ltd. had resolved to decide to hive off a part of its business to the Appellant is a matter of the indoor management of GAIL and has no legal effect qua third parties, much less can it bind the statutory body (PNGRB) tasked with determining whether and on what terms such renunciation is to be permitted.

- ix) As per the applicable law on 26.09.2011, the only legal avenue available to GAIL was to apply for acceptance of authorization under section 17(2) of the PNGRB Act read with Regulation 17 of the PNGRB Authorization Regulations and then renunciate the same in favour of the Appellant after the expiry of the prescribed

period of 03 years from the date of authorization. The letter dated 26.09.2011 issued by the Chairperson erroneously sought to pass the procedure enumerated in Regulation 10(3) to 10(5) for renunciation/ transfer of authorization and as such was ultra vires.

- x) PNGRB is vested with the powers to pass the Impugned Order dated 02.03.2015, reviewing and setting aside the letter dated 26.09.2011.
- xi) The impugned Authorization was bad in law having been issued in a manner contrary to the law laid down by Hon'ble Delhi High Court and affirmed by the Hon'ble Supreme Court in Voice of India. The Impugned Authorization was issued by the Chairperson in the exercise of powers delegated unto him vide Board Resolution dated 11.09.2008, which was been held to be illegal by the Delhi High Court in Voice of India vs Union of India & Ors. ILR (2010) III Delhi 367 (read with the Delhi High Court

order dated 08.02.2010 in WP (C) No. 9022/2009) which judgement was confirmed in relevant part by the Hon'ble Supreme Court vide order dated 08.02.2013 passed in SLP (C) Nos. 5408 of 2010, 5576 of 2010 and 7770 of 2010.

- xii) There is no contradiction between PNGRB's order dated 23.11.2015 invoking the Appellant's performance bank guarantee and the PNGRB's stand in the present proceedings that the impugned Authorization is invalid in law and was rightfully quashed.

(7) Deliberations:

After hearing counsels and submissions from Appellant and the Respondent the following limited issues need to be decided by this Tribunal-

Whether PNGRB was justified in quashing, *Suo-Motu*, the acceptance of authorization dated 26.09.2011 granted by PNGRB in favour of Appellant (GAIL Gas Limited).

- (8) The Contention of Respondent No. 1 i.e PNGRB is that the Chairperson of the Board accepted the Central Government's Authorization and issued the letter dated 26.09.2011 which authorized the Appellant to supply gas in the Firozabad GA in TTZ which is ultra vires in terms of Section 16,17 of the Act and Regulation 17 of the Authorization Regulation. The Impugned Authorization was issued by the Chairperson in the exercise of powers delegated unto him vide Board Resolution dated 11.09.2008, which was been held to be illegal by the Delhi High Court in Voice of India vs Union of India & Ors. ILR (2010) III Delhi 367.
- (9) PNGRB has also filed a document titled ***“Recognition of Central Government authorization for M/s GAIL (India) Ltd. for operating CGD network in Firozabad GA (TTZ Area) under Regulation 17(1) dated 5.7.2011.”*** along with the affidavit dated 24.05.2011. The Appellant contends that the authorization of Firozabad GA vide letter dated 26.09.2011 has been issued on behalf of the Board by the then Secretary, whereas the Counsel for the PNGRB argued that though

the letter dated 26.09.2011 states that it has been issued by the Board, however, the Board in the Impugned Order after looking at the evidence had concluded that the same was issued by the Chairman. Specifically, attention has been drawn to page 19 of the impugned Order where the Board has recorded the following:

“We have heard Ld. Counsel for all concerned and perused the evidence on record. The official record of the Board relating to the authorization of GA Firozabad has also been requisitioned from the Board’s office for perusal”.

It is thus construed that only after seeing the entire record, the majority decision was rendered that it was the Chairman who had granted the authorization. However, no record has been filed by PNGRB in the present matter to substantiate the said argument. In the present appeal, the grounds sufficiently shows that the finding has been challenged. Even otherwise it was for PNGRB to establish that it was the Chairman alone who had sanctioned without the consent of other members, the record of which is in the exclusive possession of the PNGRB. The PNGRB’s stand during the hearing before the Board, while dealing with the complaint filed by M/s Sanwariya Gas,

reveals that the authorization has been accepted by the Board. PNGRB never took up the issue in the hearing before the Board that the authorization was invalid because only the Chairman had granted authorization without consulting the members. It seems that during the hearing Board *Suo-Motu* took the issue concerning Chairman solely having granted the authorization without the consent of other members of the Board. PNGRB had taken a stand before the Board in the course of hearing that the authorization letter dated 25.09.2011 has been issued by the Board.

While examining the complaint of M/s Sanwariya Gas respecting its claim over Firozabad GA and allegations of its rights on account of operations of the Appellant in the said GA, the Board went beyond the questions to be decided and proceeded to find fault with their own process leading to the issuance of the authorisation letter dated 25.09.2011 without sharing the complete record with the Appellant or allowing the Appellant to meet the case developed over and above the complaint of M/s Sanwariya Gas. However, as we intend to go

into the merits of the matter, therefore, we will deal with the stand of the PNGRB being taken now before us.

- (10) During the hearing, the counsel for PNGRB requested that he would like to show the record based on which it was concluded that the authorization was granted by the Chairman acting solely. In support of the same, the PNGRB filed the above-said document titled ***“Recognition of Central Government authorization for M/s GAIL (India) Ltd. for operating CGD network in Firozabad GA (TTZ Area) under Regulation 17(1) dated 05.07.2011.”***. However, the said document referred, contains Chairman comments for accepting the authorization of TTZ in favour of GAIL. It has been pointed by the Ld. Senior Counsel for the Appellant that the said noting dated 05.07.2011 has been upheld by the Board. The impugned Order records (page no. 33) as under:

“The documents which led to the acceptance of the Central Government’s authorization by the Board in favour of GAIL (R-3) are available on official record with regard to Firozabad GA (TTZ Area) and their examination reveals that the GAIL (R-3) had taken up the CGD Project in Firozabad GA after incurring an expenditure of multi-millions under the direction of MOP&NG and the Hon’ble Supreme Court to supply natural gas to industrial consumers in TTZ

and this project had become functional prior to the commencement of the 'Act' and the establishment of the 'Board', and the Central Government's authorization was accepted under Section 17 (2) of the Act read with Regulation 17 (1) of the Petroleum & Natural Gas Regulatory Board (Authorising Entities to Lay, Build, Operate or Expand City, or Local Natural Gas Distribution (Networks) Regulations, 2008 vide Order dated 05.07.2011."

- (11) Though the 'impugned Order" records that the Board had accepted Central Government's authorization, however, the Ld. Counsel for PNGRB has clarified that no order dated 05.07.2011 was ever issued and, it is only a noting. Further from the above-mentioned record, it cannot be concluded that the Chairman had acted solely. The PNGRB has failed to produce any record in support of its contention that the Chairman had acted solely. Since the record shown during the hearing is restricted to the noting dated 05.07.2011, we have specifically questioned the Ld. counsel for the PNGRB to show us the administrative files of the Board leading to the issuance of letter dated 25.09.2011. We received no response. It has to be remembered that the Board is the custodian of the record. The onus to prove one way or the other on the basis of such records is squarely that of the Board. The Board having failed to account for the complete records, an

adverse inference is drawn to the effect that if the complete records have been shown, the same would not support the unilateral contention of the Board that the authorisation letter dated 25.09.2011 had not received approval of the Board.

(12) Thus, it may be construed that after due deliberation authorization vide letter dated 26.09.2011 in favour of Appellant was issued by the Board, duly signed by Secretary PNGRB, after accepting Bank Guarantee submitted by GAIL Gas for TTZ.

(13) It would not be out of place to further clarify that in the operative part of the Impugned Order it has been held that authorization in favour of GAIL (India) Ltd. still holds good. Another reason to conclude that the finding in the Impugned Order is invalid on the face of it that only official record before the Board was the noting dated 05.07.2011 and the same has been upheld to be valid then without any basis the PNGRB had concluded that the Chairman had acted solely without the consent of other members when the Judgement itself upholds the same noting to be valid.

(14) PNGRB has contended that the acceptance of authorization could only be issued in favour of GAIL and not Appellant (GAIL Gas Limited) as GAIL is an entity that has received Central Government Authorization for distribution of natural gas to industrial units in Firozabad. Only the entity authorized by the Central Government at any time before the appointed day i.e. 01.10.2007 can obtain the benefit of the legal fiction engrafted in the proviso to section 16. There is no dispute that according to Hon'ble Supreme Court order in M.C Mehta, GAIL (India) Ltd was asked to supply gas to the TTZ area so that the industries could switch over to eco-friendly fuel. In terms of the orders passed by the Hon'ble Supreme Court, the Central Government, Ministry of Petroleum and Natural Gas (MOP&NG) vide its letter dated 27.07.1995 in principal allocated gas to GAIL for the secondary distribution in the Taj Trapezium area and also directed to take necessary steps for setting up a joint venture for the same. Pursuant of setting up of PNGRB, GAIL submitted an application vide letter dated 17.10.2008 under Regulation 17 of Petroleum and Natural

Gas Regulatory Board (Authorising Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008 for acceptance of Central Governments authorization under Section 17 (2) of the PNGRB Act. Section 17(2) of the PNGRB Act states:-

*“An entity which is laying, building, operating or expanding, or which proposes to lay, build, operate or expand, a city or local natural gas distribution network shall apply in writing for obtaining an authorization under this Act: **Provided that an entity laying, building, operating or expanding any city or local natural gas distribution network authorised by the Central Government at any time before the appointed day shall furnish the particulars of such activities to the Board within six months from the appointed day.**”*

- (15) There is no dispute that the requirement of Section 17 (2) of the PNGRB Act is to furnish the information. Vide letter dated 18.03.2011 GAIL (India) Ltd informed the PNGRB Board about the incorporation of its wholly-owned subsidiary company i.e GAIL Gas Ltd., for carrying out all the CGD activities and transferring the Agra Firozabad CGD assets to GAIL Gas and issue authorization of TTZ in favour of GAIL Gas Ltd. instead of GAIL (India) Ltd. In the 287 Board meeting held on 06.04.2011, GAIL's Board approves the transfer of local distribution assets of Agra Firozabad to GAIL Gas Ltd. PNGRB Board

vide letter dated 26.09.2011 accepted the Central Government authorization and granted exclusivity to GAIL Gas for the Firozabad Geographical Area which included five charge areas, i.e. Firozabad, Fatehpur Sikri, Bharatpur, Goverdhan and Vrindavan. The entire allocation of APM gas of 1.1 MMSCMD for distribution to Agra and Firozabad industries was also transferred by the Ministry of Petroleum and Natural Gas vide letter dated 29.09.2011 to GAIL Gas Ltd. Thus it is construed that GAIL has complied with the requirement of Section 17(2) of the PNGRB Act.

- (16) It is also contended by PNGRB that the acceptance of authorization in favour of GAIL Gas Ltd. was Ultra Vires Regulation 10(4) Read with 10(5) of the Authorization Regulations. It is also submitted by PNGRB that regulations 10 (4) and 10 (5) have further been amended. The following table provides the original definition as well as the amended definition:

Regulations 10 (4) and 10 (5) before the amendment

10 (4) The entity intending to renunciate the authorization in favour of another entity after the end of the three years period shall submit

a proposal to the Board at least thirty days in advance and shall provide all information as may be called for by the Board.

10 (5) The Board after satisfying itself that the proposal will not adversely affect the existing or proposed activities of laying, building, operating or expansion of the CGD network shall either accept the proposal in full or with such modifications as it may deem fit and in a case where the entity is permitted by the Board to take over the activities of laying, building, operating or expanding the CGD network such entity shall abide by the existing or modified terms and conditions of the authorization including compliance with the service obligations and adherence to the quantity of service standards:

Provided that the Board reserves the right to reject the proposal in the public interest and in such a case the Board shall provide in writing the reasons for such rejection.

Regulations 10 (4) and 10 (5) amendment subsequent to 26.09.2011 and presently read as:-

10 (4). The entity intending to renunciate the authorization in favour of another entity after the end of the [five years or till achievement of cumulative work programme to be achieved by the end of five contract years, whichever is later] shall submit a proposal to the Board at least thirty days in advance and shall provide all information as may be called for by the Board.

10 (5) The Board after satisfying itself that the proposal will not adversely affect the existing or proposed activities of laying, building, operating or expansion of the CGD network shall either accept the proposal in full or with such modifications as it may deem fit and in a case where the entity is permitted by the Board to take over the activities of laying, building, operating or expanding the CGD network such entity shall abide by the existing or modified terms and conditions of the authorization including compliance with the service obligation and adherence to the quality of service standards:

Provided that the Board reserves the right to reject the proposal in the public interest and in such a case the Board shall provide in writing the reason for such rejection.”

(17) It is contended by the PNGRB that PNGRB can now in terms of the present regulation transfers it to a subsidiary which it could not have done in relevant time. In the Impugned Order, PNGRB has specifically held that GAIL can submit a proposal under the Authorising Regulation if it intends to renunciate the authorization in favour of another entity along with information. Thus, it is conceded that PNGRB has the power to transfer the authorization in favour of GAIL Gas and the only contention is that for the same an application must be filed under the relevant Authorization Regulation along with relevant data for PNGRB to proceed and as the same has not been done therefore the authorization in favour of GAIL Gas is invalid. In our view, regulation 10 (4) and 10 (5) are procedural and are not substantive. Moreover, after the amendment, it is clear that a transfer can be allowed in favour of a subsidiary.

(18) Further, the record reveals that after the issuance of the authorization, the Appellant continued to make investments and expand the network. The PNGRB had regular meetings with the Appellant to

monitor the progress of the work being undertaken by the Appellant in the authorised area. In fact, it is also revealed that on finding that the Appellant had failed in its targets which were issued vide the authorization dated 26.09.2011, the PNGRB went ahead and encashed Bank Guarantee of TTZ Area submitted by GAIL Gas vide letter dated 23.11.2015. It is also revealed that prior to the encashment of the Bank Guarantee there was various meetings and correspondences between the Appellant and PNGRB.

(19) We find it strange as to:

- (i) Why did the PNGRB not raised this issue immediately when the authorization dated 26.09.2011 was granted and allowed the Appellant to continue for a long period of 4 years and then on a procedural aspect has invalidated the said authorization.
- (ii) Why PNGRB was monitoring the non-authorised entity and also taking cognizance of the capital expenditure being done by the Appellant.

(iii) Why PNGRB encashed the Bank guarantee submitted by GAIL Gas Ltd. on lack of performance and the first instant and took the BG from a non-entity and they might have deposited in the received head from GAIL Gas.

(20) We see no reason to uphold the "Impugned Order", in view of the fact that regulations 10(4) and 10(5) are merely procedural in nature and considering the actions of the PNGRB. Once, the PNGRB had granted the authorization knowing it well that it would be acted upon and same has actually been acted by the Appellant and the said actions of the Appellant were accepted by the PNGRB, thus there is no occasion to undo what has been done now for 10 years for mere procedural aspect where the Appellant would have to go back to PNGRB and seek re-issuance of authorization. It is also important to point out that the PNGRB proceeded on a presumption that there was an authorization in favour of GAIL whereas the counsel for the PNGRB has admitted that no such authorization was ever issued in favour of GAIL, thus the question of transfer of authorization from

GAIL to the Appellant would itself not arise when the authorization in the first place after due deliberation was granted to GAIL Gas in accordance with the law. As per the counsel for PNGRB there is no order dated 05.07.2011 in favour of GAIL but only a noting which has been produced. Normally, prior to the issuance of the authorization dated 26.09.2011, there would have been a Board meeting, where the Board would have cleared the issuance of the authorization. A similar procedure would have been followed prior to the web hosting of the said authorization. There would be internal meetings of the Board for which the only PNGRB is Privy and not Appellant. The web hosting of the authorization in favour of GAIL Gas took place on 28.11.2011. As per the counsel for the respondent the issue of the authorization was raised by respondent no.2 i.e. Sanwariya Gas in December 2011 itself, thus the entire Board was aware of the issue in December 2011 itself.

- (21) The respondent has only argued that there is a technical flaw in the transfer of authorization in favour of the Appellant which should have

been in favour of GAIL. At the same time, the respondent has also stated that no authorization order was ever issued in favour of GAIL thus taking the contradictory stand. The respondent has not shown as to why the authorization in favour of Appellant could not be issued in the absence of the authorization in favour of GAIL. The respondent has also taken a contradictory argument that the noting dated 05.07.2011 titled as **“Recognition of Central Government authorization for M/s GAIL (India) Ltd. for operating CGD Network in Firozabad GA (TTZ Area) under Regulation 17 (1)”** has been issued by the Chairman without the consent of Board Members, therefore, the authorization in favour of Appellant is invalid. While at the same time the respondent has also taken a stand that this noting is a valid authorization order in favour of GAIL. It is strange that while the same document is being stated to be void, as the same was not considered by the members other than the Chairman, however, when it comes to GAIL, it has still been held to be duly considered to be valid. In our view, this contradictory stand itself is enough to set aside

the "Impugned Order" as the same is unreasoned and without any basis.

(22) Another issue raised by the Counsel for the respondent was that GAIL Gas is not the 100% subsidiary of GAIL. It has been admitted by PNGRB that GAIL Gas is a 100% subsidiary of GAIL, however, the entire argument is based on a stand taken by GAIL Gas that arms-length dealing with GAIL. It is clear that the Appellant is a 100% subsidiary of GAIL and has been treated so throughout. The Appellant had pleaded and there is no rebuttal to the pleadings that the Appellant is 100% subsidiary of GAIL. Sufficient documents and records have been placed on records and there are being no effort to refute, we have no hesitation in concluding that the appellant is, in fact, 100% subsidiary, owns and controlled by GAIL.

(23) The judgement of Voice of India does not apply to the facts and circumstances of the present case. The said judgement was rendered in the year 2009 while the authorization in the present case has been issued in the year 2011. The Board approval has been considered

void by the PNGRB Board vide "Impugned Order" dated 26.09.2011 in the context of the Voice of India (VOI) judgement. The voice of India judgement had examined certain acts of the then Chairman PNGRB, indulged in on his own. The authorization letter dated 25.09.2011 was not a subject matter of the said case. Any adverse comments or conclusions respecting other acts of the Chairperson in the name of the Board in the judgment of Voice of India cannot be availed off to set at naught, every other action, wherein the same Chairperson may have participated. The effect of Judgement in Voice of India has to be restricted to the transactions, challenged in the said matter and the ruling in the said case cannot be applied generally. Crucially, to apply the ratio of Voice of India Judgement, it will have to be first shown that the Chairperson of PNGRB had acted in excise of the delegated powers by himself. Since there is no evidence supporting such a contention, the invitation of Judgement in Voice of India is misplaced. It is clear from the fair reading of the majority judgement under-challenged here at the Board has assumed that the Chairperson

would have acted on his own rather than routing the matter through the Board. There is no foundation for such an assumption.

- (24) It is also clear from the record that GAIL, which was authorized by the Central Government had to merely inform the PNGRB in accordance with Section 17 (2) of the PNGRB Act read with Regulation 17 of the Authorization Regulation and nothing more was required to be done other than a ministerial lack of acceptance of the information of PNGRB. In our view, there is no requirement of any action to be taken by the Central Government in the matter keeping in view that the Appellant was already authorized by the Central Government. GAIL had not only applied to PNGRB along with the authorization by the Central Government but also has requested that the authorization be issued directly in the name of the Appellant, which was also duly done in lines with the directions of the Hon'ble Supreme Court and the Central Government. It is relevant to mention herein that the supply of natural gas to the Taj Trapezium Zone originated from an order by the Hon'ble Supreme Court in a Public Interest Litigation entitled M.C.

Mehta Vs. UOI & Ors. pertaining to the effects of pollution in the Taj Mahal because of the use of coke and coal in and around the area of Taj Mahal. GAIL was tasked by the Court to supply gas to the area. Vide Order dated 10.04.1996 (reported in (2012) 8 SCC 123, at page 125) the Hon'ble Supreme Court the Court had directed as under:

“10. Pursuant to this Court’s order dated 14-3-1996 Mr P.C. Gupta, General Manager (Civil), Gas Authority of India Ltd. has filed an affidavit dated 2-4-1996. It is stated in the affidavit that the Ministry of Petroleum and Natural Gas has already allocated 0.60 MMSCMD for distribution to the industrial units in Agra and Firozabad. It is stated that as per the schedule already filed in this Court, the two pipelines shall be completed by December 1996. It is further stated that the quantity of gas as mentioned above is only for the purposes of supplying the same to the industries located within the Taj Trapezium.

11. We have no doubt that while laying down the supply line within the city of Agra, the safety of Taj and also the people living in the city of Agra shall have to be taken into consideration. We are told that expertise in this respect is available with GAIL. If necessary, the opinion of NEERI, which has been associated by this Court in Taj Trapezium matters, can also be obtained by GAIL.

12. We have already heard the arguments regarding the relocation of industries from the Taj Trapezium. Some of the industries which are not in a position to get gas connections or which are otherwise polluting may have to be relocated outside the Taj Trapezium. GAIL may also examine whether in the event of the availability of more quantity of gas, the same can be supplied to the industries outside the Taj Trapezium which are located in the vicinity from where the gas pipe is passing.

13. Mr Gupta has further stated that for the purposes of laying a distribution network within the Taj Trapezium; GAIL is establishing a joint venture company. However, pending the formation of the joint venture company, the required functions are being performed by GAIL. It is stated that GAIL had advertised comparative prices and heat

equivalent of various fuels in the newspapers circulated in Agra and Firozabad to enable the industries, who are prospective consumers of gas to evaluate the economics of gas conversion. So far 214 parties from Agra and 364 parties from Firozabad have responded. According to the affidavit, these responses are being processed.”

(25) Thus it may be construed that the Hon’ble Supreme Court while giving the task to GAIL for supplying gas to industries in TTZ took the cognizance of GAIL’s affidavit of establishing a joint venture company. Thereafter vide Judgment dated 30.12.1996 (reported in (1997) 2 SCC 353) the Hon’ble Supreme Court had ordered various industries of Agra/ Firozabad region to switch over to environment-friendly fuels and further to approach/apply to GAIL for grant of natural gas connections and also directed the Uttar Pradesh Pollution Control Board (UPPCB) to issue individual notices and also public notice to the remaining industries of Taj Trapezium Zone (TTZ) to apply for gas connections so as to avoid large scale pollution in the area due to use of coke and coal which was found to be affecting the Taj Mahal. The relevant portion of the Order is extracted as under:

“35. We order and direct as under:

(1) The industries (292 listed above) shall approach/apply to the GAIL before 15-2-1997 for grant of industrial gas connection.

(2) The industries which are not in a position to obtain gas connections and also the industries that do not wish to obtain gas connections may approach/apply to the Corporation (UPSIDC)/Government before 28-2-1997 for allotment of alternative plots in the industrial estates outside TTZ.

(3) The GAIL shall take final decision in respect of all the applications for grant of gas connections by 31-3-1997 and communicate the allotment letters to the individual industries.

(4) Those industries which neither apply for gas connection nor for alternative industrial plot shall stop functioning with the aid of coke/coal in the TTZ with effect from 30-4-1997. Supply of coke/coal to these industries shall be stopped forthwith. The District Magistrate and the Superintendent of Police shall have this order complied with.

(5) The GAIL shall commence supply of gas to the industries by 30-6-1997. As soon as the gas supply to an industry commences, the supply of coke/coal to the said industry shall be stopped with immediate effect.”

- (26) Pursuant to this order of the Supreme Court, MOP&NG vide its letter dated 27.07.1995 directed that the secondary distribution of natural gas in TTZ be taken by a joint venture company to be set up by GAIL. Thus it is clear that much before the enactment of the PNGRB Act, 2006, GAIL had been tasked by the Hon'ble Supreme Court to supply gas to TTZ. Vide letter dated 27.07.1995, the Central Government authorized GAIL (India) Ltd. to take up the secondary distribution of

gas in the Taj Trapezium Zone (TTZ) and principal, 0.6 MMSCMD gas was allocated, which was to be later taken by joint venture company to be set up by GAIL(India) Ltd., and was directed to take necessary action for the same. The Board accepted the authorization granted to the Appellant by MoP&NG as per Section 17 of the PNGRB Act, 2006 vide letter dated 26.09.2011. Further, vide letter dated 29.09.2011, Central Government has accepted the authorization in favour of the Appellant and transferred the 1.1 MMSCMD Gas in favour of the Appellant. Thus, the documents which are indicating approval in favour of Appellant are as under :

- (i) PNGRB Board order dated 26.09.2011
- (ii) MoP&NG letter dated 29.09.2011

The letter of MoP&NG dated 29.09.2011 is a deemed approval to the acceptance of authorization in favour of Appellant, which states as follows:-

Quote

“Please refer to this Ministry’s letters No L-12011/8/94-GP dated May 2, 1995, and No. L-2011/2/00-GP dated June 5, 2000, whereby APM allocations of 0.60 MMSCMD & 0.5 MMSCMD (totaling to 1.1 MMSCMD) respectively were made in favour of GAIL for Agra Firozabad. Subsequently, GAIL has given the responsibility of running its CGD projects in Agra-Firozabad to its 100% subsidiary, namely, GAIL Gas Ltd.. Hence, the APM allocation of 1.1 mmscmd in favour of GAIL for Agra-Firozabad is hereby transferred to GAIL Gas Ltd. The end customer allocations /supply will remain unchanged.”

Unquote

- (27) In this letter dated 29.09.2011, the gas allocated to GAIL in the track of 0.5 MMSCMD and 0.6 MMSCMD totaling 1.1 MMSCMD was transferred to the Appellant. It is worth mentioning herein that the Gas allocation is a controlled activity of MoP&NG and to be allocated to the approved allottees after due approval of the competent authority in the Ministry. Thus PNGRB has erred/may be overlooked this issue

in their “Impugned Order”. Even if we apply the principle of “Doctrine of Introversion” i.e if GAIL Gas is not authorized as per PNGRB order 26.09.2011, keeping in view of the Voice of Judgement, then what action PNGRB could have taken. Appellant would have gone to MoP&NG for regularization as done in other cases. Since the authorization to GAIL Gas is already been made by the MoP&NG the deemed approval was already existing, thus no action was solicited to reproach MoP&NG for approval.

Thus in view of the PNGRB order dated 26.09.2011 & MoP&NG letter 29.09.2011 which complimented the transfer of gas of 1.1 mmscmd in favour of GAIL Gas holds the authorization in favour of Appellant valid.

(28) CONCLUSION

i) It may be concluded that pursuant to the order of the Supreme Court, wherein GAIL (India) Ltd. was tasked to supply gas to industries in TTZ, MoP&NG vide its letter dated 27.07.1995 authorized GAIL(India) Ltd. to take up the secondary distribution of gas in the Taj Trapezium Zone

(TTZ) and principal, 0.6 MMSCMD gas was allocated (further 0.5 mmscmd was allocated totaling to 1.1 mmscmd), which was to be later taken by joint venture company to be set up by GAIL(India) Ltd., and directed to take necessary action for the same. Thus it is clear that much before the enactment of the PNGRB Act, 2006, GAIL had been tasked by the Supreme Court to supply gas to TTZ. Pursuant of setting up of PNGRB, GAIL submitted an application vide letter dated 17.10.2008 under Regulation 17 of Petroleum and Natural Gas Regulatory Board (Authorising Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008 for acceptance of Central Governments authorization under Section 17 (2) of the PNGRB Act and furnished particulars. Further, before the Board passing an Order thereupon, vide letter dated 18.03.2011 GAIL had sought authorization in favour of the Appellant i.e GAIL Gas Ltd. which is the wholly-owned subsidiary of GAIL (India) Ltd. which was formed to carry out all the CGD activities and to issue the authorization in favour of GAIL Gas Ltd. instead of GAIL (India)

Ltd.. It is relevant to mention herein that the Board of Directors of GAIL (India) Ltd. in their 287th Board Meeting held on 06.04.2011, had approved the transfer of local distribution project in the Agra-Firozabad area to GAIL Gas Ltd..

(ii) The PNGRB Board accepted the authorization granted by MoP&NG in favour of Appellant, as per Section 17 of the PNGRB Act, 2006 vide letter dated 26.09.2011 which is very much in accordance with the Order of the Hon'ble Supreme Court which also took cognizance of GAIL's affidavit, as well as the Central Government Authorization dated 27.07.1995 which had given the direction to GAIL to transfer the activities in the TTZ area in favour of a Joint Venture Company to be formed by GAIL. However, GAIL had formed its own subsidiary and decided that the authorization should be issued in favour of its own subsidiary, which request was duly communicated to the PNGRB Board and acting thereupon the Board issued the authorization in favour of the Appellant. We do not find any irregularity in this.

(iii) Moreover even the Central Government has accepted the authorization in favour of the Appellant and transferred the 1.1 MMSCMD Gas in favour of the Appellant vide letter dated 29.09.2011. Such gas allocations are done to authorized entities only by MoPNG.

(iv) Further, it may also be noted that pursuant to the acceptance of the Authorization by PNGRB vide letter dated 26.09.2011, the said authorization was duly acted upon by the Appellant and done investments for the development of the city gas network. PNGRB, from the very inception, was fully aware that the Appellant was acting upon the said authorization and the Board could not have invalidated the said authorization as was done in the "Impugned Order".

(v) The Board also did not have any material before it while deciding that the authorization was issued by the Chairman and not by the Board itself. The Board also had no occasion to hold that the Appellant is not a 100% subsidiary of GAIL. Had Board required any further details, at the relevant time it should have asked the Appellant prior to the grant of authorization. Board could not have held the authorization

in favour of the Appellant to be invalid merely on the ground that some details are to be furnished by the Appellant without even specifying as to what details are being referred to.

(vi) Thus, in our view, the authorization dated 26.09.2011 in favour of Appellant for Firozabad GA was validly issued by the PNGRB. The majority "Impugned Order" dated 02.03.2015 passed by three members out of five member erred in quashing the authorisation of Firozabad GA granted in favour of the Appellant vide letter dated 26.09.2011 by the Board. Further, the said impugned order was also challenged by Respondent No. 2 before this Tribunal through Appeal bearing No. 125/2015 which has also been withdrawn by Respondent No. 2 vide order dated 26.8.2020.

ORDER

Having regard to the factual and legal aspects of the matter as stated above, we are of the considered opinion that the authorization issued by Board vide letter dated 26.09.2011 in favour of the Appellant of the Firozabad GA is held to be valid authorization.

The “Impugned Order” dated 02.03.2015 is hereby set aside.

No order as to costs.

Accordingly, the present Appeal including IA’s is disposed of in the above terms.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERRING ON THIS 07th DAY OF JULY, 2020.**

(Dr. Ashutosh Karnatak)
Technical Member

(Justice R.K. Gauba)
Judicial Member