IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 25 OF 2022

Dated: **16th March 2022**

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

In the matter of:

Hindustan Petroleum Corporation Limited
[Through, Chief General Manager – Pipeline Projects]
Hindustan Bhawan
8, Shoorji Vallabhdas Marg, Ballard Estate,
Mumbai-400 001
Email: psmurthy@hpcl.in ... Appellant(s)

VERSUS

PETROLEUM & NATURAL GAS REGULATORY BOARD
[Through its Secretary]
1st Floor, World Trade Centre, Babar Road
New Delhi-110001
Email: contact@pngrb.gov.in … Respondents

Counsel for the Appellant (s): Mr. Matrugupta Mishra
Ms. Ritika Singhal
Mr. Sanjeev Singh Thakur

Counsel for the Respondent (s): Mr. Raghavendra Shankar
Ms. Pinki Mehra
Ms. Arshiya Sharda
Ms. Tanuja Dhoulakhandi
Ms. Shipra Malhotra
Mr. Mohit Budhiraja for R-1

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. This matter was taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. The appeal at hand was brought under Section 33 of the *Petroleum and Natural Gas Regulatory Board Act, 2006* (in short, "PNGRB Act") by *Hindustan Petroleum Corporation Limited* ("HPCL") challenging the Order dated 06.03.2020 passed in Case/Reference No. PNGRB/Monitoring/3/ PPP-UCSPL/(3)/2014 by the *Petroleum and Natural Gas Regulatory Board* (hereinafter referred to as the "Board") whereby the request for refund of the amount of Rs. 77.5 lakhs encashed by the Board through invocation of the bank guarantee, vide its earlier decision dated 04.03.2016, was rejected. The dispute requiring resolution in the matter at hand relates to the provisions of the *Petroleum and Natural Gas Regulatory Board (Authorising Entities to Lay, Build, Operate or Expand Petroleum and Petroleum Products Pipelines) Regulations, 2010* (in short, "Authorizing Regulations"), framed by the Board under the PNGRB Act. The bank guarantee which had been invoked was furnished by the appellant (HPCL) in relation to the authorization granted by the Board in its favour under Regulations 17(1) of Authorization Regulations, vide letter dated 01.11.2012, for laying, building, operating or expanding *Uran-Chakan-Shikrapur LPG Pipeline* (for short, "UCSPL").

3. The brief background facts, restricted to the extent relevant for present discussion, may be noted at the outset.

4. In terms of the authorization granted to HPCL by the Board in relation to UCSPL, on 01.11.2012, the former (HPCL) was required to complete the works of laying, building or expanding the activities of the said project within a period of thirty-six months i.e. until 31.10.2015. Concededly, the timeline was extended subsequently, upon request of the appellant, till March, 2017.

5. Regulation 16 of the Authorization Regulations, in terms of which the bank guarantee was encashed, provides as under:

> *"16. Consequences of default and termination of authorization procedure.*
> *An authorized entity shall abide by all the terms and conditions specified in these regulations and any failure in doing so, except for the default of the service obligation under sub-regulation (1) of regulation 14 and force majeure, shall be dealt with as per the following procedure, namely:-*
>
> > *(a) the Board shall issue a notice to the defaulting entity allowing it a reasonable time to fulfill its obligations under the regulations;*
> >
> > *(b) no further action shall be taken in case remedial action is taken by the entity within the specified period to the satisfaction of the Board;*
> >
> > *(c) in case of failure to take remedial action, the Board may encash the performance bond of the entity on the following basis, namely:-*
> >
> > > *(i) twenty five percent of the amount of the performance bond for the first default;*
> > >
> > > *(ii) fifty percent of the amount of the performance bond for the second default:*
> > >
> > > > *Provided that the entity shall make good the encashed performance bond in each of the cases at sub-clause (i) and (ii) within a week of*

encashment failing which the remaining amount of the performance bond shall also be encashed and authorization of the entity terminated;

(iii) one hundred percent of the amount of performance bond for the <u>third default and simultaneous termination of authorization of the entity</u>;

(d) the procedure for implementing the termination of an authorization shall be as provided in Schedule G.

(e) <u>without prejudice to as provided in clauses (a) to (d), the Board may also levy civil penalty</u> as per section 28 of the Act in addition to taking action as prescribed for offences and punishment under Chapter IX of the Act."

(Emphasis supplied)

6. Indisputably, there were delays in completion of the project within the timeline prescribed by the Board. Against such backdrop, by its Order dated 04.03.2016, the Board had directed encashment of 25% of the Performance Bank Guarantee (PBG) submitted by the appellant, amounting to Rs.77,55,000/-, under the provisions of Regulation 16(c)(i). The said order was challenged by the appellant preferring an appeal before this tribunal, it being registered as appeal no.102 of 2016. The Order dated 04.03.2016 was assailed by the appellant on various grounds including the contention that the UCSPL was a dedicated/captive pipeline rather than a common carrier. The plea to such effect has since been abandoned by the appellant. The appellant had sought to explain, in the said earlier round, the delay in completion of the project within the specified time referring, *inter-alia,* to various road blocks faced mainly being delay in receiving

statutory provisions, the prime submission being that they were in the nature of *force majeure*.

7. It was also the submission of the appellant in the above-said previous round that the Board had failed to follow the procedure prescribed in Regulation 16 before imposing the penalty of forfeiture of 25% of the performance bank guarantee by neither having served any notice nor abided by principles of natural justice nor granted a reasonable time to the appellant (authorized entity) to fulfil its obligation or take remedial action.

8. The appeal was allowed by judgment dated 09.01.2019, having the effect of setting aside the said earlier order dated 04.03.2016, remitting the matter to the Board for taking a fresh decision within a period of four months directing, *inter-alia,* the Board "*to afford fresh reasonable opportunity of hearing to the appellant*" and "*in accordance with law and in the interest of natural justice and equity*". For issuing such directions, this tribunal had set out the reasons in judgment dated 09.01.2019 as under:

> *"21. The scheduled date to complete the job of laying of the pipeline under reference was 31.10.2015 and the Appellant could not accomplish the same by that date. The Board accordingly encashed 25% of the PBG as per Regulation 16 of the Authorization Regulation as a first default on the part of the Appellant. It is fact that Regulation 16 authorizes the Board to encash the PBG; however, the issues of force majeure, serving notice and taking up remedial action as mentioned in Regulation 16 (a) and (b) would need to be addressed. The above three issues have been vehemently argued by the Appellant.*

22. The learned counsel Mr. M.G. Ramachandran appearing for the Appellant admitted that there has been delay in completing the project, but the delays have occurred because of reasons beyond the Appellant's control. All the reasons for delay were explained and submitted to the Board, but the Board has considered the reasons for delay in a cursory manner without analyzing the impact on the implementation of the project and has vaguely held that "the situation on the ground does not provide sufficient optimism for the commissioning of the pipeline" while imposing penalties. The impugned decision therefore clearly suffers from lack of reasons; non-application of mind and is contrary to the record.

23. The delays were on account of various reasons viz delay in obtaining various statutory approvals including forest clearance in Pune and Raigad districts, litigations in the Mumbai High Court and National Green Tribunal, Pune etc. Considerable delay took place in re-routing the pipeline in Pune district because of local obstructions.

24. We have also noted that the delays took place in spite of the fact that the project was being monitored by the Project Monitoring Group of the Cabinet Committee on Investment and quarterly review meetings were being held with the Chief Secretary, Government of Maharashtra in order to expedite approvals. For our better clarifications, we also directed the Appellant to submit to this Court the records on the steps taken by the Appellant to obtain various clearances from various departments/Government authorities. The Appellant submitted the same to us on 19.07.2017.

25. While perusing the records, we observe that sufficient correspondences were made and discussions held by the Appellant with various authorities for obtaining the clearances etc. We also observe that the Appellant before the impugned order was issued, submitted a letter dated 02.12.2015 to the Board giving the status of the project as on 7th November, 2015 which says that the Appellant had placed 100% orders for procurement and it had already acquired 80% of the procurement items and it had incurred expenditure of Rs. 253.37 Crores with 70% progress at station works and overall physical progress of 77.5%.

26. We also note from the impugned order dated 04.03.2016 that the Board admitted that there had been delay in obtaining approvals from various authorities which is reproduced as below:-

"12. The documents/communications furnished by the entity were analyzed and it was observed that there has been delay in granting approvals/permissions by the authorities."

27. Learned counsel Mr. Rahul Sagar Sahay appearing for the Board stated before us that the reasons for delay were examined from the point of view of Force Majeure and it was found that the reasons could not be considered as Force Majeure conditions which the Appellant claimed it to be so. In this context, we have also observed that the Board extended the time schedule for completion of the project till March, 2017 while encashing 25% of the PBG which would mean that the Board accepted the delay based on the reasons given by the Appellant. Both these actions of extending the time schedule and imposing penalty taken simultaneously appear to be contradicting.

28. We have also observed the following statement made in the impugned order by the Board and sought further details on the same from the learned counsel appearing for the Board.

"14. The Statutory permissions may never be in place all in one go. One or the other clearance might remain pending but it does not stop the entity from pursing other activities related to the project. The situation on ground does not provide sufficient optimism for early commissioning of the pipeline."

We, did not, however, get any more details and also basis for making the above statement from the counsel/Board.

29. One of the contentions of the Appellant is that the Board ought to have issued a notice to the defaulting entity allowing it a reasonable time to fulfill its obligations under Regulations 16 (a) of the Authorization Regulations which the Board did not do. The Board's general reply is that ample opportunities have been provided to the Appellant of being heard and allowed reasonable time to fulfill its obligations. As per the Appellant, encasing the PBG without issuing a notice as per provisions of the Regulations is a violation of principles of natural justice.

30. In the above context, we observe that the scheduled time for completion of the project was by 31.10.2015 and the only review meeting of which minutes were issued was held on 19.11.2015 which happened after the scheduled completion date of 31.10.2015. We are not clear whether the Board followed the

following regulations of the Authorization Regulations while monitoring the progress of the project.

"13. Post-authorization monitoring of activities (precommissioning)

(1) ……….
(2) ……….
(3) ……….
(4) The Board shall monitor the progress of the entity in achieving various targets with respect to the petroleum and petroleum products pipeline project, and, in case of any deviations or shortfall, advise remedial action to the entity."

Regulation 13 (4) above is relevant in the present case and we observe that the monitoring conducted by the Board was not sufficient enough to carry forward a project like the instant one in the interest of the nation and in the spirit of the PNGRB Act, 2006

31. After carefully perusing the submissions made by the Appellant as well as the Respondent Board and after hearing the arguments made by the counsel appearing for the parties, it appears that the Board was not careful enough to examine the reasons submitted by the Appellant for the delay. The impugned order lacks proper reasoning for not extending the scheduled completion time as requested by the Appellant before encashing the 25% of the PBG. The impugned order suffers from gross deficiency in explaining the grounds while considering to encash the PBG. We hold that a more elaborate analysis would need to be carried out by the Board on the correspondences made and documents submitted by the Appellant while requesting to extend the time schedule for completion of the project before encashing the PBG. We also hold that the Appellant needs to be heard by the Board afresh before taking a final decision. In view of our observations and discussions, we feel it prudent to remand the instant matter to the Board for a fresh and independent review."

9. It is a common case of both parties that in the wake of the above said decision dated 09.01.2019 of this tribunal, the Board had called the appellant for hearing on 22.02.2019. The appellant informed the Board at that stage that 92% of the project had been completed, only about four

kilometers of the pipeline having remained to be laid. On 08.03.2019, the appellant furnished details of the status of the completion of the project requesting the Board to extend the timeline till August, 2019. Acceding to the said request, the Board, by its Order dated 09.05.2019, extended the time for completion of the project by August, 2019. Noticeably, the prayers made by the appellant at that stage included the request for refund of amount of Rs. 77,50,000/- that had been realized by the Board through invocation of bank guarantee on the strength of the earlier order which had been displaced by the judgment dated 09.01.2019 of this tribunal. The Board, while granting the request for extension of time till August, 2019, articulated its views in the Order dated 09.05.2019 as under:

> *"9. During the hearing on 22.02.2019, HPCL accepted that the said pipeline is neither a captive nor dedicated pipeline and it is a common carrier. However, in the submission dated 08.03.2019, HPCL again stated that the pipeline is a captive pipeline. However, this plea was earlier dropped by HPCL during the hearings before APTEL on 12.12.2018 and its advocate suggested to deal with the issue of encashment of PBG only.*
>
> *10. HPCL further submitted that the Central Government authorization was accepted by vide letter dated 01.11.2012 and while accepting the Central Govt. authorization, PNGRB imposed certain terms and conditions like a bank Guarantee was sought and also as per the paragraph/Condition no.4 of the said authorization letter, the time for completion of the project was given as 31st October, 2015. In this regard, it is pertinent to point out that HPCL knowing all the said terms and conditions of authorization, accepted the said authorization, as a common carrier pipeline and submitted the Bank Guarantee of Rs.3.10 Crore to PNGRB.*
>
> *11. HPCL, submits various challenges faced by them in implementing the project and also submits that the reasons for delay were beyond their control and must be considered as force majeure. In this regard, it is opined that the issues/constraints*

like delay in obtaining clearances/permissions are inherent risk which the entity laying or building a pipeline is well aware of while accepting the terms and conditions of the authorization.

12. APTEL has directed PNGRB to issue a fresh order within 4 months from the date of the order (09.01.2019). However, in its submissions vide letter dated 08.03.2019 has prayed for treating the various delays as force majeure situation, to refund PBG encashment of Rs. 77,55,000, not to further invoke the PBG and to allow time extension till August, 2019.

13. Earlier, during hearing of the case before APTEL, HPCL has argued that in terms of regulation 16(a) of NGPL Authorisation Regulations, the Board ought to have allowed a reasonable time to the entity to fulfil its obligations. As the pipeline is not yet complete even after 78 months of its authorization against allowed time of 36 months, the Board is of the view that it will be advisable to decide the issue after completion and commissioning of the LPG pipeline project."

10. The operative part of the Order dated 09.05.2019 read as under:

"14. In view of the above facts, current status of the project and the above deliberations, the Board allows HPCL to complete the activities of laying, building and commission the Uran-Chakkan-Shikrapur LPG pipeline project by August, 2019, as requested by it. The Board will consider other prayers, made by HPCL vide letter dated 08.03.2019 and mentioned at para 7(i), (iii) & (vi) above, after August, 2019."

11. Thus, while extending the timeline till August, 2019, as requested, the prayer for refund of the encashed part of the bank guarantee was kept pending.

12. On 30.08.2019, the last date of the extended timeline, the Board was informed by the appellant, through a formal communication, about the completion of the entire work relating to the project, Pre-commissioning

Safety Audit by the concerned agency (OISD) and approval for charging the pipeline with LPG for commissioning by another agency (PESO) only being pending at that stage. The relevant part of the said communication dated 30.08.2019 reads thus:

> *"…*
> *We are happy to inform you that we have completed laying of Uran Chakan Shikrapur Pipeline. Vide letter PROJ/UCSPL/OISD/MBI dated 5.8.2019 addressed to OISD. Further, vide our letter dated 30.8.2019, we have also applied to PESO for commissioning approval for charging the pipeline with LPG. Once the clearance is received from these statutory authorities, we shall be commissioning the pipeline with LPG and thereafter stabilizing the pipeline for operations.*
>
> *As per GSR 39 € code of practices for ERDMP Regulations, the certification of ERDMP will be done after commissioning and stabilization of the pipeline. However Emergency Response Disaster Management Plan as per PNGRB regulation Clause 6.7 G.S.R. Infra/T4S/P&PPPL/01/2014 is also prepared and under certification by PNGRB enlisted agency. The same will be submitted after due approval of HPCL's Management.*
> …"

13. Indisputably, the Board did not respond to the said communication dated 30.08.2019 till 11.11.2019 on which date, by an email communication, the "latest status" was required to be submitted by 12.11.2019, reference being made to the letter dated 30.08.2019 and quarterly progress report of second quarter of 2019-20 that had been up-loaded on the online reporting portal by the appellant. Admittedly, the project was completed and the pipeline was energized on 14.11.2019.

14. Referring to the above-mentioned events, HPCL submitted a fresh letter of request on 03.01.2020 seeking refund of the amount of Rs. 77,50,000/- encashed through invocation of performance bank guarantee under the earlier order of 2016. The said request was declined by the Board by majority order passed on 16.08.2020, the Member (Legal) having dissented and giving a separate opinion holding to the contrary.

15. The impugned order, based on majority opinion, sets out the reasons as under:

> *"26. During the hearing held on 22.02.2019, HPCL accepted that UCSPL is neither a captive nor dedicated pipeline and it is a common carrier pipeline. However, in the submission dated 08.03.2019, HPCL again stated that the pipeline is a captive pipeline. However, this plea was earlier dropped by HPCL during the hearings before APTEL on 12.12.2018 and its advocate suggested to deal with the issue of encashment of PBG only.*
>
> *27. HPCL submitted that while accepting the Central Government authorization, PNGRB imposed certain terms and conditions like seeking a bank guarantee and also the time for completion of the project was kept as 31.10.2015. In this regard, HPCL was well aware of all the terms and conditions of the authorization, accepted the said authorization as a common carrier pipeline and submitted the Bank Guarantee of Rs.3.10 Crore to PNGRB.*
>
> *28. HPCL submitted various challenges faced by them in implementing the project and also submitted that the reasons for delay were beyond the control of HPCL, which may be considered as Force Majeure. It is pertinent to note that obtaining permissions from various statutory authorities is the sole responsibility of the authorized entity and the issues/constraints like delay in obtaining clearances/permissions are inherent project risks which the entity was well aware of while accepting the terms and conditions of the authorization.*

29. The Board, vide order dated 09.05.2019, directed HPCL to complete the activities of laying, building and commissioning UCSPL project by August, 2019 as requested by the entity and stated that the other prayers of HPCL made vide letter dated 08.03.2019 will be considered after August, 2019. In this regard, HPCL achieved only mechanical completion of the project by 30.08.2019, while the commissioning of the LPG pipeline could be achieved only on 14.11.2019. vide letters dated 30.08.2019 and 03,01.2020, HPCL has requested the Board to consider its other balance prayers.

30. It is pertinent to mention that finally the UCSPL project was completed with a further delay of 2.5 months beyond August, 2019 (i.e. time extension granted by the Board at the request of the entity) and HPCL has failed to comply with the direction of the Board for achieving commissioning of UCSPL project by August, 2019."

16. The operative part of the impugned order reads thus:

"31. Based on the above facts, circumstances and deliberations, the reasons as stated by HPCL for delay in implementing the project are inherent project risks which the entity was well aware of while accepting the terms and conditions of the authorization. Moreover, the same do not qualify as Force Majeure.

32. With regard to request of HPCL for return of earlier encashed amount of Rs. 77.5 Lakh and not to further invoke the bank guarantee, we do not find any reason or justification for refunding the amount of Rs. 77.5 Lakhs encashed by PNGRB through invocation of Bank Guarantee. Further, the entity has once again failed to comply with its own commitment and the direction of the Board vide order dated 09.05.2019 to commission UCSPL project by August, 2019. However, considering various submissions of the entity, the Board hereby accepts completion of the project on 14.11.2019 without any further penalty."

17. In contrast, the Member (Legal), who recorded dissent opinion, has observed thus:

"Having extensively perused the order dated 9th January, 2019 of the APTEL and having gone through the material on record, the only question that falls for my consideration is whether HPCL is entitled to the refund of the amount of Rs. 77.5 Lakh which was earlier encashed by PNGRB through invocation of the bank guarantee. In this regard, HPCL has mentioned various challenges which were faced by them in implementing the project. HPCL submitted that they had taken up the project in right earnest and applied for all statutory approvals in time and received Environmental Clearance, PCL=B, Petroleum and Explosive Safety Organisation (PESO), RoU notifications along the road and crossing approvals in time. However, certain critical approvals viz. Forest Clearance, Wildlife Board and along the road of SH 55 approvals got delayed due to procedural delays and pending petitions in Courts. It was also submitted that the reasons for delay were beyond their control. In this respect, the majority order vide para 28 observes as under:

> *'28…It is pertinent to note that obtaining permissions from various statutory authorities is the sole responsibility of the authorized entity and the issues/constraints like delay in obtaining clearances/permissions are inherent project risks which the entity was well aware of while accepting the terms and conditions of the authorization."*

Though impossibility of performance is, in general, no excuse for not performing an obligation which a party has expressly undertaken, yet when the obligation is one implied by law, impossibility of performance is a good excuse. In HUDA and Anr. v. Dr Babeswar Kanhar & Anr (2005) 1 SCC 191, the Supreme Court considered the general principle that a party prevented from doing an act by some circumstances beyond his control, can do so at the first subsequent opportunity.

This conclusion of mine would be sufficient to dispose of the case before me, in favour of the entity, but there is another aspect on the basis of which the principal question can be approached. In this regard, I deem it necessary to extract para 31 of APTEL'S order dated 09.01.2019:

> *"31. After carefully perusing the submissions made by the Appellant as well as the Respondent Board and after hearing the arguments made by the counsel appearing for the parties, it appears that the Board was not careful enough to examine the reasons submitted by the Appellant for the delay. The impugned order lacks proper reasoning for not extending the scheduled completion time as*

> *requested by the Appellant before encashing the 25% of the PBG. The impugned order suffers from gross deficiency in explaining the grounds while considering to encash the PBG. We hold that a more elaborate analysis would need to be carried out by the Board on the correspondences made and documents submitted by the Appellant while requesting to extend the time schedule for completion of the project before encashing the PBG. We also hold that the Appellant needs to be heard by the Board afresh before taking a final decision. In view of our observations and discussions, we feel it prudent to remand the instant matter to the Board for a fresh and independent review."*

Whereas the APTEL, in its order, has directed the Board to issue a fresh order in the interest of 'natural justice and equity,' the majority order fails to address the issue of the adequacy of the reasons submitted by the entity for the delay in completion of the project and lacks proper reasoning for not refunding the amount which was earlier encashed by PNGRB.

In view of the above, my answer to the question in this case is in the affirmative and in favour of the entity. The entity is entitled to the refund of the earlier encashed amount of Rs. 77.5 Lakh."

18. We have heard the learned counsel for the appellant and for the Board at length.

19. In the overall scheme of the PNGRB Act, the Board has been entrusted with multifarious duties, responsibilities and functions that include primarily the task of the sector regulator, it also being the statutory authority to deal with issues of non-compliance or engage in dispute resolution. Having regard to this, the Board is also the authority that guides the conduct of various stakeholders, the prime objective being to subserve public interest.

20. We have noted earlier the provision contained in Regulation 16 of the Authorization Regulations the bare text of which makes it clear that the purpose of taking a performance bond at the time of grant of authorization is to ensure that all directions, terms or conditions attached to the permission are strictly abided by, the idea being to secure timely compliances subject, however, to the Board also being *reasonable* in assessing the time required for such compliances to be made including in the matter of completion of a project of such nature as at hand. Regulation 16 also clarifies, by the concluding Clause (e), that the encashment of performance bank guarantee is in addition and without prejudice to civil penalty that may be imposed by the Board under Section 28 of PNGRB Act which relates to "*contravention of directions*". It is vivid that contravention of directions as is governed by the provision of Section 28 leading to civil penalty pertains to a situation where there is intentional non-compliance. Be that as it may, even the invocation of the bank guarantee in case of default or failure within the meaning of Regulation 16 of Authorization Regulations is punitive rendering the said regulation a penal provision. It is trite that a penal provision has to be construed strictly. Having regard to the overall scheme of the Authorization Regulations and the provision of Regulation 16 dealing with defaults, the consequence whereof might lead eventually even to termination of authorization, the step-by-step authority given unto the Board to penalize the authorized entity against the

performance bond is meant and designed to nudge it towards completion rather than invariably punish for each default.

21. The learned counsel for the Board was at pains to argue, referring to the history of delays in the project at hand and the explanations tendered by, or the extension of timelines granted to, the appellant, his submission being that the case at hand involves an order passed at a stage where the subject default cannot be described as the first of its kind. His submission was that keeping in view the extensions granted earlier, the invocation of the bank guarantee to the extent of 25% only shows that the Board has been very lenient towards the appellant.

22. The fallacy in the above line of the arguments lies in the fact that the bank guarantee had been encashed by the earlier decision dated 04.03.2016 of the Board at a stage then of first default only. The said Order dated 04.03.2016 had been set aside by this tribunal in appeal and the matter was remitted to the Board for a proper consideration in light of the guidance given by judgment dated 09.01.2019. The impugned order has been passed not on the basis of any fresh notice of the second or third default but in the proceedings taken out on the basis of the said remit by judgment dated 09.01.2019. The justification for penalizing the appellant under Regulation 16(c)(i) had to be examined afresh by the Board in light of the facts then prevailing though, of course, also factoring in the subsequent

conduct seen particularly in the light of later order rendered by the Board on 09.05.2019.

23. We disapprove of the view taken by the Board while passing the Order dated 09.05.2019 to the extent thereby the decision on the prayer for refund of the encashed part of the bank guarantee was deferred beyond August, 2019. The bank guarantee had been invoked, as already noted earlier, in terms of Order dated 04.03.2016. The said order stood vacated by virtue of the decision rendered by this tribunal on 09.01.2019 in appeal no. 102 of 2016. Once the order leading to the encashment had been set aside and the matter remitted for fresh decision, the Board had no business or authority to retain the money collected under its cover.

24. Be that as it may, the judgment dated 09.01.2019 dealing with the earlier Order dated 04.03.2016 of the Board clearly shows that the Board was found remiss in adopting a proper procedure and also in exercising effective guidance to the authorized entity (appellant) by not taking any meaningful steps for monitoring its activities in terms of Regulation 13. Further, the Board had not given any thought to its duty under Regulation 16(a) to afford "reasonable time" to the appellant to fulfil its obligations before examining as to whether penalty required to be imposed by invocation of the 25% of the amount of the performance bond.

25. The question of grant of "reasonable time" eventually came up before the Board when, after the remit, having taken inputs from the appellant, it had proceeded to pass the order on 09.05.2019 granting extended period to the appellant till August, 2019. In this view, the Board was also duty-bound again, in terms of Regulation 13 - quoted by this tribunal in judgment dated 09.01.2019 passed in the earlier round, to monitor the activities of the appellant. The fact that the Board had granted time to the appellant to complete the project till August, 2019 can only mean that in the considered view of the Board that was the reasonable time which the appellant deserved to be allowed for fulfilling its obligations within the meaning of Regulation 16. Having granted such extension of time till August, 2019, it was the obligation of the Board also to monitor the further activities. It is a matter of regret that the Board again took its duties casually, there being no communication shown issued from its end till after the appellant had reported completion of project by its letter dated 30.08.2019.

26. We are conscious that the pipeline was energized eventually only on 14.11.2019. But it also needs to be borne in mind that while reporting completion of the ground work of execution of the project by letter dated 30.08.2019, the appellant had informed the Board that pre-commissioning safety audit was to be done by OISD on which the approval for charging the pipeline by PESO would depend. During the arguments, learned counsel for the Board agreed that OISD and PESO are official agencies

and it is not within the hands of the authorized entity (the appellant) to push them for action within a time bound manner. From this perspective, it is clear that the appellant had achieved what was within its domain well within the extended timeline.

27. The objective of Regulation 16 is not to penalize an entity for delays beyond its control. In these circumstances, the conclusion reached by the Board, through the majority opinion forming the basis of the impugned order, is not only incorrect but also wholly unfair and inequitable. The fact that OISD and PESO would also be taking time after the execution of the project by the appellant should have been factored in when the Board was examining the issue of grant of "reasonable time" within the meaning of Regulation 16 to the appellant by Order dated 09.05.2019. Even if that part had somehow escaped the attention or consideration by the Board at the time of passing of Order dated 09.05.2019, the same should have entered the relevant considerations when the Board declined to refund the encashed part of the bank guarantee by the impugned order.

28. For the forgoing reasons, the appeal at hand must succeed. The impugned order of the Board passed on 06.03.2020, based on majority opinion, declining refund of Rs.77.5 lakhs to the appellant is set aside. As observed earlier, the said amount had become refundable when the previous order dated 04.03.2016 of the Board had been set aside by

judgment dated 09.01.2019 in appeal no. 102 of 2016. The Board is directed to now refund the said amount of money to the appellant forthwith.

29. Before parting, we must add here that if the Board is to function as a regulator which exercises effective control over the conduct of various stakeholders, it must develop and introduce a robust mechanism of monitoring so that such provisions as in the nature of Regulation 16 (quoted earlier) are meaningfully enforced.

30. The appeal is disposed of in above terms.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 16th DAY OF MARCH, 2022.

(Dr. Ashutosh Karnatak) Technical Member (P&NG)	**(Justice R.K. Gauba)** Officiating Chairperson

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