APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 115 OF 2023
AND
IA NO. 2153 OF 2022

Dated: 19th April, 2023

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Dr. Ashutosh Karnatak, Technical Member (P&NG)

In the matter of:

Gujarat Gas Limited
Through Mr. Ajitpal Singh,
Manager (Secretarial and Legal)
Gujarat Gas CNG Station
Sector 5-C, Gandhinagar – 382006 Gujarat, India
Email: ajitpal.singh@gujaratgas.com
Mobile:+917573018733 … Appellant(s)

AND

1. **Petroleum & Natural Gas Regulatory Board**
Through the Secretary
1st floor, World Trade Centre, Babar Road,
New Delhi – 110 001
Email: secretary@pngrb.gov.in
Mobile:+919999663394

2. **M/s Haldyn Heinz Fine Glass Pvt. Ltd.**
Through the Director
B-1202, Lotus Corporate Park,
Ram Mandir Lane, Jai Coach Junction, Off
Western Express Highway, Goregaon (E),
Mumbai- 400063
Email: jkaramchandani@haldynheinz.com
Mobile:+912242878900 … Respondent(s)

Counsel for the Appellant(s) : Mr. Piyush Joshi
Ms. Sumiti Yadava
Ms. Vatsala Bhatia
Mr. Divit Arora

Counsel for the Respondent(s) : Mr. Sumit Kishore
Mr. Mohit Buddhiraja
Ms. Kartikey Joshi
Ms. Shreya Smriti
Mr. Sulabh Singh Chauhan for R-1

Ms. Swpana Seshadri
Ms. Kriti Soni
Ms. Ashabari Thakur for R-2

JUDGMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

1. This appeal is preferred by Gujarat Gas Limited **("Appellant"**) against the order passed by Petroleum and Natural Gas Regulatory Board ("**PNGRB/BOARD)** dated 11.11.2022 directing them to disclose the breakup of gas price, and other charges such as transmission charges etc, as demanded in the fortnightly bills raised by it on the 2nd Respondent, within 2 months from the date of the Order. In this Order, parties shall hereinafter be referred as they are arrayed in this Appeal.

2. Facts, to the limited extent necessary, are that the Appellant is a company engaged in the business of transmission and distribution of natural gas, to domestic, commercial and industrial units, through an inter-connected network of gas transportation and distribution pipelines, and an entity vested with authorization, under Regulation 18(1) of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008 (the "2008

Regulations" for short), for the Surat- Bharuch- Ankleshwar Geographical Areas ("SBA GA") City Gas Distribution ("CGD") Network development.

3. By its Order dated 17.05.2016, the Board directed the Appellant to provide access, to the 2nd Respondent, on a non-discriminatory basis for transportation of natural gas to its manufacturing plant at Jhagadia in accordance with the applicable regulations. A Gas Supply Agreement (the "GSA" for short) was entered into, between the Appellant and the 2ndRespondent on 20.10.2016, for supply of gas, at their glass manufacturing plant in Surat District, at a Daily Contract Quantity ("DCQ") of 16000 SCMD at the price of Rs. 25.300 per SCM of Gas. Clause 3.1 of the GSA prescribed that the contract period would be in force from 20.11.2016 to 30.06.2019.

4. The 2nd Respondent filed a petition before the Board seeking a direction to the Appellant to provide a break-up of the invoice raised on them; grant them access to the Appellant's CGD network on a common carrier or a contract carrier basis, without the CGD network having been declared to be a common carrier or a contract carrier under the provisions of the PNGRB Act read with the applicable regulations.

5. The Appellant, vide letter dated 28.02.2017, informed the 2nd Respondent of the revision in the gas price which had been necessitated due to increase in the cost of natural gas on account of international prices. A similar break up was provided to the 2nd Respondent on 22.12.2017 also. By its letter dated 06.04.2018, the 2nd Respondent sought clarification regarding the invoices raised by the Appellant towards gas supply, and sought details of the charges for gas supply in terms of Article 6.1 of the agreement which stipulated that the

price per SCM of Gas was Rs. 25.300. The Appellant informed the 2nd Respondent, by its letter dated 25.04.2018, that this was the effective price on the date of signing of the contract, which had been revised on 1s March 2017 and 23rd December 2017 as per the provisions of Clause No. 6.2(a) of the agreement, and they were not imposing any other charges which did not form part of the agreement between the parties.

6. The 2nd Respondent however claimed, in its letter dated 11.05.2018, that the Appellant had included all incidental costs such as transportation etc. in the base price of gas, which was contrary to Clause 6 of the GSA; the exclusivity granted to the Appellant had ended on 07.12.2015, and they were therefore obliged to provide the 2nd Respondent access to the CGD network to procure gas from other suppliers. The Appellant informed the 2ndRespondent, by its letter dated 16.07.2018, that they were acting specifically in terms of the agreement, and clause 6.1 could not be read in isolation and should necessarily be read in conjunction with the other provisions of the agreement including clause 6.2 and clause 6.3 thereof.

7. The 2nd Respondent was a CGD customer which was required to be supplied gas by the authorised entity ie the Appellant. Placing reliance on the Order of the PNGRB dated 17.05.2016, in the matter of *Saint Gobain India Private Limited vs. Gujarat Gas Limited,* the 2nd Respondent had contended that the exclusivity granted to the Appellant had come to an end on 07.12.2015, and the appellant was therefore obliged to provide non-discriminatory access to its CGD Network to any third party.

8. By its letter dated 29.11.2018 the Appellant replied, among others, that they were not engaged in the production of gas, and only sourced gas through multiple sources; the requirement of maintaining adequate multiple sources of gas was a mandatory obligation, placed on CGD entities, to ensure adequate supply of gas to the respective authorized GAs; the Board's order dated 17.05.2016 had been challenged by the Appellant before APTEL (P&NG Bench), in the matter of *Gujarat Gas Limited vs. Saint Gobain India Private Limited & Anr. (*AppealNo.174 of 2016), and the order of the Board had not achieved finality.

9. The 2nd Respondent thereafter filed a complaint against the Appellant before the Board on 01.04.2019. While matters stood thus, the Appellant and the 2nd Respondent entered into a Retail Gas Sale Agreement on 17.05.2021, and a Supply Framework Agreement ("SFA"), in terms of which the period of agreement was to remain in force from 17.05.2021 till 17.05.2022. In terms of the SFA dated 17.05.2021, the daily contracted quantity as per supply proposal 1 was 650 MMBTU per day.

10. On 13.09.2021, the Board issued a Public Notice inviting comments on the declaration of GA of Surat, Bharuch and Ankleshwar as a common carrier or contract carrier. The said public notice was subjected to challenge before the Delhi High Court in **GUJARAT GAS LTD. VS. PETROLEUM AND NATURAL GAS REGULATORY BOARD.** The Delhi High Court, in its Order in LPA No.254/2021 dated 11.10.2021, noted that it had earlier, in its order in CM No.26676/2021 dated 18.08.2021, stayed the operation, implementation and execution of Public Notice No. PNGRB/Auth/1-CGD(07)/2021 dated 30.06.2021 as in their prima facie view, in the absence of a duly constituted Board, the impugned Notice was without jurisdiction being violative of Section 10(1) and other

provisions of the PNGRB Act; they had also stayed the operation of the judgment passed in W.P. (C) No.7001/2021 dated 26.07.2021, and had further directed that, even if the PNGRB was duly constituted during the pendency of this appeal, it shall not take any decision based on the views, comments or proceedings pursuant to the impugned Notice, without the leave of this Court. Thereafter the Division Bench, by its order dated 11.10.2021, stayed the operation, implementation, and execution of the Public Notice dated 13.09.2021 issued by the Board, under Section 20 of the PNGRB Act and Regulation 6(1) of the Petroleum and Natural Gas Regulatory Board (Guiding Principles for Declaring City or Local Natural Gas Distribution Network as Common Carrier or Contract Carrier) Regulations, 2020, till the next date of hearing.

11. In its objection filed before the Board, to the complaint petition filed by the 2nd Respondent, the Appellant contended that the said complaint related to gas marketing and gas price which fell outside the jurisdiction of the Board; Section 25 of the PNGRB Act was not applicable; the 2ndRespondent was seeking to bring a dispute on gas-pricing within the jurisdiction of the Board, and to obtain access to the Appellant's CGD network on a common carrier or contract carrier basis, without the said CGD network having been declared a common carrier or a contract carrier under Section 20 of the PNGRB Act; in the appeal preferred against the Order of Board, in the matter of *Gujarat Gas Limited v. Saint Gobain India Private Limited and Anr.* (Appeal No. 174 of 2016), APTEL had, by its order dated 20.04.2022, quashed the order of the Board dated 17.05.2016; and, in view of Regulation 9 of the PNGRB (CGD Exclusivity) Regulations, no directions could be given to the Appellant without declaring the disputed pipeline as a common

carrier/contract carrier. Thereafter, the Appellant and the 2nd Respondent entered into a fresh Gas Supply Agreement on 18.05.2022, which was to remain valid till 31.03.2023.

12. The Board, in its Order under challenge in this Appeal, noted that the 2nd Respondent was only pressing for the prayer sought at Para 37 (a)in the petition, which was to provide the breakup of gas price including "transportation charges"; such a relief could be sought in terms of Section 22 of the PNGRB Act; the prayer in Para 37(b) was to grant access to the CGD network which would apply only after the CGD network was declared as a common carrier net work; and the 2nd Respondent did not press for grant of such a relief.

13. By its Order dated 11.11.2022, the Board directed the Appellant to disclose the break-up of prices and other charges such as transmission charges etc, as demanded in the fortnightly bills raised on the 2nd Respondent, within two months from the date of the order.

14. Elaborate submissions were put forth by Mr. Piyush Joshi, Learned Counsel for the Appellant, Sri Sumit Kishore, Learned Counsel for the Respondent-Board, and Ms. Swapna Seshadri, Learned Counsel for the 2nd Respondent. It is convenient to examine the rival submissions under different heads.

I. DOES THE BOARD HAVE JURISDICTION TO DIRECT THE APPELLANT TO DISCLOSE THE BREAK UP OF THE BASIC PRICE STIPULATED IN THE CONTRACT?

Mr. Piyush Joshi Learned Counsel for the Appellant, would submit that the power conferred by Section 11 (a) of the Act can be exercised by the Board only to protect the consumer interest by way of fostering fair

trade and competition amongst entities; this provision did not enable the Board to amend the terms of a concluded and performed contract or impose obligations or vest rights not provided in the said contract; Section 11 did not confer power on the Board to determine the price of gas; the power conferred on the Board, under Section 11 of the Act, was limited to notified petroleum, petroleum products and natural gas which, in terms of Section 2 (zc) of PNGRB Act, meant those petroleum products notified by the Central Government, and no such notification had been issued; Regulation 7(1)(i)(iii) PNGRB (Code of Practice for Quality of Service for City or Local Natural Gas Distribution Networks) Regulations, 2010 did not obligate the Appellant to provide the breakup of gas price; and the Board lacked jurisdiction to direct the Appellant to provide the price break-up in the invoices raised by them under the Gas Supply Contract.

On the other hand, Ms. Swapna Seshadri, Learned Counsel for the 2nd Respondent, would submit that the contract / GSA cannot limit the powers of the Board, which is a sector regulator, to enforce its regulations and to look into the conduct of a licensee, if a complaint is made before it; Section 11 (a) of the Act stipulates that the protection of consumer interest is the primary function of the board; and, therefore, the Appeal preferred against the order of the Board, passed in consumer interest, ought be dismissed.

In the Order under Appeal dated 11.11.2022, the Board, after taking note of the rival submissions, framed three issues. We are concerned in the present Appeal only with Issue No. 3 which is *"Whether the Respondent is bound to disclose the breakup of gas price and other*

charges such as transmission charges etc., in the fortnightly bills being raised by the Appellant on the 2nd Respondent". While examining this issue, the Board opined that it had a wide range of powers to protect the end customers; in the present case, the Appellant had refused to disclose the breakup of the prices, and had raised invoices without indicating the breakup figures to the 2nd Respondent; in terms of Regulation 7 of the 2010 Regulations, every entity is mandated to provide the Network Tariff for last mile connectivity, the applicable taxes, levies, the sale price charged for supply of gas, penalty chargeable for payment after due date and total dues payable.

After extracting Regulation (7) in the impugned order, the Board held that it was of the considered view that, where there was an element of mistrust which affected consumer interest, it was the moral responsibility of the authorised entity (Appellant) to serve the interest of consumers; the Appellant's contention, regarding expiry of the Agreement dated 20.10.2016 by efflux of time, had no bearing on the facts of this case, since it had a continuing cause of action; and non-disclosure of the break-up of the price by the appellant was unfair and against consumer interest. The complaint was allowed, and the Appellant was directed to disclose the break-up of the price and other charges, such as transmission charges etc, as demanded in the fortnightly bills raised by the Appellant on the 2ndRespondent, within 2 months.

In the proceeding dated 25.01.2023, we had recorded the submission of Mr. Piyush Joshi, learned counsel for the Appellant, that the price charged on the consumers was only the basic gas consumption

charges which was the contracted price X volume + taxes, and had granted them a week's time to file a detailed affidavit.

In its affidavit dated 31.01.2023, the Appellant stated that the invoices raised by them were in accordance with the provisions of the Gas Supply Agreement (GSA) dated 20.10.2016; at the time of execution of the GSA, the price was specified in Clause 6.l (a) as Rs.25.300 per SCM of Gas; and clause 6.2, enabled the Appellant, in its sole discretion, to review and revise the price specified in clause 6.1. The affidavit contains a table wherein reference is made to around 48 invoices from 2017 till 31.05.2019. The said table gives details of the bill period, the price, the gas volume and the basic gas consumption charges. It also refers to the revision in the basic price of gas periodically. Also enclosed, along with the said affidavit, is a copy of the amended agreement dated 16.12.2018 entered between the Appellant and the 2nd Respondent, in terms of which clause 6.1 (a), which relates to the price, was substituted and it was provided that the seller shall sell gas to the buyer at a price of U $ 15.046 per MMBTU of Gas.

After going through the said affidavit we had, in our order dated 01.02.2023, noted that the Appellant had been raising invoices on the 2nd Respondent each fortnight; one such invoice, was the invoice dated 16.03.2017 wherein the Basic Gas Price, excluding tax, was recorded as 27.80000 per SCM, the basic gas consumption in units was shown as 127,888 units, and this figure multiplied with the Basic Gas Price had resulted in the levy of basic gas consumption charges of Rs.3,555,286.40; apart from this amount, the only other charges levied were VAT at 15% and VAT additional tax, and Rs. 12 had been levied towards late payment charges.

We had also taken note of the submission of Mr. Piyush Joshi, learned counsel for the Appellant, that the gas supplied to the 2nd respondent had been procured through different sources; and, in cases where there was a composite supply of gas, it was impossible to trace its source or indicate the price with each of the suppliers had charged on the appellant. We, therefore, asked the learned counsel for the 2nd Respondent whether this information now furnished would suffice. As two weeks' time was sought on behalf of the 2nd Respondent to ascertain the facts and, if need be, to file a reply, we had granted them time as sought for.

The 2nd Respondent had thereafter filed the affidavit dated 27.02.2023, wherein they contended that the Appellant's affidavit dated 25.01.2023 provides insufficient information; the 'break-up' provided by the Appellant was purely of the gas prices charged by its consumers multiplied by the units of gas supplied without disclosing any break up, i.e. charges of gas, transmission charges etc; in terms of the authorization, granted under Regulation 18 of 2008 Regulations, the Appellant has been exclusively authorized to lay, build, operate and expand the CGD Network; in terms of the Authorization, read with Regulation 3(2)(a) of the CGD Authorization Regulations, the 2nd Respondent has no choice but to fulfil its requirement of procuring 16,000 SCMD of gas of the Appellant, as its industrial consumer base is situated in the area where the Appellant is exclusively authorized to lay, build and operate the CGD Network.

The 2nd Respondent further contended that the Gas Supply Agreement (i.e. the "GSA"), was a standard form document drafted by the Appellant, and the 2nd Respondent had no choice but to sign on the dotted line, and no changes or modifications were entertained by the

Appellant; and, as the Appellant charged a consolidated price included transmission charges, the 2nd Respondent had filed a complaint before the Board.

While admitting that, once natural gas enters into the CGD network from various natural gas pipelines and gas from various sources is co-mingled, it is not possible to determine the cost of transportation paid by the gas suppliers to the distribution network, the 2nd Respondent would however contend that the city gas stations, i.e., the point where custody transfer of natural gas pipeline to the CGD network takes place, forms part of the infrastructure of the authorised entity and, at these city gas stations, the transmission charges of natural gas from various natural gas pipelines are determined through meters installed at such city gate stations; based on such transmission charges, the Appellant must have determined the basic gas price under the GSA; it is these charges that the 2ndRespondent has sought from the Appellant; and fixing the price, in terms of a unilateral contract favouring one party, was unbecoming of a state instrumentality and hampered consumer interest.

A. RELEVANT STATUTORY PROVISIONS:

As reliance is placed on behalf of the Appellant on certain provisions of the Petroleum and Natural Gas Regulatory Board Act, 2006, in support of their claim that the Board lacks jurisdiction to examine these issues, it is useful to take note of the said provisions. Section 11(a) of the Act stipulates, among other functions, that the

Board shall protect the interests of consumers by fostering fair trade and competition amongst the entities. The word ‘entities’ is

defined in Section 2(p) to mean a person engaged in refining, processing, storage, transportation, distribution, marketing, import and export of petroleum, petroleum products and natural gas including laying of pipelines for transportation of petroleum etc. What is stipulated in Section 11(a) is for the Board, in order to protect the interest of consumers, to foster fair trade and competition amongst the entities. There is no material on record to show that absence of fair trade and competition amongst different entities had caused harm or affected the interests of consumers such as the 2nd Respondent, or that the basic price fixed for supply of gas to them was because of these reasons, warranting exercise of its powers by the Board under Section 11(a) of the Act.

Section 12 of the Act relates to the powers regarding complaints and resolution of disputes by the Board and, under sub-section 1(a) thereof, the Board shall have jurisdiction to adjudicate upon and decide any dispute or matter arising amongst entities or between an entity and any other person on issues relating to refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas according to the provisions of Chapter V, unless the parties have agreed for arbitration. The Board is entitled to exercise jurisdiction, under Section 12(a) of the Act, only in cases where the parties have not agreed to resolve their disputes by arbitration.

Section 12(1)(b)(iv) confers jurisdiction of the Board to receive any complaint from any person and conduct any inquiry and investigation connected with the activities relating to petroleum,

petroleum products and natural gas on contravention of the terms and conditions subject to which a pipeline has been declared as a common carrier or contract carrier or access for other entities was allowed to a city or local natural gas distribution network, or authorisation has been granted to an entity for laying, building, expanding or operating a pipeline as a common carrier or a contract carrier or authorisation has been granted to an entity for laying, building, expanding or operating a city or local natural gas distribution network. The dispute regarding the basic price charged by the Appellant, in the invoices raised by them on the 2nd Respondent, does not fall within the ambit of clause (iv) of Section 12(1)(b) of the Act.

B. JUDGEMENTS RELIED, ON BEHALF OF THE APPELLANT,UNDER THIS HEAD:

On the question of price fixation, the Delhi High Court, in **Indraprastha Gas Ltd. v. Petroleum and Natural Gas Regulatory Board; 2012 SCC On Line Del 3215,** held that the preamble to the PNGRB Act described it as, to provide for the establishment of the Board to regulate inter alia 'marketing and sale of natural gas so as to protect the interests of consumers; regulation of marketing and sale would, generally speaking, include regulation of price; price fixation was also generally towards protection of interest of consumers; from a reading of the Preamble to the Act, it followed that the Board constituted there under was empowered to 'fix the price'; however such an objective reflected in the preamble to the statute was not enough, and a provision for price fixation had to exist

in the body of the statute also; there was no specific provision of the PNGRB Act empowering the Board to control/regulate or fix the price at which gas was to be sold to the consumer, and which power was being sought to be exercised by the Board; Section 11 of the PNGRB Act, while prescribing the functions which the Board was to perform, did not state, as it ought to have stated/prescribed, had the legislature intended the Board to perform the function of controlling/regulating/fixing the price of natural gas, to perform such function; and what fell for determination was whether the power to control/regulate/determine price could be deduced from the functions as described in the clauses of Section 11 of the Act.

After extracting clauses (a), (e), (f) and (j) of Section 11, the Delhi High Court opined that none of the said clauses could be construed as prescribing price control/regulation as a function of the Board; clause (a), while prescribing protection of interest of consumers, limited the same to, by fostering fair trade and competition amongst entities engaged in distributing, dealing, transporting, marketing gas; the function of the Board there under was of regulating the inter-se relationship of entities under the Act, and not to regulate/control the relationship between the entities under the Act and the consumers; similarly clause (f), while prescribing the function of monitoring prices, limited the same to taking corrective measures to prevent restrictive trade practices by the entities; thus only if the Board found that the marketeers of gas, in a particular area, had formed a cartel or were indulging in any other restrictive trade practices, was the Board empowered to monitor prices; such was not the case of the Board in the present

instance; the petitioner, even though till date the exclusive marketeer of gas in Delhi, had not been accused of any restrictive trade practice, and the power exercised was also not in the name of monitoring price; another sub-clause of clause (f) of Section 11 conferred the function on the Board to ensure display of information about Maximum Retail Price; had the intent of the legislature been to confer power on the Board to fix the Maximum Retail Price, nothing prevented the legislature from providing so expressly; instead, functions of enforcing retail service obligations and marketing service obligations only had been conferred by the legislature; and the definition of retail service obligations and marketing service obligations in Sections 2(zk) and (w) also did not include obligation to sell at the prices fixed by the Board.

In the appeal preferred by the Board there against, in **Petroleum and Natural Gas Regulatory Board v. Indraprastha Gas Ltd., (2015) 9 SCC 209,** the Supreme Court, after extracting para 11 of the judgement of the Delhi High Court in **Indraprastha Gas Ltd. case [2012 SCC On Line Del 3215,** referred to Section 61 which deals with the power of the Board to make Regulations, to sub-section (1) of Section 61 which stipulates that the Board may, by notification, make regulations consistent with the Act and the Rules made there under to carry out the provisions of the Act, and to sub-section (2) of Section 61 which stipulates that, without prejudice to the generality of the foregoing power, such Regulations may provide for all or any of the matters enumerated thereafter. After referring to Section 61(2)(*t*), which provides for the transportation tariffs for common carriers or contract carriers or city or local natural gas

distribution network, and the manner of determining such tariffs under sub-section (1) of Section 22, the Supreme Court held that a scrutiny of the said provision showed that it dealt with transportation tariff for “common carrier” and “contract carrier” or “city or local natural gas distribution network” and the determination had to be done as per sub-section (1) of Section 22; pursuant to the said provision, the Petroleum and Natural Gas Regulatory Board (Determination of Network Tariff for City or Local Natural Gas Distribution Networks and Compression Charge for CNG) Regulations, 2008 (i.e “the Regulations”) had been framed; Regulation 2(1)(*e*) defined ‘compression charge for CNG’ to mean a charge (excluding statutory taxes and levies) in Rs/kg for online compression of natural gas into compressed natural gas (hereinafter referred to as ‘CNG’) for subsequent dispensing to consumers in a CNG station; Regulation 2(1)(g) defined ‘**Network tariff**’ to mean the weighted average unit rate of tariff (excluding statutory taxes and levies) in rupees per million British Thermal Units (Rs/MMBtu) for all the categories of consumers of natural gas in a CGD Network; Regulation 4 related to determination of network tariff and compression charge for CNG, and stipulated that the network tariff and compression charge for CNG, in respect of an entity covered by clause (*a*) or clause (*b*) of sub-regulation (1) of Regulation 3, shall be determined as per the procedure at Schedule A; and **i**n addition, there were various Regulations dealing with the procedure of determination.

On the submission that Section 61 of the Act had to be read in consonance with the Objects and Reasons of the Act, and when the

Board had the power to frame regulations to carry out the purposes of the Act, it had framed the Regulations in accordance with the legislation, the Supreme Court held that they had already dealt with the purport of Section 11, adverted to the facet how the words "subject to" had to be interpreted, the functions of the Board and the provisions relating to exclusivity, definitions of "common carrier" and the "contract carrier"; Section 61 was a provision that enabled the Board to frame Regulations; if, on reading of the statute in its entirety, such a power did not flow, a delegated authority could not frame a regulation as that would not accord with the statutory provisions nor would it be for the purpose of carrying on the provisions of the Act; in the case at hand, the Board had not been conferred such a power as per Section 11 of the Act; that was the legislative intent; Section 61 enabled the Board to frame Regulations to carry out the purposes of the Act, and certain specific aspects had been mentioned therein; Section 61 should be read in the context of the statutory scheme; regulatory provisions should be read and applied keeping in view the nature and textual context of the enactment, as that was the source of power; on a scanning of the entire Act, and applying various principles, they found that the Act did not confer any such power on the Board and the expression "subject to" used in Section 22 made it a conditional one; it had to yield to other provisions of the Act; as the power to fix the tariff had not been given to the Board, it could not frame a Regulation which would cover the area pertaining to determination of network tariff for a city or local gas distribution network, and compression charge for CNG; and, as the entire Regulation centred around the said subject, the said Regulation deserved to be declared ultra vires.

C. REGULATION 7 OF THE 2010 REGULATIONS:

Reliance is placed by the Board, on Regulation 7 of the Petroleum and Natural Gas Regulatory Board (Code of Practice for Quality of Service for City or Local Natural Gas Distribution Networks) Regulations, 2010, which reads as under :

> "7.
>
> *(1) every entity shall comply with the following code of practice with reference to billing of domestic commercial and industrial connections namely :-*
>
> *(a) raisebillsfordomesticconsumerswithabillingcyclenotlongerthanbimonthly;*
>
> *(b) notify area or district or circle wise billing and payment schedule and raise the bill for any billing cycle based on actual meter readings only;*
>
> *(c) upgrade billing procedures from time to time to accommodate advance lumpsum payments, online payments, smart cards or any other such schemes which would facilitate consumers' payments and also provide details of such procedure on its website;*
>
> *(d) raise the bill at least fifteen days before the due date of the payment for domestic consumerandsevendaysbeforeduedateforcommercialandindustrialconsumers;*
>
> *(e) issue the first bill only after energizing the connection;*
>
> *(f) issue a duplicate bill free of cost, if requested by the consumer;*
>
> *(g) resolvetheissuewithintendaysincaseitisestablishedthatthemeterreadingis not correctly reflected in the bill;*
>
> *(h) reflectadjustmentofanyexcesspaymentmadebytheconsumerinthesubsequent bill failing which interest on the excess payment shall be payable by the entity at the prevailing Prime Lending Rate (PLR)*

notified by the State Bank of India;

(i) the bill shall contain following details, namely:-

(i) Consumer details: Account Number, Name, Address. Phone number;

(ii) Consumption details: consumer category, consumption details, date of reading (old, new and next due on);

(iii) Network tariff Charges for the last mile connectivity if applicable taxes levied, the sale price charged for supply of gas, penalty chargeable for payment after due date and total dues payable;

(iv)in the case of CNG consumer, the entity shall also indicate the compression charges for CNG;

(v) inthecaseofdomesticconsumers,theentityshallindicateadditionalparameters, namely, average consumption in the last six months, excess payments made by consumer, if any, other charges if any, collected by the entity from the consumer during the billing cycle etc;

(vi) the invoice shall also indicate the entity related details like Name, Address and Telephone numbers of Bill Collection Centre, their timings, Incharge-Complaint Receiving Cell, Nodal Officer and Appellate Authority for dealing with consumer complaints;

(j) if the meter is found to be defective and the supply is continuing the bill for such period shall be based on average consumption of the last six billing cycles;

(k) the entity shall acknowledge immediately any complaints filed by the consumer on billing; (l) there shall be a provision for the consumer to lodge the complaint through email also;

(m) the complaint shall be addressed within ten days and if additional time is required, then, it has to be conveyed to the consumer along with reasons thereof;

(n) in case of consumer's request for final bill settlement, the entity shall arrange a special meter reading for final bill within seven days and–

(a) final bill shall be generated within seven days of the closure of gas supply;

(b) once the final bill is raised, the entity shall not have any right to recover any charge other than those in the final bill."

In terms of Regulation 7(1)(i)(iii) of the 2010 Regulations, every entity shall comply with the following code of practice with reference to billing of domestic commercial and industrial connections namely that the bill shall contain the following details, among others, the network tariff charges for the last mile connectivity, if applicable taxes levied, the sale price charged for supply of gas, penalty chargeable for payment after due date and total dues payable. Regulation 7(1)(i)(iii) of the 2010 Regulations does not obligate the Appellant to provide the breakup of the basic gas price, as network tariff charges only means the weighted average unit rate of tariff (excluding statutory taxes and levies), and nothing more.

D. RELEVANT CLAUSES OF THE GSA:

In considering the submission of Ms. Swapna Seshadri, Learned Counsel for the 2nd Respondent, that the Gas Supply Agreement is one sided, unfair and unreasonable, the 2nd Respondent had no choice but to sign on the dotted line, and the Board was therefore justified in directing the respondent (appellant herein) to provide proper breakup of the amounts being charged in terms of the Gas Supply Agreement dated 20.10.2016, it is useful to refer to certain clauses of the said Gas Supply Agreement dated 20.10.2016, to the extent relevant.

Article 2 of the Gas Supply Agreement relates to the scope of the contract and clause 2.2 to sale and purchase of gas. There under, subject to the provisions of the contract, with effect from the start date the seller shall sell and tender gas for delivery at the delivery point to the buyer in the quantities set out in the contract, and the buyer shall buy and receive

gas at the delivery point from the seller and pay for and receive such gas in accordance with the terms and conditions set out in the contract. Article 4 relates to delivery point, metering point, title and risk. In terms of clause 4.1 there under, all gas sold by the seller and charged by the buyer shall be supplied and tendered for delivery by the seller in a single co-mingled stream to the buyer at the delivery point and the buyer shall off-take and purchase gas from the seller at the delivery point. The sale and delivery of gas by the seller to the buyer under the contract shall be deemed to have been completed at the delivery point and, upon such delivery, the buyer shall be liable to pay the seller for the gas in accordance with the terms and conditions of the contract.

Article 6 relates to price and security, and Article 6.1 to the price. Article 6.1 (a) stipulates that the seller shall sell gas to the buyer under this contract at a price of Rs.25.300 per SCM of gas (the price). Article 6.1(b) provides that the aforesaid price is only applicable to gas sold and purchased under this contract, and shall be exclusive of all taxes and other incidental and related costs, charges and expenses of the seller for supplying and delivering gas to the buyer at the delivery point under this contract, which shall be separately applied and charged by the seller and which shall be billed to and will be paid by the buyer, as provided in this contract hereafter.

Clause 6.2 relates to revision of price and reads thus:

> *"(a) At any time after the Start Date, the Seller shall, at its sole discretion, be entitled to review and revise the Price set out in Article*
>
> *6.1. The Seller shall intimate change in the Price to the Buyer*

and the Buyer shall be liable to pay at such revised Price from the notification date as mentioned in the intimation/communication. Notwithstanding anything to the contrary as may be set out elsewhere and for the avoidance of any doubts in this regard, it is hereby clarified that there shall be no limit on the number of times the seller shall be entitled to review and revise the Price as aforesaid during the Contract Period and any such revision of the Price by the Seller effected pursuant to the Article 6.2 shall be binding on the Buyer.

(b) The Buyer hereby agrees that all decisions taken by the Seller in respect of revision of the Price shall be final and binding upon the BUYER and that the revised Price(s) shall apply to calculate all bills and payments to be made by the Buyer under this Contract and that the Buyer shall make such payments to the Seller at the revised Price(s). PROVIDED THAT in the event that any revision in Price notified by the Seller as aforesaid is not acceptable to the Buyer, the Buyer shall have a right to terminate the Contract with effect from a Day after completion of ninety (90) Days from the proposed date of revision in Price by issuing a prior written notice to the Seller within thirty (30) days from the date of notification of the revised Price by the Seller."

Clause 6.3 relates to taxes and reads thus:

"(a) The Seller shall be responsible for and agrees to pay all Taxes applicable to the sale transmission and delivery of Gas delivered and sold under the Contract upstream of the Delivery Point(s) and shall be entitled to recover such Taxes from the Buyer. All Taxes applicable over and above the Price set out in Article 6.1 above shall be passed on to the Buyer by the Seller and shall be borne by the Buyer and such Taxes shall be applied, charged and invoiced by the Seller in the Fortnightly Invoice issued to the Buyer under Article 7.1. Any future revision imposition, levy or assessment of Taxes shall become applicable immediately and the Buyer shall be liable to bear and pay such revised Taxes over and above the Price with

immediate effect. If the Buyer is in any doubt or requires a clarification as to whether any Taxes are effective or imposed, as the case may be, the Buyer shall take up the matter directly with the concerned Governmental Authority or any such other body or bodies without withholding the payments due to the Seller under this Contract on that account. The buyer shall thereafter forthwith inform the Seller regarding the decision of such governmental Authority in the matter.

(b) The Buyer shall be responsible for and agrees to pay, or cause to be paid all Taxes arising from the purchase, transportation, processing, handling and use of Gas downstream of the Delivery Point(s) under this Contract, including all Taxes arising in respect of the Buyer's/Seller's Facilities and all Taxes including those based on the Buyer's income, profits and capital gains."

A reading of one sample invoice (the invoice dated 16.02.2017) would show that the basic gas price (excluding taxes) stipulated there under is Rs.25.30000. The basic gas consumption and unit-1 SCM is 10,477.00000, the basic gas consumption charges is Rs.265,068.10 which is the basic gas price multiplied by the number of units of gas consumption. All that is charged, in addition to the basic gas price, is VAT, additional VAT and certain service charges. The 2nd Respondent does not dispute the Appellant's entitlement to impose taxes and other services charges on them. Their grievance is confined only to the basic gas price charged at Rs.25.30000 per SCM, and it is for this amount that they seek a break-up.

As noted hereinabove, this basic gas price of Rs.25.3000 is the rate stipulated in clause 6.1 (a) of the Gas Supply Agreement. Having agreed to this price, in the contract they entered into with the Appellant, it is now not open to the 2nd Respondent to turn around

and dispute the said price, or to seek a break-up thereof, claiming that the price charged is excessive or high.

Clause 4.1 of the GSA makes it clear that what is delivered by the Appellant to the 2nd Respondent, at the delivery point, is a single co-mingled stream of gas. We find considerable force in the submission of Shri Piyush Joshi, learned Counsel for the Appellant, that, since they procure gas from different suppliers at different rates, it is not possible for them to identify the source of gas supplied to any particular customer, and it is well-nigh impossible for them identify a particular source and then detail the cost of such procurement or its price at the point of delivery; that is why the basic price is expressly stipulated in the agreement; and this is the price which a consumer is required to pay for the gas supplied to them.

E. JUDGEMENT RELIED ON BEHALF OF THE 2ND RESPONDENT UNDERTHIS HEAD:

Reliance is, however, placed by Ms. Swapna Seshadri, learned Counsel for the 2nd Respondent, on the judgment of the Supreme Court in **Pioneer Urban Land & Infrastructure Ltd. v. Govindan Raghavan, (2019) 5 SCC 725,** to contend that, since the 2nd Respondent had no choice but to sign on the dotted line, the clauses in the GSA would not disable the 2nd Respondent from seeking a break-up of the basic gas price stipulated therein, to satisfy themselves whether or not the price charged is excessive.

In **Pioneer Urban Land & Infrastructure Ltd,** the appellant builder launched a residential project. The respondent flat purchaser

entered into an apartment buyer's agreement with the appellant to purchase an apartment in the said project. As per Clause 11.2 of the agreement, the appellant was to make all efforts to apply for the occupancy certificate within 39 months from the date of excavation, with a grace period of 180 days, and offer possession of the flat to the respondent. The appellant builder failed to apply for the occupancy certificate as per the stipulations in the agreement. The respondent filed a complaint, before the National Commission, alleging deficiency of service on the appellant's failure to obtain the occupancy certificate and hand over possession of the flat, and sought refund of the entire amount deposited, along with interest @18% p.a and compensation of Rs 10,00,000 for mental agony, harassment, discomfort and undue hardship etc. The National Commission passed an ex-parte interim order restraining the appellant from cancelling the allotment made in favour of the respondent. During the pendency of proceedings before the National Commission, the appellant obtained the occupancy certificate, and issued a possession letter to the respondent.

The appellant submitted before the National Commission that, since construction of the apartment was complete and the occupancy certificate had since been obtained, the respondent must be directed to take possession of the apartment, instead of directing refund of the amount deposited. The Respondent however submitted that he was not interested in taking possession of the apartment on account of the inordinate delay of almost 3 years and he had, in the meanwhile, taken an alternate property.

The National Commission allowed the complaint holding that, since the last date stipulated for construction had expired about 3 years before the occupancy certificate was obtained, the respondent could not be compelled to take possession at such a belated stage; the grounds urged by the appellant, for the delay in handing over possession, were not justified so as to deny awarding compensation to the respondent; and the clauses in the agreement were wholly one-sided, unfair, and not binding on the respondent. The appellant was directed to refund the amount deposited by the respondent, along with interest towards compensation. However for the period when the interim order was in operation, which restrained the appellant builder from cancelling the respondent's allotment, no interest was awarded.

It was submitted by the appellant-builder, before the Supreme Court, that the respondent-flat purchaser was not entitled to refund of the amount deposited, since the apartment buyer's agreement was not terminated by the respondent in accordance with Clause 11.5(*ii*) of the agreement, which stipulated that the allottee had to terminate the agreement by giving a termination notice of 90 days to the Developer, and therefore the builder could not sell the apartment, and refund the money to the respondent; on the contrary, the respondent had filed a consumer complaint and had obtained an ex-parte interim order restraining the builder from cancelling the allotment made in favour of the respondent.

It is in this context that the Supreme Court held that the appellant had obtained the occupancy certificate almost 2 years after the date stipulated in the apartment buyer's agreement; as a consequence, there was failure to hand over possession of the flat to the respondent within a reasonable

period; the occupancy certificate was obtained during the pendency of the proceedings before the National Commission; in ***LDA* v. *M.K. Gupta*, (1994) 1 SCC 243**, the Supreme Court had held that, when a person hires the services of a builder or a contractor for the construction of a house or a flat and the same is for a consideration, it is a "service" as defined by Section 2(1)(*o*) of the Consumer Protection Act, 1986; the inordinate delay in handing over possession of the flat clearly amounted to deficiency of service; in ***Fortune Infrastructure* v. *Trevor D'Lima*, (2018) 5 SCC 442**, the Supreme Court had held that a person cannot be made to wait indefinitely for possession of the flat allotted to him, and is entitled to seek refund of the amount paid by him, along with compensation; the respondent had made out a clear case of deficiency of service on the part of the appellant; the respondent was justified in terminating the apartment buyer's agreement by filing the consumer complaint, and could not be compelled to accept possession whenever it is offered by the builder; and the respondent was legally entitled to seek refund of the money deposited by him along with appropriate compensation.

After so holding, the Supreme Court noted that the National Commission had held that the clauses relied upon by the builder were wholly one-sided, unfair and unreasonable, and could not be relied upon; the Law Commission of India, in its 199th Report, had addressed the issue of "Unfair (Procedural & Substantive) Terms in Contract", and had recommended that a legislation be enacted to counter such unfair terms in contracts; a perusal of the apartment buyer's agreement revealed stark incongruities between the remedies available to both the parties; section 2(1)(*r*) of the Consumer Protection Act, 1986 defines "unfair trade practices" to include any of the practices enumerated therein; and the provision is illustrative, and not exhaustive.

The Supreme Court, thereafter, referred with approval to its earlier judgement in ***Central Inland Water Transport Corpn. Ltd.*** **v.** ***Brojo Nath Ganguly*****, (1986) 3 SCC 156,** wherein it was held thus:-

> *"*. … Our Judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. … ***This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power*****.** It is difficult to give an exhaustive list of all bargains of this type. No court can visualise the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. … These cases can neither be enumerated nor fully illustrated. ***The court must Judge each case on its own facts and circumstances.*****"**
>
> (emphasis supplied)

The Supreme Court, in **Pioneer Urban Land & Infrastructure Ltd,** then proceeded to hold that a term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, in a contract framed by the builder; the contractual terms of the subject agreement were ex facie one-sided, unfair and unreasonable; incorporation of such one-sided clauses in an agreement constituted an unfair trade practice as per Section 2(1)(*r*) of the Consumer Protection Act, 1986 since it adopted unfair methods or practices for the purpose of selling the flats by the builder; they had no hesitation in holding that the terms of the apartment buyer's agreement were wholly one-sided and unfair to the respondent; the appellant could not seek to bind the respondent with such one-sided contractual terms; the appellant had failed to fulfil his contractual obligation of obtaining the occupancy certificate, and offering possession of the flat to the respondent within the time stipulated in the agreement, or within a reasonable time thereafter; the respondent could not be compelled to take possession of the flat, as it was offered almost 2 years after the grace period under the agreement had expired; during this period, the respondent had to service a loan that he had obtained for purchasing the flat, by paying interest to the Bank; in the meanwhile, the respondent had also located an alternate property; and, in these circumstances, the respondent was entitled to be granted the relief prayed for i.e. refund of the entire amount deposited by him with interest.

In ***Central Inland Water Transport Corpn. Ltd.*** **v.** ***Brojo Nath Ganguly*****, (1986) 3 SCC 156,** (on which reliance was placed in **Pioneer Urban Land & Infrastructure Ltd),** the Supreme Court, while holding that Courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in

a contract, entered into between parties who are not equal in bargaining power, opined that it was difficult to give an exhaustive list of all bargains of this type; this principle, however, would not apply where the bargaining power of the contracting parties is equal or almost equal; this principle may not apply where both parties are businessmen and the contract is a commercial transaction; and the court must judge each case on its own facts and circumstances.

Further, in **Pioneer Urban Land & Infrastructure Ltd,** the Supreme Court has given elaborate reasons for its conclusion that the subject agreement was one sided, unfair and unreasonable, holding that a perusal of the apartment buyer's agreement revealed stark incongruities between the remedies available to both the parties; for instance, Clause 6.4(*ii*) of the agreement entitled the appellant to charge interest @18% p.a. on account of any delay in payment of instalments from the respondent flat purchaser, and Clause 6.4(*iii*) of the agreement entitled the appellant to cancel the allotment and terminate the agreement, if any instalment remained in arrears for more than 30 days; on the other hand, as per Clause 11.5 of the agreement, if the appellant failed to deliver possession of the apartment within the stipulated period, the respondent had to wait for a period of 12 months after the end of the grace period, before serving a termination notice of 90 days on the appellant, and even thereafter, the appellant had 90 days to refund only the actual instalment paid by the respondent, after adjusting the taxes paid, interest and penalty on delayed payments; and, in case of any delay thereafter, the appellant was liable to pay interest @9% p.a. only.

Another instance cited by the Supreme Court, in **Pioneer Urban Land & Infrastructure Ltd,** for its conclusion that the contract was one-sided and unreasonable, was clause 23.4 which entitled the appellant to serve a

termination notice upon the respondent for breach of any contractual obligation; if the respondent failed to rectify the default within 30 days of the termination notice, then the agreement automatically stood cancelled, and the appellant had the right to forfeit the entire amount of earnest money towards liquidated damages; on the other hand, as per clause 11.5(*v*) of the agreement, if the respondent failed to exercise his right of termination within the time limit provided in Clause 11.5, he was not entitled to terminate the agreement thereafter, and was to be bound by the provisions of the agreement.

F. IS THE GSA ONE SIDED AND UNREASONABLE:

In the present case, both parties to the agreement are businessmen and the agreement is a commercial transaction. Unlike in **Pioneer Urban Land & Infrastructure Ltd,** the 2nd Respondent herein has not placed any material, either before the Board or before this Tribunal, to show how fixation of price, at 25.30000 per MCD in the agreement, is one sided, unfair or unreasonable. The 2nd Respondent seeks to have a roving enquiry caused regarding the price at which the Appellant has procured gas from its suppliers when, in fact, the gas supplied to it is co-mingled and is not traceable to any single source. Not every standardized Agreement would amount to a one-sided agreement, much less one which is unfair and unreasonable. Reliance placed, on behalf of the 2nd Respondent, on **Central Inland Water Transport Corpn. Ltd** and **Pioneer Urban Land & Infrastructure Ltd**, is therefore misplaced.

The appellant before the Supreme Court, in **Pioneer Urban Land &Infrastructure Ltd,** was a builder and it was found, as a fact, by the National Commission that there was deficiency of service on their part. It is in such circumstances that the provisions of the contract were examined

and it was held that, since there was deficiency in service and the contract was one-sided, such a contract could not be enforced. No specific allegation has been made, nor has any material been placed on record, by the 2nd Respondent to show how the price being charged was excessive. It is also not discernible, either from the petition filed by them before the Board or from the impugned order passed later, as to how they, a large manufacturing company, could claim that the contract was one-sided.

As the Board lacked jurisdiction to examine a complaint regarding the price stipulated in a bilateral agreement, and no material has been placed to establish how the said price is excessive and unreasonable, the contentions under this head necessitate rejection.

II.DOES THE EXISTENCE OF AN ARBITRATION AGREEMENT BAR EXERCISE OF JURISDICTION BY THE BOARD TO DIRECT THE APPELLANT TO DISCLOSE THE BREAK UP OF THE BASIC PRICE?

Mr. Piyush Joshi, learned counsel for the Appellant, would contend that the Board lacks jurisdiction to determine a dispute covered by the arbitration clause of the agreement; the issue regarding break-up of the price was not raised by the 2nd Respondent independent of the contract; and the dispute was specifically in relation to the invoices raised in terms of the contract, and was clearly governed by the specific terms of the contract.

Article 18 of the Gas Supply Agreement relates to governing law, dispute resolution and jurisdiction, and Article 18.2 to arbitration. Article 18.2 (a) reads thus:

> *" Any Dispute whatsoever arising out of this Contract which is not resolved by mutual agreement through negotiations between the Parties within thirty (30) days of the notice of the Dispute, shall be referred to and shall be finally settled by binding arbitration conducted in accordance with the provisions of the Arbitration*

and Conciliation Act, 1996, and the rules made there under from time to time, and any statutory modifications thereof."

The Appellant herein had contended before the Board that, in the light of the arbitration clause in the agreement, the 2nd Respondent should be relegated to the remedy of arbitration, and the Board should not entertain the dispute regarding the basic price charged, since it was levied strictly in terms of Article 6.1 of the agreement.

In the Order under Appeal, the Board, after noting the Appellant's contention that it lacked jurisdiction to adjudicate disputes covered by the arbitration clause in the agreement, observed that it was not denied that the arbitration mechanism should be preferred at the first instance to resolve the dispute between the parties, as it was an expedient mode of dispute resolution mechanism; however, on examination, it found that the 2nd Respondent was not trying to wriggle out of the arbitration clause, but was only trying to get a break-up of the price, which was not an unreasonable demand as other customers must have demanded the same; it was the duty and obligation of the Appellant to provide the break-up of the price, and resolve the grievance of the customer, especially when the 2nd Respondent had specifically mentioned that their plant at Kosamba was facing severe problems as the important input of fuel became very costly; they disagreed with the present contention of the Appellant as the 2nd Respondent had raised a serious dispute reflecting the conduct of the Appellant wherein allegations had been made regarding non-disclosure of break-up of the price; thus an element of mistrust existed; therefore, it was well within the power of the Board, and it was competent to take cognizance despite there being a clause of arbitration in the agreement which must be given a go by, especially in cases where an

element of mistrust was present; further, the Board had jurisdiction to intervene in the matter, and the scope of the powers of the Board were not limited by the arbitration agreement entered between the parties in terms of the provisions of the Arbitration and Conciliation Act, 1996; and the arbitration clause found in the agreement would not automatically restrict the jurisdiction of the Board to decide the dispute.

The Board further held that it was settled law that, where the issue of "arbitrability" arises in context of an application under Section 8 of Arbitration and Conciliation Act, 1996 in a pending complaint, all aspects of arbitrability will have to be decided by the court arising out of the complaint, and cannot be left to the decision of the arbitrator; even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the forum where the complaint is pending has the prerogative to refuse an application under Section 8 of the Act i.e. to refer the parties to arbitration, if the subject-matter of the complaint is capable of adjudication only by a concerned forum or the relief claimed can only be granted by that forum; any dispute arising out of the GSA, which was not resolved by mutual agreement between the parties, shall be referred to arbitration conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996, and the sole arbitrator shall be appointed by the Seller i.e. the Appellant; in view thereof, the Appellant was solely responsible to appoint the sole arbitrator if the dispute was not resolved between the entities within 30 days; however, the Appellant could not conduct the arbitration proceedings within the stipulated time period; thus, at this stage, the Appellant cannot challenge the jurisdiction of the Board to entertain the present complaint; and the statutory function to be performed by it, under Section 11(a) of the Act,

was over-reaching and could not be curtailed by arbitration proceedings.

The Board has evidently erred in holding that, even if there is an arbitration agreement and the dispute is covered in terms thereof, it has the prerogative not to refer the parties to arbitration where the subject matter of the complaint is capable of adjudication by it.

A. SECTION 8 OF THE ARBITRATION AND CONCILIATION ACT, 1996: ITS SCOPE:

Section 8 of the Arbitration & Conciliation Act, 1996 relates to the power of a judicial authority to refer parties to an arbitration where there is an arbitration agreement. Clause (1) thereof reads thus:

"(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists."

Section 8 refers to the power to refer parties to arbitration where there is an arbitration agreement and, under sub-section (1) thereof, a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. The conditions which are required to be satisfied under Section 8, before the court can exercise its powers, are: (1) there is an arbitration agreement; (2) a party to the agreement brings an action in

the court against the other party; (3) subject-matter of the action is the same as the subject-matter of the arbitration agreement; and (4) the other party moves the court for referring the parties to arbitration before it submits its first statement on the substance of the dispute. The last provision creates a right in the person bringing the action to have the dispute adjudicated by the court, once the other party has submitted his first statement of defence. ***(P. Anand Gajapathi Raju v. P.V.G. Raju*, (2000) 4 SCC 539)**.Section 8 mandates that the judicial authority before which an action has been brought in respect of a matter, which is the subject-matter of an arbitration agreement, shall refer the parties to arbitration if a party to such an agreement applies not later than when submitting his first statement. Notwithstanding the pendency of the proceedings before the judicial authority or the making of an application under Section 8(1) of the 1996 Act, the arbitration proceedings are enabled, under Section 8(3) of the 1996 Act, to be commenced or continued and an arbitral award also made unhampered by such pendency. **(Kalpana Kothari vs Sudha Yadav: (2002) 1 SCC 203).**

The language used in Section 8 is: "*in a matter which is the subject of an arbitration agreement*". The court (in the present case – the Board) is required to refer the parties to arbitration where the suit (complaint) is in respect of "*a matter*" which the parties have agreed to refer, and which comes within the ambit of the arbitration agreement. Where, however, a suit is commenced — "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words *"a matter"* indicate that the entire subject-matter of the suit should be subject to the arbitration agreement. ***(Sukanya Holdings (P)***

***Ltd. v. Jayesh H. Pandya*, (2003) 5 SCC 531).** In cases where the arbitration clause in the agreement clearly shows that the parties thereto had agreed to refer their dispute arising out of the agreement, of whatever nature it may be, to an arbitrator as contemplated in that Agreement, Section 8 of the Act, in clear terms, mandates that a judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement, should refer such parties to arbitration. The language of this section is unambiguous. ***(Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums*, (2003) 6 SCC 503).**

An application before a court under Section 8 merely brings to the court's notice that the subject-matter of the action before it is the subject-matter of an arbitration agreement. In cases where the arbitration agreement covers all the disputes between the parties in the proceedings, the language of Section 8 is peremptory and it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising there from ***(P. Anand Gajapathi Raju v. P.V.G. Raju*, (2000) 4 SCC 539),** after such an application is made except to refer the dispute to an arbitrator. If as contended by a party, in an agreement between the parties before the court, there is a clause for arbitration, it is mandatory for the court to refer the dispute to an arbitrator. If the existence of the arbitration clause is admitted, the court ought to refer the dispute to arbitration in view of the mandatory language of Section 8 of the Act. ***(Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums*, (2003) 6 SCC 503)**. Any objection, as to the applicability of the arbitration clause to the facts of the case, will have to be raised before the Arbitral Tribunal concerned, and the court ought not to proceed to examine the applicability of the arbitration

clause to the facts of the case in hand, but ought to leave that issue to be determined by the Arbitral Tribunal, as contemplated in the arbitration clause of the Agreement, as required under Sections 8 and 16 of the Act. (***(Hindustan Petroleum Corpn. Ltd. v. Pink City Midway Petroleums*, (2003) 6 SCC 503; *Konkan Rly*: (2002) 2 SCC 388)**.

B.SECTION 12(1)(a) OF THE PNGRB ACT: ITS SCOPE:

The jurisdiction conferred on the Board by Section 12(1)(a) of the PNGRB Act, to adjudicate upon and decide any dispute or matter arising between an entity (ie the Appellant herein) and any other person (i.e the 2nd Respondent herein), is available to be exercised unless the parties have agreed to arbitration. It is only in cases where the dispute between the parties is not covered by the arbitration clause of the agreement (ie the GSA), can the Board exercise jurisdiction under Section 12(1)(a) to adjudicate upon and decide such a dispute.

In the present case, Article 6 of the GSA relates to price and security, and Article 6.1 to the price. Article 6.1 (a)&(b) required the Appellant to sell gas to the 2nd Respondent at Rs.25.300 per SCM exclusive of all taxes and other incidental and related costs, charges and expenses, at the delivery point. Article 6.2(a) enabled the Appellant to review and revise the price set out in Article 6.1, and intimate the change in the price to the 2nd Respondent which was then liable to pay at such a revised price. The proviso there under enabled the 2nd Respondent, in the event the revision in price was not acceptable to it, to terminate the contract after ninety (90) days from the date of revision in price, by issuing a prior written notice within thirty (30) days from the date of notification of

the revised price. Article 18.2 (a) of the GSA brings within the ambit of the arbitration clause of the GSA, any dispute whatsoever arising out of this Contract which would, evidently, include Articles 6.1 and 6.2 of the GSA as well.

In terms of Section 8(1) of the Arbitration and Conciliation Act,1996, once it is found that the dispute is the subject matter of an arbitration agreement, the Board was bound, on an application made before it by the Appellant, to refer the parties to arbitration unless it was of the view that, *prima facie,* no valid arbitration agreement existed. The obligation cast on the Respondent-Board, under Section 8(1), was only to satisfy itself, that too *prima facie,* that there existed a valid arbitration agreement, and nothing more. The moment it was so satisfied, the Board was bound to relegate the parties to arbitration for resolution of the dispute which was the subject matter of such an agreement. For the reasons stated earlier in this order, the Board lacked jurisdiction to consider the issue of price-fixation which, in effect, was what the 2nd Respondent was questioning when it sought a breakup of the basic price charged by the Appellant. Even if we were to presume otherwise, Section 8(1) of the Arbitration & Conciliation Act read with Section 12(1)(a) of the PNGRB Act obligated the Board to refrain from adjudicated and deciding this dispute, and instead to relegate the parties to their contractual remedy of arbitration.

Failure of the Appellant to refer the dispute to arbitration within 30 days, as required under Article 18.2(a) of the GSA, does not clothe the Board with jurisdiction to adjudicate upon and decide the subject dispute. Such failure on the part of the Appellant, only enabled the 2nd Respondent to approach the concerned High Court, under Section 11(6) of the

Arbitration and Conciliation Act, 1996, requesting it to take the necessary measure for securing appointment of an arbitrator.

On this ground also, the order under appeal necessitates interference, and merits being set aside.

III.CONCLUSION:

Viewed from any angle, we are satisfied that the Board has erred in entertaining the subject complaint, and in calling upon the appellant to provide information which it was not obligated to do in terms of the GSA, as the Board lacked jurisdiction even to adjudicate upon and decide the dispute, much less compel the Appellant to provide such a break-up to the 2nd Respondent. The Appeal is allowed, and the impugned order is set aside.

Pronounced in the open court on this the 19th day of April, 2023.

(Dr Ashutosh Karnatak) Technical Member(P&NG)	(Justice Ramesh Ranganathan) Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

mk/ks