Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL NO. 16 OF 2009

Dated: 31st August, 2009

Present :Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. M. B. LAL, Technical Member (P&NG)

In the matter of:

Reliance Fuel Resources Ltd. … Appellant (s)
H-Block, First Floor,
Dhirubhai Ambani Knowledge City,
Navi Mumbai - 400710

Versus

Petroleum & Natural Gas Regulatory Board … Respondent (s)
1st Floor,, Word Trade Centre
Babar Road, New Delhi

Counsel for the Appellant(s) : Mr. Vikas Singh, Sr. Advocate
Mr. Apoorva Misra,
Ms. Shobana Master
Mr. S. Venkatesh,
Ms. Poonam Verma

Counsel for the Respondent (s): Ms. Anita Sahani, Ms. Divya Roy
Mr. Rakesh Dewan

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Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

JUDGMENT

Facts of the case

1. The Reliance Fuel Resource Ltd. (RFRL) is the Appellant herein. The Appellant filed 4 applications before the Petroleum and Natural Gas Regulatory Board (hereinafter to be referred to as the 'Board') seeking for the grant of authorization for the CGD net work pipelines for the 4 areas. The said applications were rejected by the Board by passing the impugned order dated 30.10.2008. Challenging the said order the Appellant has filed this Appeal before this Tribunal.

2. The necessary facts in a nut shell are as follows:

A. The Appellant is a group company of the Reliance Dhirubhai Ambani Group. It has significant investment plans to lay, build and operate natural gas transmission pipelines and develop the city gas distribution infrastructure in various states.

B. On 20.12.2006 the Central Government promulgated the policy for the pipeline policy providing for authorization of entities by the Petroleum Board to lay, build, operate and

expand gas pipelines. In pursuance of the said policy on 25.06.2007 the Board was first constituted by a notification issued by the Ministry of Petroleum and Natural Gas.

C. Based on the Pipeline Policy issued by the Central Government and also the constitution of the Board provided with powers to grant authorization for gas pipeline, the Appellant on 03.09.2007 submitted 4 applications for grant of authorization for the 4 areas to the Board. The Appellant had also sent a letter dated 22.11.2007 reminding the Board praying for the authorization of the gas pipeline through its 4 application pending before the Board.

D. In response to this letter, the Board, through its Secretary, sent replies dated 28.11.2007 and 10.12.2007 intimating the Appellant that their 4 applications for grant of authorization in 4 areas cannot be considered at present as the relevant Regulations have not yet been framed and requesting the Appellant to apply afresh as per the Regulations after the said Regulations are framed and notified. Challenging the

same the Appellant filed the Appeal in Appeal No. 53 of 2008 before this Tribunal on 17.01.2008 seeking for a direction to the Board to consider its 4 applications dated 03.09.2007 without waiting for the framing of the Regulations. When the matter came up before the Tribunal it was reported on behalf of the Board that till now no open bidding process has started in the country for selection of entities to operate a natural gas pipeline as per the Act and the said process will start only after the Regulations are framed and the framing of Regulations is under process of finalization. So awaiting the finalization of the Regulations the Tribunal periodically adjourned the matter. Ultimately Regulations were finalized and notifications were issued on 19.03.2008 and 06.05.2008. Accordingly, the same was informed to the Tribunal.

E. On the basis of the above on 26.05.2008 the Tribunal disposed of the Appeal by directing the Board to dispose of the applications filed by the Appellant as early as possible.

F. In accordance with the order of the Tribunal the opportunity of hearing was given by the Board to the Appellant who in turn made submissions through its counsel on various dates. Ultimately the Board by the impugned order on 30.10.2008 rejected the said Applications holding that those 4 applications filed by the Appellant were presented on 03.09.2007 i.e. prior to framing of Regulations and as such the said applications cannot be entertained as the same were not filed in accordance with the Regulations. Aggrieved by this, the Appellant has filed this Appeal in Appeal No. 16 of 2009 before this Tribunal challenging the said order dated 30.10.2008 passed by the Board

G. Mr. Vikas Singh, learned senior counsel appearing for the Appellant made the following contentions while assailing the order impugned dated 30.10.2008.

(i) The Appellant submitted its 4 applications before the Board on 03.09.2007 itself i.e. even prior to the framing of the Regulations. Therefore, the Board will have to take into consideration all these 4 applications dated

03.09.2007 in accordance with law as prevalent then. At that time the provisions of the Petroleum Act, 1934, Petroleum Rules 2002 and the Petroleum Board Act, 2006 alone were available. The Regulations were admittedly framed and notified by the Board later i.e. on 19.03.2008 and 06.05.2008. As such, while considering the applications of the Appellant the Board ought to have applied the doctrine of *Relation Back* as propounded by the Supreme Court in various decisions.

(ii) If a statute or a provision does not explicitly provide for retrospective operation the said provision cannot be given retrospective effect. Based on the said anology the applications which were filed on 03.09.2007 have to be considered only as per the legal regime which was prevalent then. The Regulations which were framed and notified by the Board at a later point of time i.e. on 19.03.2008 and 06.05.2008 cannot be given retrospective effect in the matter of the consideration of the application made on 03.09.2007 for grant of authorization.

(iii) The rejection of the applications submitted by the Appellant due to non framing and non- finalization of the Regulations is contrary to the well established law that the framing of Regulations is not a condition precedent to perform the statutory functions by a statutory body like the Board as laid down by the Supreme Court in various decisions.

(iv) At the time of filing of original applications before the Board i.e. on 03.09.2007 there was no requirement of bidding for grant of authorization. The legal regime prevalent at that time when the applications were first made did not provide for any bidding process. When such being the case now directing the Appellant to comply with the Regulations which were subsequently framed is not only discriminatory but also would amount to denying the Appellant a level playing field.

(v) Even though Section 16 of the Act has not been notified by the Central Government, the Board can still exercise its power to grant authorization as the said power flows from a combined reading of Section 11, 17 and 19 of the

Act. Under these sections the entities seeking authorization may make applications before the Board and on considering those applications the board is empowered to grant authorization to such entities. Hence, the Board ought to have considered the applications filed by the Appellant on 03.09.2007 in terms of doctrine of *Relation Back* and under law prevalent then without referring the Regulations dated 19.03.2008 and 06.05.2008.

(vi) In this case the impugned order was passed on the basis of the decision arrived at by the Committee consisting of 2 members. Under Section 8 of the Act, the Board alone can decide the issue and not the Committee. Under the relevant Regulations the transaction of the business shall be constituted by the 3 Members of the Board including the Chairman. In this case the Board has failed to comply with the said procedure. It is contended on behalf of the Board that on the strength of resolution dated 11.09.2008 the Chairman has referred the case to a committee consisting of 2 members to hear the applications, and

make recommendations. This contention of the Board is wrong as the said resolution is not valid in law as its is contrary to the provisions of Section 6 of the Act. The delegated power cannot be redelegated and as such the impugned order passed on the basis of the recommendation of the Committee is bad.

H. In reply to the above points the learned counsel for the Respondent Board has made the following submissions:

(i) In the earlier Appeal No. 53 of 2008 filed by the Appellant challenging the letters of the Board dated 20.11.2007 and 10.12.2007 rejecting the application and asking the Appellant to apply afresh after the Regulations are framed, the main contention of the Appellant was that the framing of the Regulations is not a condition precedent for performing the statutory duty of the Board for considering the applications for the authorization. Admittedly, in the said Appeal the Tribunal has not given any findings

with respect to that nor directed the Board to consider the applications dehors the Regulations. On the other hand the Tribunal, on being informed that the Regulations are yet to be framed, was pleased to adjourn the matter on several occasions directing the Board to finalize the Regulations as soon as possible. Only after finalization of the Regulations the Tribunal passed the final order in the said Appeal directing the Board to consider and dispose of the said 4 applications filed by the Appellant, pending before the Board. Having failed to get any finding over the said point from the Tribunal the Appellant now cannot raise the very same point in this Appeal.

(ii) The Pipeline Policy was issued by the Central Government on 20.12.2006. Thereafter, the Board was constituted. The applications were filed on 03.09.2007. From this it is clear that pipeline policy dated 20.12.2006 would govern the field. As per this policy no pipeline will be laid without the

authorization on the basis of the Regulations to be framed by the Board. This policy further provides that the entity has to be selected only under the bidding process by following the procedure as prescribed under the Regulations. It is true that the Petroleum Act 1934 relied upon by the learned counsel for the Appellant deals with the license and concept of the authorization. But that Act was valid only till the pipeline policy was notified i.e. 20.12.2006. The Petroleum Board Act came into force in the year 2006. The Board had also been constituted under the said Act in 2006. From this it is clear that applications were filed by the Appellant before the Board only after the issuance of notification of Pipeline policy, and only after Act of 2006, has come into force. This would indicate that the applications were submitted on 03.09.2007 i.e. during the legal regime governed by the Pipeline Policy dated 20.12.2006 and the Act of 2006.

(iii) A combined reading of Section 11, 17, 19 and 61 of the Act would clearly reveal that the entities can be selected by the Board for grant of authorization only as per the procedure prescribed under the Regulations to be framed by the Board. Admittedly, when the applications have been submitted by the Appellant on 03.09.2007 the Act of 2006 the Pipeline Policy which was issued by the Government on 20.12.2000 were in force. Therefore, the Appellant's contention on the basis of the doctrine of *Relations Back* the old laws alone would apply to the applications dated 03.09.2007 is misconceived.

(iv) Admittedly, the applications were submitted by the Appellant before the Board neither on invitation extended by the Board nor on the recommendations of the Central Government forwarding these applications to the Board. There is no occasion for the Appellant to apply for authorization until the applications were invited by the Board in terms of

Section 19 of the Act and the Regulations thereunder. Therefore no authorization can be granted on the strength of uninvited applications to any entity contrary to the provisions of the Act and Regulations. Mere filing of uninvited applications for grant of authorization does not bestow any right on the Appellant nor to claim any preference over the other entities. There is no provision for the "first come first serve" either in terms of the policy or the provisions of the Act.

(v) The Board has passed the impugned order on the basis of the recommendations made by the Committee to which the case was referred by the Chairman of the Board. As per Section 6 and Section 58 the resolution can be passed by the Board by which the Chairman of the Board was authorized to refer such a dispute to the committee to hear and send its recommendation to take the final decision. It is contended that by virtue of the resolution it cannot be allowed to sub-delegate the

powers delegated to Chairman. This contention is wrong. The resolution dated 11.09.2008 had been passed by the Board delegating the power to Chairman to refer the cases to the Committee of 2 members. Therefore, it is the Board who took the ultimate decision on the basis of the recommendations of the committee which heard the counsel for the Appellant. Furthermore, when the committee heard the applications the Appellant submitted to the jurisdiction of the said Committee and never raised the question of jurisdiction.

4. We have heard the learned counsel for both the parities and have given our careful consideration to the rival contentions. The written submission was filed by the Appellant on 14.07.2009 and reply to the written submission on behalf of the Respondent Board was filed on 07.08.20009. By way of rejoinder another written submission was filed on behalf of the Appellant on 24.08.2009. We have perused those written submissions as well as the records. The main question that arises for consideration in this case is as follows:

Whether the Petroleum Board is right in refusing to entertain and consider the applications of the Appellant seeking for authorization on the ground that the Appellant's applications were filed prior to the framing of Regulations without appreciating the doctrine of *Relation Back?.*

5. Before delving deep into this question it would be appropriate to keep in mind the background and the facts of the case in detail.

6. Let us now refer to those facts in the following paragraphs:

(i) Originally the Central Government, Ministry of Petroleum and Natural Gas was the authority to entertain the applications from the various entities with regard to the Petroleum products and grant of licenses under the power conferred under the Petroleum Act 1934 and Petroleum Rules 2002.

(ii) On 20.12.2006 the Central Government, Ministry of Petroleum and Natural Gas promulgated a policy for development of natural gas pipeline and city or local natural gas distribution networks. This policy was called

pipeline policy. The said policy provided for the grant of authorization to the entities by the Petroleum and Natural gas Regulatory Board. As per this policy the Board shall decide and select entity only among serious bidders who should participate in the bidding process.

(iii) On 31.03.2006 the Parliament enacted the Petroleum and Natural Gas Regulatory Board Act, 2006. In pursuance of the said Act, by the notification dated 25.06.2007 the Board was constituted namely the Petroleum and Natural Gas Regulatory Board issued by the Ministry of Petroleum and Natural Gas. Based on the policy guidelines and also the constitution of the Board, the Appellant on 03.09.2007 submitted 4 applications for grant of authorization in 4 areas mentioning in those applications that appellant undertakes to abide by all the rules and regulations as prescribed in the Act and framed by the Board.

(iv) On 30.10.2007 the Board issued a press note that even though the Section 16 of the Act is not yet notified by the Government, it will grant authorization to lay, build,

operate and expand gas pipeline as contract carrier under Section 17 of the Act and such authorization will be granted in terms of the Regulations which are yet to be finalized

(v) On 22.11.2007 the Appellant sent a letter reminding the Board about the pendency of its 4 applications for 4 areas which had already been filed for authorization.

(vi) In response to this letter the Board sent replies dated 28.11.2007 and 10.12.2008 intimating to the Appellant that those applications cannot be entertained at present as the relevant Regulations are still under finalization and, requested, the Appellant to apply afresh in the prescribed format alongwith the prescribed fee after the Regulations have been notified.

(vii) As the Appellant is aggrieved by the non-consideration of those applications which were filed on 03.09.2007 they filed an Appeal before the Tribunal on 17.01.2008 in Appeal No. 53 of 2008 seeking for a direction to the Board for consideration their 4 applications without waiting for finalization of the Regulations.

(viii) The said Appeal was taken by the Tribunal in February, 2008. At that time it was represented on behalf of the Board that the framing of Regulations is necessary as per the Act and the Pipeline Policy and the bidding process has to be started in accordance with the Regulations in order to select an entity in a prospective and objective manner through the process of competitive bidding for the purpose of protecting the interest of the consumers and, therefore, quick steps are being taken for the finalization of the Regulations. On the basis of the said statement the Tribunal adjourned the matter to various dates awaiting the finalization of the Regulations.

(ix) Ultimately, on 07.05.2008 when the matter came up before the Tribunal it was submitted on behalf of the Board that the relevant Regulations were already framed and have been published in the official Gazette on 19.03.2008 and 06.05.2008. In view of the said statement made on behalf of the Board the Appellant withdrew the Appeal from this Tribunal. Accordingly, the Appeal was dismissed as withdrawn. However, on

18.02.2008 an Application for restoration of the said Appeal was filed by the Appellant on the ground that their counsel without getting proper instruction from the client agreed to withdraw the Appeal and, therefore, the said Appeal may be restored for hearing. Accordingly, on 05.03.2008 order had been passed restoring the Appeal. The Appeal was again heard. On 25.05.2008 the Tribunal disposed of the Appeal after hearing the counsel for the parties holding that the decision to reject the applications made only by the Secretary of the Board is non est and since the decision can be taken only by the Board these applications must be considered and disposed of by the Board as early as possible.

(x) Even though the Appeal was disposed of on 25.05.2008 by the Tribunal, the Appellant filed another application on 09.09.2008 being I.A. No. 129 of 2008 in the above Appeal seeking for the direction to the Board. In this Application the Tribunal passed an order directing the Board to take conscious decision as to the date on which the Appellants' applications would be treated to have

been presented. In pursuance of the said order, the applications were taken up by the Board for hearing on 11.09.2008. On that date the Board passed resolution to empower the Chairman to take appropriate decision and to authorize to refer these cases to the committee consisting 2 or more members of the Board to hear the applications and made recommendations to Board for taking a final decision. Accordingly the Committee was constituted. Thereupon the Committee issued notice to the Appellant. On receipt of the notice the learned counsel for the Appellant appeared before the Committee and made his oral submission on 15.09.2008, 16.09.2008 and 20.09.2008. On 13.10.2008 the learned counsel for the Appellant filed the written submission as well. Thereafter, the committee after considering the various submission made by the counsel as well as the written submission made and sent report containing recommendations to the Board.

(xi) On 30.10.2008 Chairman of the Board after careful consideration of the Committee's Report passed the

impugned order accepting the committee's recommendation and rejecting the applications filed by the Appellant holding that these applications were to be treated as presented on 03.09.2007 i.e. prior to the notification of the Regulations and as such the said application could not be entertained as the same were not filed in accordance with the Regulations which are framed later. After the said order, on the request of the learned counsel for the Appellant, the Petition in I.A. 129 of 2008 was again taken up by the Tribunal on 04.12.2008. On that day, it was informed to the Tribunal by the learned counsel for the Board that the final order had already been passed on 30.10.2008 rejecting these applications. The Tribunal recorded the said statement in the order and directed the Appellant to file separate Appeal before the Tribunal as against the order dated 30.10.2008 passed by the Board, if it is aggrieved over the same. Consequently this Appeal has been filed.

7. The above facts indicate three important aspects:

(i) As against the letters sent by the Secretary of the Board rejecting its applications, the Appellant filed an Appeal earlier in Appeal No. 53 of 2008 on 17.01.2008 before this Tribunal and the same had been disposed of on 26.05.2008 directing the Board to dispose of those applications as the letter sent by the Secretary of the Board rejecting the applications was non est.

(ii) Even though earlier appeal had been filed seeking for a direction to the Board to consider its application dehors the Regulations as the Regulations is not condition precedent for considering the applications of the Appellant for authorization, the Tribunal did not chose to give any such direction and instead Tribunal waited till the finalization of the Regulations and only after the notification, gave a direction to the Board to take decision regarding the date of presentation of applications and dispose of those applications as early as possible.

(iii) The Tribunal by its order dated 04.12.2008 in I.A. No. 129 of 2008 on being informed about the rejection of those applications by the Board on 30.10.2008 holding that

those applications cannot be entertained as they were filed before framing of the Regulations was not inclined to go into the merits of the findings and on the other hand it directed the Appellant to file separate appeal as against the order dated 30.10.2008, if it is aggrieved.

8. The above three aspects have to be borne in mind, while considering the main point which arises for consideration in this case.

9. Let us now come to the main point.

10. The main point urged by the Appellant seeking to set aside the order impugned in this Appeal is this:

"The order impugned passed by the Petroleum Board rejecting the applications filed by the Appellant seeking for authorization for CGD networks is on the ground that since the Regulations were not yet framed, the applications for the said authorization cannot be entertained. This ground is quite wrong. Because the Appellant made its application on 03.09.2007 itself i.e. even prior to the framing of the Regulations. Hence, the Board should have entertained and considered the applications in

accordance with the law prevalent as on 03.09.2007, without waiting for the Regulation on that date the provisions of Petroleum Act. 1934, Petroleum Rules 2002, and the Petroleum Board Act, were alone available. These do not provide for the bidding process. Therefore, the Board ought to have entertained the applications of the Appellant by applying the doctrine of *Relation Back* and considered the same without insisting for bid process and without reference to the Regulations which were framed later. As this has not been done by the Board, the order impugned is illegal hence it is liable to be set aside."

Let us deal with this point.

11. No doubt it is true that the applications for authorization were submitted on 03.09.2007 i.e. prior to the framing of the Regulations. But it cannot be disputed that even prior to that the pipeline policy was issued by the Central Government on 20.12.2006. This Pipeline policy clearly provided that bidding process to select the entity for authorization has to be adopted by the Petroleum Board. Thereupon,

the Petroleum Board was constituted through the notification by the Ministry of Petroleum and Natural Gas on 25.06.2007 as per the Petroleum and Natural Gas Regulatory Board Act, 2006 which has been enacted by the Parliament on 31.03.2006. Only thereafter the Appellant filed those 4 applications on 03.09.2007 before the Board seeking for authorization. Therefore, procedure for considering the authorization by the Board under the law prevalent when the applications were filed on 03.09.2007 has got to be followed by the Board as per the Pipeline Policy dated 20.12.2006 as well as the Board Act, 2006. In other words the mandate of Pipeline Policy dated 20.12.2006 and the provisions of Petroleum and Natural Gas Regulatory Board Act, 2006 alone would govern the filed. On this basis the Petroleum Board rejected those applications holding that the same cannot be entertained as these were filed not under the Regulations to be framed by the Board in accordance with Act and the Pipeline Policy.

12. The relevant portions of the Pipeline Policy contained in the notification dated 20.12.2006 is as follows:

> *"**Policy for Development of Natural Gas Pipelines and City or Local Natural Gas Distribution Networks.***

F. No. L-12022/1/03-GP(Pt.II):- The Government of India is pleased to issue, in public interest, the following Policy for Development of Natural Gas Pipelines and city or Local or Natural Gas Distribution Networks. This policy will come into effect from the date of publication of this notification in the official Gazette.

1.3 The objective of the policy is to promote investment from public as well as private sector in natural gas pipelines and city or local natural gas distribution networks, to facilitate open access for all players to the pipeline network on a non-discriminatory basis, ***promote competition among entities*** *thereby avoiding any abuse of the dominant position by any entity, and secure the consumer interest in terms of gas availability and reasonable tariff for natural gas pipelines and city or local natural gas distribution networks.*

2.2 ……. The Petroleum & Natural Gas Regulatory Board established under the Petroleum & Natural Gas Regulatory Board Act, 2006 (hereinafter referred to as the Board) ***shall ensure selection of an entity to lay, build, operate or expand*** *a natural gas pipeline or a city or local natural gas distribution network in a* ***transparent and objective manner*** *with a view to facilitating*

investments in the sector and protecting the interests of the consumers. ……..

3.1 No gas pipeline or the city or local gas distribution network will be laid, built, operated or expanded without the authorization by the Board.

Provided that such an authorization for gas pipeline shall be granted to any entity only if the design pipeline is at least 33% more than the capacity requirements of the concerned entity plus the firmed up contracted capacity (termed as total capacity) and this extra capacity is available for use on common carrier basis by any third party on open access and non-discriminatory basis at transportation rates laid down by the Board. The capacity available under the "open access" common carrier basis ***will be allocated in a transparent and objective manner in line with the regulations to be drafted by the Board in this regard.***

3.3 The entity authorized to lay, build, operate or expand a city or local natural gas distribution network will need to follow the marketing service obligations as may be prescribed by the Board in accordance with the provisions of the Act. ***The Board may decide on the period of exclusivity to lay, build, operate or expand a city or local natural gas distribution net work in***

accordance with its regulations in a transparent manner while protecting the consumer interest. *…….*

4.1 The entity proposing to lay, build, operate or expand a gas pipeline or city or local natural gas distribution network will be required to furnish to the Board a bid bond for an amount as may be decided by ***the Board with a view to ensuring that only serious bidders participate in the bidding process. It will be encashed if a bidder wins a bid but then walks away from the bid. The successful bidder will have to furnish a performance bond*** *for an amount as may be decided by the Board for ensuring timely construction as per the design offer and for meeting performance undertaking during the operation phase.*

13. A perusal of the relevant portions of the Pipeline Policy as referred to above would make it clear that specific instructions have been issued by the Government with regard to the manner in which the applications have to be submitted before the Board by the entities and also the mandatory guidelines to be followed by the Board for consideration for the grant of authorization to the entity on receipt of those application.

14. The gist of the instructions given in the Policy is as follows:

(a) The objective of the policy is to promote investment from public as well as private sector for natural gas pipelines to facilitate open access for al players to the pipeline network on non-discriminatory basis and **to promote competition amongst the entities** thereby avoiding any abuse of the position by any entity.

(b) The Petroleum Board as established under the Petroleum and Natural Gas Regulatory Board Act, 2006 **shall ensure the selection of the entity** to lay, build, etc. for the natural gas distribution network **in transparent and objective manner with** a view to facilitate investment in the sector and protecting the interest of the consumers.

(c) No gas pipeline or the gas distribution network will be laid, build, or expanded without authorization by the Board.

(d) The authorization for the gas pipeline shall be granted by the Board to the entity only if the design pipeline capacity is at least 33% more than the capacity requirement of the concerned entity. **The capacity available under the open access will be allocated in a transparent and**

objective manner in line with the Regulations to be drafted by the Board.

(e) The entity authorized by the Board has to follow the marketing service obligation as may be prescribed by the Board in accordance with the provision of the Act. **The Board may decide on the period exclusivity to lay, build, operate or expand the gas distribution network in accordance with the Regulations** in a transparent and objective manner while protecting the interest of the consumers.

(f) **The entity must be selected by the Board only amongst the serious bidders participated in the bidding process.** Once the successful bidder is selected, the said bidder will have to furnish a performance bond for an amount which may be decided by the Board.

(g) The Central Government may suggest to the Petroleum Board to invite the applications from the interested parties in transparent and objective manner in accordance with

the provisions of the Act and **as per the procedures prescribed in the Regulations.**

(h) This Pipeline policy will come into effect from this date of Publication i.e. 20.12.2006.

15. A reading of the above mandatory instructions given in the Pipeline Policy would clearly indicate that the entity has to be selected only under the bid process and only after such selection, the successful bidder will be allowed to furnish a bid bond for the amount as may be decided by the Board. These things would make it clear that the provision providing the procedure in the Petroleum Act 1934 which deals with the grant license and concept of authorization by the Central Government which is relied upon by the Appellant would no longer be available as it was valid only till pipeline policy which was issued i.e. on 20.12.2006, in pursuance of the Petroleum Board Act which was enacted on 31.03.2006. In other words all the applications in the present case were submitted by the Appellant before the Board only after Pipeline Policy was published and the Petroleum board Act of 2006 had come into force. Therefore, it has to be construed that all the applications were submitted during the legal regime governed

by the Policy dated 20.12.2006 and the Petroleum Board Act 2006 which provide for the Bidding process as per the procedure incorporated in Regulations. Thus it is clear that the Pipeline Policy dated 20.12.2006 and Petroleum Board Act, 2006 and its Regulations alone would govern the field. If that is so, the applications for authorization cannot be considered by the Board without the Regulations being framed under the powers conferred to the Board. In other words, only after the framing of the Regulations, the Board is empowered to entertain the said applications and to make scrutiny as to whether, their applications were filed in accordance with the said Regulations.

16. The Appellant's reliance on the doctrine of *Relation Back* is not legal in view of the fact that as per the Pipeline Policy and as per the Regulations framed under the said Pipeline Policy as mentioned earlier the Appellant is required to participate in a bid process alongwith other bidders by expression of interest to qualify for consideration of his applications for grant of authorization, irrespective of the date of their application. Under no provision of Law the Appellant is entitled to claim for consideration of its

application for authorization without participating in the bid as contemplated in the policy as well as the Regulations framed under the said policy.

17. The learned senior counsel appearing for the Appellant cited a number of authorities in support of his plea relating to the doctrine of *Relation Back.* The following are those decisions

A. 1976(3)SCC 693 in the case of D.C. Rai
B. AIR 1963 (SC) 1756 in the case of P.H. Kalyani
C. AIR 1960 (SC) 1326 in the case of Guduthur Brothers
D. (2003) 12 SCC in the case of Engineering Laghu Udyog Employees Union.
E. (1997) 6 SCC 159 in the case of Punjab Dairy Development Corporation Ltd.
F. (1999) 7 SCC 645 in the case of Graphite India Ltd.
G. AIR 1957 SC 540 in the case of Garikapati Veeraya
H. (1994) 4 SCC 602 in the case of Hitender Vishnu Thakur
I. (2001) 1 SCC 24 in the case of Shyam Sunder
J. AIR 1968 SC 464 in the case of Mysore SRTC
K. (2001) 6 SCC 446 in the case of Meghalaya SEB
L. (2003) 10 SCC 421 in the case of Orissa SPCB

18. The learned counsel appearing for the Respondent Board cited the following authorities and contended that the facts of the cases

referred to in the decision cited by the learned senior counsel for the Appellant would clearly be distinguishable as the ratio of the decision in those cases would not decide the issue raised in the instant case:

A. AIR 2004 SC 4778 in the case of Bharat Petroleum Corporation Ltd.
B. Air 1968 SC 647 in the case of State of Orissa
C. (1987)1 SCC 213 Ambica Quarry Works
D. (2003) 2 SCC 111 in the case of Bhavnagar University
E. JT 2002(3) SC 1 in the case of P.S. Rao
F. 1980 SCC (Crl.) 946 in the case of Rafiq

19. On going through the authorities cited on behalf of the Appellant it is clear that the ratio decided in those cases in the light of the facts and circumstances of those cases would not apply to the issue raised in this Appeal. The Appellant has relied upon the various judgments of the Hon'ble Supreme Court to apply the doctrine of *Relation Back* to the facts which are related to service law where the employee had the vested right on the date when the proceedings were started against him. In those cases the Supreme Court held that the action can be taken by the authorities as against aggrieved parties as they had no vested rights even though the Regulations were not framed. When the action of the department

concerned has been challenged by the aggrieved parties on the ground of lack of Regulations on the basis of the facts and circumstances of those cases the Supreme Court upheld the action which has been taken by the department concerned in spite of the absence of the Regulations. In this case no such action has been challenged while seeking directions for grant of authorization. The relevant provisions would reveal that the Board would empower to grant authorization only after following the procedure contemplated under the Pipeline Policy and the Regulations framed under the Act of 2006. When a special procedure has been contemplated under the said policy and the Regulations, the Board cannot be compelled to give authorization to the appellant without following the mandatory bid process incorporated under the Pipeline Policy or the procedure contemplated under the Regulations framed under the Act. As correctly pointed out by the learned counsel for the Respondent Board none of these judgments cited on behalf of the Appellant directly relate to the controversy raised in this case between the parties. As referred to in the various decisions cited on behalf of the Respondent that a decision is only an authority for what it actually decides; what is of the essence in a decision is its ratio and not every

observation found therein. The ratio in a decision must be noted in the background of the facts of that case. The ratio of one case cannot be mechanically applied to any other case regardless of the facts, situation and circumstances contained in those cases. In view of the dictum laid down by the Supreme Court as referred to above we are of the opinion that the decisions cited on behalf of the Appellant would not in any way help the Appellant.

20. According to the learned Senior Counsel appearing for the Appellant, even though Section 16 has not been notified by the Central Government the Board can exercise its powers to grant authorization as the said power flows from combined reading of Section 11, 17 and 19 of the Act. Even if this view was to be accepted, it should be remembered that granting of authorization could be done only after following the procedure under the Act and policy and also only after fulfilling the conditions as incorporated in the Regulations.

21. As per section 11, the Board shall protect the interest of the consumers by fostering fair trade and competition amongst the

entities. Under Section 17 the entity has to furnish all the particulars of its activities to the Board while applying for obtaining an authorization under this Act. Section 17 further provides for procedure for application for authorization. This section emanates that applications seeking for authorization shall be in such a form and such a manner and shall be accompanied with such a fee as the Board may specify **through Regulations**. Under Section 19 the Board shall give wide publicity of his intention to give authorization and may invite applications from the interested parties and then Board may select an entity in an objective and transparent manner as specified **by the Regulations for such activities**. Under Section 61 the Board shall issue notification **framing Regulations** consistent with the provisions of the Act. The procedure for selecting entities has to be followed only **as per the relevant Regulations**.

22. So these Sections contained in the Act, 2006 and the Pipeline policy would clearly indicate that the Board is empowered to grant authorization to such entity in an objective and transparent manner only through the bid process as specified by the **Regulations** for such activities. When these substantive sections under the Act and

the Pipeline Policy would provide for the special procedure through bid process which has, to be followed for selecting the entity, the Board cannot be directed to give a go-by to all these mandatory procedures and to give authorization to the Appellant merely because the Appellant filed its application prior to framing of the Regulations. If such authorization has been given to the Appellant without following the Regulations to be framed, the action of the Board will be termed to be arbitrary as it amounts to violation of the mandatory procedure contemplated under the Pipeline Policy as well as the Act, 2006 which is prevalent on the date of the application.

23. While challenging the letters dated 20.11.2008 and 10.12.2008 sent by the Secretary of the Board rejecting the applications in the earlier appeal before the Tribunal, the main ground urged on behalf of the Appellant is that the framing of the Regulations is not the condition precedent for consideration of its applications for authorization. Admittedly this point had not been pursued by the Appellant before this Tribunal. On the other hand the Tribunal adjourned the said Appeal to various dates to facilitate the Board to finalize the Regulations and file a status report to enable this Tribunal

to pass further order in the Appeal. In pursuance of the said direction during the pendency of the Appeal, the Board finalized the Regulations and notified in the Gazette and intimated the same to the Tribunal. Only thereafter, by the order dated 26.05.2008 the Tribunal disposed of the Appeal after recording the statement made on behalf of the Board and directed the Board to dispose of those applications as early as possible. This indicates that the Appellant did not pursue the point raised in the said Appeal that the Board has to consider the applications without waiting for the Regulations. That apart the Tribunal also did not choose to give any direction to the Board to consider the application for authorization dehors the Regulations. As indicated earlier the Tribunal waited till the framing of the Regulations and only after it was informed that the Regulations have been framed and notified, the Tribunal thought it fit to dispose of the Appeal. This itself would indicate that the Board has been merely directed to consider the question as to the date of the presentation of the applications filed by the Appellant in light of the Regulations which have been framed and notified. The Appellant having failed to press the point before the Tribunal in the earlier Appeal regarding the power of the Board to consider the Application without Regulations, is now

making another unsuccessful attempt to urge the very same point in this Appeal. The curious part is that there is no explanation whatsoever as to why the Appellant did not invite any finding from this Tribunal on this point, though that was the only point raised by the Appellant in the earlier Appeal.

24. Let us now quote some of the relevant Sections of the Act and the Regulations framed under the Act. Section 19 of the Act is quite relevant to decide the issue in question. Section 19 of the Act specifically provides that any entity can file the application for authorization only when the Applications are invited in accordance with the Regulations framed thereunder.

> " Section 19 ***Grant of Authorization***
>
> *(1) When, either on the basis of an application for authorization fro laying, building, operating or expanding a common carrier or contract carrier or for laying, building, operating or expanding a city or local natural gas distribution network is received or on suo mottu basis the Board forms an opinion that it is necessary or expedient to lay, build, operate or expand a common carrier or contract carrier between two specified points, or to lay, build, operate or expand a city or local natural gas distribution network in a specified geographic area, the Board may give vide publicity of its intentions to do so and* ***may invite***

applications from interested parties to lay, build, operate or expand such pipelines or city or local natural gas distribution network.

(2) The Board may ***select an entity in an objective and transparent manner as specified by Regulations for such activities****."*

25. Admittedly, the applications were submitted by the Appellant before the Board neither on the invitation extended by the Board nor on the instructions of the Central government forwarding those applications to the Board. Hence, no authorization can be granted to any entity by the Board contrary to the provisions of the Act and Regulations framed. Mere filing of the uninvited applications for grant of authorization would not invest any right on any party nor any party could claim any preference over the other entities.

26. There is no provision for "First Come First Serve" either in terms of the Policy or the Regulations. Both under the Regulations as well as under the Pipeline Policy the Appellant is required to participate in a bid by way of Expression of Interest to qualify for consideration of his application for grant of authorization irrespective of the date of the

application. Only after becoming successful bidder the Appellant can be authorized by the Board.

27. In this context, it would be appropriate to refer to Section 61 of the Act. As provided in Section 61 of the Act the Board has to frame relevant Regulations for authorization to lay, build, operate, and expand city or local natural gas distribution network.

Let us quote Section 61

(1) The Board may, by notification ***make regulations*** *consistent with this Act and the rules made there under to carry out the provisions of this Act.*

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matter; namely: -

…….

(h) the technical standards and specifications including safety standards in activities relating to Petroleum, Petroleum products and natural gas under ***clause(i) of Section 11***

(r) the guiding principles to be followed by the Board and the objective for declaring, or ***authorizing to lay, build operate or expand a common carrier or contract carrier for declaring, or authorizing to lay, build, operate or expand a city or***

local natural Gas distribution network *under sub section 5 of section 20."*

Only under this Section the Regulations were framed by the Board

Let us now see the relevant Regulations which are as follows:

A. An entity desirous of laying, building, operating or expanding a natural gas pipeline **shall submit an expression of interest to the Board in the form of an application at Schedule-A alongwith an application fee as specified under the Petroleum and Natural Gas Regulatory Board (Levy of Fee and Other Charges) Regulations, 2007.**

B. The Board may suo motto initiate a proposal **inviting the entities to participate in the process of selection of an entity** for laying, building, operating or expanding a natural gas pipeline alongwith any route.

C. The Board may, within the period specified in Sub Regulations (4), published **through open advertisement** in at least one national

and one vernacular daily newspaper (including web-hosting) proposal for the development of the natural gas pipeline and invite bid for the same.

D. The Board shall scrutinize the bids received in response to the advertisement in respect **of only those entities** which fulfill **the minimum eligibility criteria.**

28. As stated earlier the various sections of the Act and also the Regulations referred to above would make it clear that the Board is empowered to grant authorization only under the procedure contemplated under the Regulations as referred to in the Pipeline Policy. Therefore, there is no merit in the contention that the Board cannot follow the Regulations which were framed later while considering the application for authorization filed prior to framing of the Regulations.

29. The Respondent Board is a statutory regulatory body and cannot favour one entity against other by allowing the Appellant to apply for authorization without following the provisions and complying

with relevant Regulations. If such a thing is allowed as prayed for by the Appellant, the same shall be violative of the mandate given to the Board under Section 17(3) requiring that the application has to be filed in such form and in such a manner and accompanied by such a fee as the Board may specify through the Regulations. This would also be against the provisions of section 19(2) of the Act, wherein the Board may select an entity in an objective and transparent manner through the bid process as specified by the Regulations for such activities.

30. As pointed out by the learned counsel for the Board the Appellant virtually claim that it is entitled for authorization and it is not liable to go through the bid process. Under no provision of the Law or otherwise the Appellant is entitled for consideration of its applications for authorization without participating in the bid process which is mandated under the Pipeline Policy and the relevant sections of the Act as well as the Regulations.

31. Under those circumstances we are of the view that the Appellant is not entitled to seek any preference and to seek directions

to the Board Directing the Board to do the act which it is not bound to do.

32. In second written submission filed on 24.08.2009 the Appellant has referred to the pendency of the Writ Petition as well as to the counter filed by the Respondent. It is also stated in the said written submission that PNGRB Act does not repeal and supersede all other existing laws and, therefore, it must be construed that all such laws which were in existence earlier would continue to apply to the Appellant in the present circumstances. These points as new plea have been raised for the first time through the Additional Written Submissions. However, we are to state that we are unable to accept these contentions. PNGRB Act 2006 is a separate Act under which the Board was constituted. The powers have been given to select the entity under the bid process as per the Regulations to be framed by the Board under the Act. This is an Act which exclusively deals with the powers of the Board in the matter of granting authorization in accordance with the provisions and procedure contemplated under the Act. So the question of repeal and saving would not arise in this case. Furthermore, only in pursuance of this Act which came into

force in 2006 by which the Board has been constituted, the Appellant submitted the applications submitting to the jurisdiction of the Board. Therefore, this Act alone would apply. In regard to the pendency of the Writ Petition before this court, it has to be stated that we are called upon to decide about the legality of the order impugned in this case passed by the Board and so the pendency of the Writ Petition, or the counter filed by the Respondent in the Writ Petition would be of no relevance to the issue in question.

33. Lastly, It is contended by the learned Senior Counsel appearing for the Appellant that the applications of the Appellant were heard and decided by a Committee Consisting of two Members in violation of the mandatory provisions of the Act as well as the Regulations framed thereunder. According to the learned Senior Counsel in the light of Section 8(3) of the Act and Regulations 7, the decision can be taken by the Board consisting of 3 members of the Board including the Chairperson and in this case contrary to the provisions of the Act and Regulations, the applications of the Appellant were heard by the Committee consisting to 2 Members and then the decision has been taken through the impugned order on the strength of some resolution

which is not valid in law. We find that there is no merit in this contention for the reasons given below:

(I) As per Section 6 of the Act the Chairman of the Board shall have the powers for General Superintendence as well as for giving direction for the conduct and affairs of the Board and shall discharge such other powers and functions of the Board as may be assigned to him by the Board. Section 58 of the Act provides that the Board may by general or special order delegate to any member or officers of the Board such of its powers and functions under this Act. It is pointed out by the learned counsel for the Respondent Board that by exercising this power conferred under Section 58 the Board passed resolution on 11.09.2008 empowering the Chairman of the Board that if thinks it fit he may refer those cases to a committee consisting 2 or more Members of the Board to hear the application and make a recommendation to take final decision. It was in consonance with the above said resolution the Chairman of the Board referred this case to 2 Members Committee and then the said Committee gave full opportunity to

the Appellant's counsel for being heard and sent recommendations based on which the final decision was taken by the Board. Therefore, the final decision taken by the Board in pursuance of the recommendations by the Committee constituted by the Chairman as empowered to do so is in our view perfectly under the jurisdiction.

(II) It is contended by the learned senior counsel for the Appellant that Chairman on the strength of the resolution cannot sub-delegate his powers to a Committee of the Members. This is also wrong as pointed out by the learned counsel for Respondent Board because the said resolution dated 11.09.2008 had not been passed by the Chairperson but the same was passed by the Board which is empowered to pass under Section 58 of the Act. In other words it shall be stated that it is the Board which delegated power to Chairperson through the resolution by which the Chairman was empowered to refer to such cases to the Committee of 2 Members of the Board to hear the applications and make recommendations on the basis of which the decision could be taken. This is what actually done in this case.

34. As a matter of fact, the Appellant herein never raised any question with regard to the jurisdiction before the Committee. Instead the learned counsel for the Appellant submitted itself to the jurisdiction of the Committee of 2 Members and made his elaborate submissions on various dates and filed his written submission. As pointed out by the learned counsel for the Board, this point has not even been raised in the grounds of Appeal filed before this Tribunal. This has been raised for the first time only during the arguments through the affidavit. That apart, it is strange to notice that the Appellant has not only questioned the power of the Committee but also questioned the validity of the resolution passed by the Board, before this Tribunal. We are of the firm view that the act of the Appellant of questioning the Resolution and constitution of the committee to hear the Appeal and make recommendations to the Chairman, that too after having argued the matter at length before the said committee by submitting to its jurisdiction does not sound well. Further, we do not find any reason to hold that the Resolution is invalid particularly when the Board passed such Resolution under the powers conferred on the Board under Section 58 of the Act.

35. In view of the discussion made in the above paragraphs we are of the opinion that none of the points urged on behalf of the Appellant has any merit and consequently we are to conclude that the order impugned by the Regulatory Board does not suffer from any infirmity as it is perfectly justified.

36. Hence, the Appeal is dismissed as devoid of merits. However, there is no order as to costs.

(M.B. Lal)
Technical Member(P&NG)

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 31st August, 2009

REPORTABLE / NON – REPORTABLE

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