

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 50 of 2009

Dated: 5th October, 2009

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Mahesh B.Lal, Technical Member**

IN THE MATTER OF :

Indian Oil Corporation Ltd.

G-9, Ali Yawar Jung Marg
Bandra (East)
Mumbai – 400 051

... Appellant 1

Bharat Petroleum Corporation Ltd.

Bharat Bhavan No. 1
4 & 6, Currimbhoy Road
Ballard Estate
Mumbai – 400 001

... Appellant 2

Hindustan Petroleum Corporation Ltd

Petroleum House
17, Jamshedji Tata Road
Mumbai – 400 020

... Appellant 3

Versus

Reliance Industries Ltd.

Maker Chambers IV
Nariman Point
Mumbai – 400 021

... Respondent 1

Essar Oil Ltd.

11, Keshavrao Khaldye Marg

P.O. No. 7945, Mahalxmi
Mumbai – 400 034

... Respondent 2

Shell India Marketing Pvt. Ltd.
8th Floor, 'Westminister'
70 (Old No. 108)
Dr. Radhakrishnan Salai, Mylapore
Chennai – 600 004

... Respondent 3

Oil & Natural Gas Corporation Ltd.
Tower II, Jeevan Bharti Building
124, Indira Chowk
New Delhi – 11 001

... Respondent 4

Oil India Ltd.
Plot No. 19, Film City
Sector 16A
Noida – 201 301

... Respondent 5

Petroleum & Natural Gas Regulatory Board
1st Floor, World Trade Centre
Babar Road
New Delhi – 110 001

... Respondent 6

Counsel for the Appellant(s) : Mr. RS Pathak, Sr. Advocate
Mr. PB Suresh
Mr. Abhinav Vasisht
Ms. Harshita Priyanka
Mr. Raman Kumar

Counsel for the Respondent (s): Mr. CS Vaidyanathan, Sr. Advocate
Mr. R. Chandrachud
Ms. Girija Krishan Varma
Mr. Rajiv Tyagi, Advocate
Mr. Ankit Parmar, Advocate
Ms. Divya Roy, Advocate
Ms. Meenakshi Ogra
Mr. Vipin Nair
Mr. KP Pathak

JUDGMENT

Per Justice M. Karpaga Vinayagam, Chairperson

1. Indian Oil Corporation Ltd., Bharat Petroleum Corporation Ltd. and Hindustan Petroleum Corporation Ltd. are the Appellants herein.

2. Reliance Industries Ltd. and two other companies, the Respondents 1 to 3 filed the complaint against the Appellants before the Petroleum & Natural Gas Regulatory Board. The Appellants raised a preliminary objection stating that the Board has no jurisdiction to entertain the said complaint. However, the Board passed the impugned Order dated 12.12.2008 rejecting the said preliminary objection; holding that it has got the jurisdiction to entertain the said complaint and directing the proceeding to continue with the hearing of the said complaint on merits. As against this Order, the Appellants have filed this Appeal.

The short facts which are relevant for disposal of this Appeal are as follows:

3. The Appellants are the Public Sector Undertakings under the complete administrative control of Ministry of Petroleum and Natural Gas,

Government of India. The Government of India holds majority of shares of the Appellants. The Appellants are companies engaged in the business of refining crude oil and marketing petroleum and petroleum products.

4. The Reliance Industries Ltd. and other two companies are the R1, R2 and R3. They are engaged in the business of marketing and transportation of Motor Spirit (MS) and High Speed Diesel (HSD), namely, petroleum products.

5. Prior to the year 1997, marketing and pricing of the petroleum products including Transportation Fuel, namely MS and HSD was controlled by the Government of India under a mechanism known as “Administered Pricing Mechanism” (APM).

6. On 1.9.1997, the Government of India issued a notification declaring that it had decided the modalities of dismantling the programme of APM from the year 2001-02 onwards.

7. Accordingly, on 28.3.2002, the Government of India issued a notification under Section 3 of the Essential Commodities Act, 1955

declaring the dismantling of APM w.e.f. 1.4.2002 and permitting the new entrants including private sector companies by allowing them to market Transportation Fuel. In pursuance of this notification, the Respondents 1 to 3 applied for obtaining the marketing rights of transportation fuels and after obtaining the same, they had started marketing the transportation fuels in India.

8. Even after the said notification dated 28.3.2002, which was issued as a policy matter of the Government of India, the prices for MS and HSD were fixed by the Central Government only. As a result, even when international prices of crude oil rose around August 2004, the Appellants were not able to increase the prices in tune with the international prices due to the fact that the Government of India decided that the prices should be kept within certain limits notwithstanding the rise in international prices. At this stage, the Petroleum and Natural Gas Regulatory Board (in short "the Board") was constituted under notification dated 1.10.2006. As per the notification and the Board Act, the prices of the petroleum products should be determined on the basis of the international prices. However, the Appellant companies have priced the products below international levels as fixed by the Central Government. Because of this,

the Respondents 1-3 companies were losing their market revenue as they were required to sell the petroleum products at a higher price.

9. Aggrieved over this, the Respondents 1 to 3 companies of the private sector filed a complaint before the Board under Section 11(a) and 12 of the Petroleum and Natural Gas Regulatory Board Act 2006 (in short “the Act”) as against the Appellants.

10. The main prayer of the Respondents before the Board through their complaint is that the Appellants have been selling the petroleum products at lower prices, i.e., below the level of international prices, as directed by the MOPNG thereby causing market revenue loss to the Respondents as they were required to sell their petroleum products at a higher price as per the international prices and as such the Appellants who are indulging in the unfair trade practice have to be restrained.

11. This complaint was entertained by the Board and notice was issued to the Appellants. On receipt of the notice, the Appellants appeared before the Board and raised a preliminary objection to the maintainability of the complaint before the Board on the ground that the Board has no

jurisdiction to pass any orders in respect of the prices relating to the fixation of the petroleum products at international levels, namely, MS and HSD since the Government of India did not notify the MS and HSD as petroleum products as referred to in Section 11(f) of the Act and till it is notified, the Board cannot decide about the fixation of the price of petroleum products. It is also contended by the Learned Senior Counsel for the Appellants before the Board that the fixation of the prices has been done by the Government under the policy of the Government and therefore the same cannot be interfered with by the Board.

12. This preliminary objection was opposed by the Respondents 1-3 who are the complainants before the Board on the ground that they have approached the Board only to take action with reference to Section 11(a) read with Section 12 of the Act and not with reference to Section 11(f) and therefore the Board has got jurisdiction to go into the merits of the matter.

13. After hearing the Learned Counsel for the parties, the Board dismissed the said Petition filed by the Appellants through its impugned Order dated 12.12.2008 holding that the Board has got the jurisdiction as it is empowered to go into the question with regard to the fair trade and

fair competitive practice under Section 11(a) of the Act and therefore the Board is empowered to go into the allegations contained in the complaint.

14. Challenging the said order, the Appellants initially went to the High Court of Delhi which in turn directed the Appellants to approach this Tribunal to file an Appeal under Section 33 of the Act. Accordingly, the Appellants have filed this Appeal in this Tribunal.

15. The Learned Senior Counsel appearing for the Appellants would assail the order impugned dated 12.12.2008 contending that the Board has no jurisdiction in entertaining the complaints filed by the R1 to R3 and as such the same is liable to be set aside. The gist of the submissions made by the Learned Senior Counsel for the Appellants questioning the order impugned is as follows:

- (i) The complaint filed by the Respondents No. 1 to 3 involves the fixation of prices of High Speed Diesel (HSD) and Motor Spirit (MS) under Sections 11(a) and 12 of the Act. Section 11(f) of the Act is the only provision which empowers the Board to monitor prices and take corrective measures to prevent restrictive trade practice by

- entities. This can be done only in respect of notified petroleum and petroleum products. Under Section 2(zc), the Central Government has to notify the petroleum, petroleum products and natural gas. Admittedly, the HSD and MS, the petroleum products have not yet been notified by the Central Government.
- (ii) The power to monitor prices and take corrective measures to prevent restrictive trade practice by the entities is conferred on the Board only in respect of notified petroleum and petroleum products. Till those petroleum products such as HSD and MS are notified by the Central Government, the Board cannot have jurisdiction to entertain the complaints with reference to the fixation of the prices of petroleum products and to monitor the same in order to prevent restrictive trade practice by the entities.
- (iii) The Board cannot go into the allegations contained in the complaint filed by the Respondents 1 to 3 on the mere ground that the Board can entertain the complaint under Section 11(a) of the Act. The perusal of the allegations of the complaint and the relief sought therein only would relate to the day to day functions/powers mentioned in Section 11(f) of the Act. Section 11(a) would not come

into play in isolation as both Section 11(a) as well as Section 11(f) of the Act are interlinked and intertwined.

- (iv) The complaint with regard to the challenge to the fixation of prices of MS and HSD does not come within the purview of powers or jurisdiction of the Board. As a matter of fact, the letter dated 28.3.2008 issued to the Appellant-1 by the Ministry of Petroleum and Natural Gas would clearly indicate that the Central Government has not notified MS and HSD as notified petroleum products and as such the instant question with reference to the fixation of these petroleum products is outside the purview of the Board. The prices of the petroleum products in question, i.e., MS and HSD have been continued to be regulated by the Central Government in pursuance of the policy decision taken by the Central Government as part of its sovereign function. When this is a policy matter of the Central Government as referred to above in the letter dated 28.3.2008 sent by the Ministry of Petroleum and Natural Gas, the same cannot be interfered with.”

16. In support of these submissions as referred to above, the Learned Counsel for the Appellant has cited following decisions:

- (i) 2002 (2) SCC 333 – Balco Employees Union Vs. Union of India.**
- (ii) 2007 (8) SCC 418 – Dhampur Sugar (Kashipur) Vs. State of Uttaranchal and Ors.**

17. By way of reply to these above contentions, the Learned Counsel appearing for the Respondents 1-3 in justification of the order impugned would submit as follows:

- (i) The complaint has not been filed asking the Board to fix the price of the transportation fuels or the petroleum products. The grievance of the complainants is that the Appellants are indulging in a predatory pricing of transportation fuels like MS and HSD which can be described as a restrictive/unfair trade practice. Therefore, the complainants approached the Board to put an end to the unfair competition being meted out to it by the entities. As such the subject matter of the complaint does not fall under Section 11(f) of the Act but is covered by Section 11(a) of the Act. Therefore, the Board has got jurisdiction to entertain the complaint.

- (ii) Section 11(f) of the Act will only apply when any product is notified with the limited purpose of improving availability and avoiding shortages of the product. On the other hand, Section 11(a) is perennial in application as it confers much wider jurisdiction to the Board for fostering fair trade and competition amongst the entities. Even though Section 11(f) would refer to the notified petroleum products, the other relevant Sections namely 12 and 25 would not refer to the notified petroleum products whereas these Sections deal with the functions of the Board with reference to the petroleum and petroleum products only. Therefore, there cannot be any bar for the Board to go into the allegations to prevent unfair trade practice for fostering fair trade and competition amongst the entities referred to in Section 11(a).

- (iii) The reference about the letter dated 28.3.2008 sent by the Petroleum Ministry to the Appellant-1 indicating that MS and HSD, the petroleum products have not been notified within the meaning of Section 2(zc) of the Act would not show that it is a policy matter of the Government. At the most it can be called to be mere executive

instructions given by the Ministry to the Appellant. As a matter of fact, the original policy by the Government which was issued on 28.3.2002 declaring the dismantling of Administered Price Mechanism and allowing the new entrants including the private sector to market transportation fuel has not been revised by the Central Government by issue of a fresh notification. Therefore, the Respondents are well within their rights to approach the Board seeking to enforce the policy issued by the Central Government on 28.3.2002.

- (iv) Further, as per Section 2(x), it is only the entities which can fix the price and not the Central Government. Therefore, the Central Government cannot fix the prices under the garb of a policy which is violative of Section 2(x) of the Act.

18. The Learned Counsel for the Respondents has cited the following decisions:

- (i) (1975) 1 SCC 76 – Shri Umed Vs. Raj Singh**
- (ii) (1961) 3 SCR 185 – JK Cotton Spinning & Weaving Mills Co. Ltd. Vs. State of UP**

- (iii) (1993) 4 SCC 25 – Home Secy., UT of Chandigarh Vs. Darshjit Singh Grewal**
- (iv) 1980 Supp. SCC 559 – Col. AS Sangwan Vs. Union of India**
- (v) (1984) 4 SCC 679 – Renusagar Power Co. Ltd. Vs. General Electric Company**
- (vi) (2008) 7 SCC 117 – Pancham Chand Vs. State of HP**
- (vii) (1969) 1 SCC 308 – The Purtabpore Co. Ltd. Vs. Cane Commissioner of Bihar & Ors.**

19. We have heard the Learned Counsel for both the parties and have given our thoughtful consideration to the rival contentions.

20. The main points urged by the Learned Counsel for the Appellants questioning the jurisdiction of the Board are two-fold.

- (i) The petroleum products in issue, i.e., MS and HSD have not yet been notified as the petroleum products under Section 2(zc) of the Act. Therefore, the Board has no jurisdiction to deal with the fixation of prices of the petroleum products as the power sought to be exercised falls under Section 11(f) of the Act.

- (ii) The fixation of prices of petroleum products by the Government is exclusively a policy matter of the Government and therefore the same cannot be interfered with either by the Board or by the Court.

21. Let us deal with these points one by one. The first point relates to the following question:

“Whether the Board has got jurisdiction to go into the allegations with reference to the pricing of the MS and HSD under Section 11(a) of the Act, though these are not notified as notified products within the meaning of Section 2(zc)?”

According to the Learned Senior Counsel for the Appellant, the complaint filed by the Respondents 1-3 is necessarily one involving the fixation of prices of MS and HSD which are yet to be notified by the Central Government under Section 11(f); so long as they are not notified, the Board cannot be asked to monitor these prices and take corrective measures to prevent restrictive trade practice; this can be done only in respect of notified products by the Central Government; in the instant case, the said products have not yet been notified and hence the complaint with reference to the fixation of prices of non-notified petroleum

products cannot be entertained by the Board under the garb of Section 11(a) read with Section 12 of the Act.

22. The main allegations contained in the complaint are these:

“The Appellants are indulging in predatory pricing of transportation fuels, namely, MS and HSD. As such they have been doing restrictive trade practice/unfair trade practice by selling the petroleum products for a lesser price thereby causing loss to the market revenue of the Respondents 1 to 3 who were compelled to sell it at the international price, i.e., higher price.”

Therefore the Appellant companies have approached the Board to stop the unfair trade practice.

23. According to the Learned Senior Counsel for the Respondents, the subject matter of the complaint does not fall under Section 11(f) of the Act, but is covered by Section 11(a) of the Act and hence the Board has got the jurisdiction.

24. Let us see both Sections 11(a) as well as Section 11(f) of the Act. The relevant portion of Section 11(a) reads as follows:

“11. Functions of the Board – the Board shall –

(a) protect the interest of consumers by fostering fair trade and competition amongst the entities.”

As per this Section 11(a), the Board is duty bound to foster the fair trade and fair competition amongst the entities in order to protect the interests of the consumers.

25. Let us now quote Section 11(f):

The Board shall

“11(f) in respect of notified petroleum, petroleum products and natural gas –

(i) ...

(ii) ...

(iii) monitor prices and take corrective measures to prevent restrictive trade practice by the entities.”

Section 11(f) of the Act lists out the specific functions of the Board with regard to the notified petroleum and petroleum products. The meaning of the notified petroleum products has been given in Section 2(zc), which reads as under:

“Notified Petroleum, Petroleum products and Natural Gas means such Petroleum, Petroleum products and Natural Gas as the Central Government may notify from time to time, after being satisfied that it is necessary or expedient so to do for maintaining or increasing their supplies or for securing their equitable distribution or ensuring adequate availability.”

26. Under this provision, the Central Government may exercise the power only under the specific circumstances mentioned therein. If the said power under Section 2(zc) is to be exercised by the Central Government only when there is a situation that there should be equitable distribution or adequate availability or there is need for increasing supplies of petroleum and petroleum products. It is true that Section 11(f) deals not just with petroleum products but also deals with “notified petroleum and petroleum products” which are notified by the Central Government under Section 2(zc). The reading of the said Section would clearly indicate that Section 11(f) will only apply when any product is notified by the Central Government with a limited purpose of improving availability and avoiding shortage of that product. On the other hand, Section 11(a) which is perennial in application confers wide jurisdiction to the Board for fostering **fair trade and fair competition amongst the entities.**

27. Therefore, the submission made on behalf of the Appellants that the Board will not get the jurisdiction to entertain any complaint until the petroleum products are notified in view of Section 11(f) cannot be accepted especially when the words “notified petroleum and petroleum products” as referred to in Section 11(f) have not been referred to in other relevant Sections.

28. Let us see those relevant Sections. Sections 12 and 25 deal with the powers of the Board in entertaining the complaint in discharging the functions of the Board with reference to the “petroleum and petroleum products” and not with reference to the “notified petroleum and petroleum products”. We will now quote those provisions:

“12. Powers regarding complaints and resolution of disputes by the Board.- (1) The Board shall have jurisdiction to-

(a) 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;

- (b) 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 –
- (i) retail service obligations;
 - (ii) marketing service obligations;
 - (iii) display of retail price at retail outlets;
 - (iv) terms and conditions subject to which a pipeline has been declared as common carrier or contract carrier or access for other entities was allowed to a city or local natural gas distribution network, or authorization has been granted to an entity for laying, building, expanding or operating a pipeline as common carrier or contract carrier or authorization has been granted to an entity for laying, building, expanding or operating a city or local natural gas distribution network;
 - (v) any other provision of this Act or the rules or the regulations or orders made thereunder.

(2) While deciding a complaint under sub-section (1), the Board may pass such orders and issue such directions as it deems fit or refer the matter for investigation according to the provisions of Chapter V.”

The above Section 12 makes it clear that the jurisdiction of the Board is not restricted to the notified petroleum or petroleum products alone but the Board can look into various issues connected with and related to activities in this sector. Section 12(b) clearly provides that the complaint can be received by the Board to conduct enquiry and investigation connected with activities relating to the petroleum and petroleum products and on contravention of the Rules and Regulations. In other words, Section 12 does not put any bar on the Board from entertaining the complaint in respect of the petroleum products which are not notified.

29. Let us now quote Section 25 of the Act:

“25. Filing of complaints. – (1) A complaint may be filed before the Board by any person in respect of matters relating to entities or between entities on any matter arising out of the provisions of this Act:

Provided that the complaints of individual consumers maintainable before a consumer disputes redressal forum under the Consumer Protection Act, 1986 (68 of 1986) shall not be taken up by the Board but shall be heard and disposed of by such forum.”

This Section as referred to above provides that a complaint may be filed before the Board by any person in respect of matters relating to entities or between entities on any matter arising out of the provisions of this Act. The words “matters relating to” have a very wide connotation and amplitude as it includes unfair trade and unfair competition within its scope and meaning as referred to in Section 11(a). In other words, the words “matters relating to” as referred to in Section 25 of the Act should be construed to give its widest amplitude. As pointed out by the Learned Counsel for the Respondent, unless there is a specific direction under Section 42 given by the Government to the Board, the Board has all the powers to entertain all types of complaints or disputes or petitions including the instant complaints.

30. It has been incidentally submitted by the Learned Senior Counsel for the Appellant that the letter dated 28.3.2008 sent by the Central Government on behalf of the Ministry of Petroleum and Natural Gas to the Appellant can be construed to be direction given by the Government to the Board under Section 42. This submission in our view is strange and misconceived and the same deserves outright rejection as this is only letter correspondence between the Ministry and the Appellant giving

some instructions and this cannot be construed to be the direction by the Government to the Board under Section 42 of the Act.

31. It is also contended by the Learned Senior Counsel for the Appellants that the Act neither enjoins that the prices of petroleum and petroleum products should be fixed by the entities only nor prohibits the Central Government from fixing such prices. This contention is factually incorrect. As rightly pointed out by the Learned Senior Counsel for the Respondents, Section 2(x) of the Act provides that it is only the entities which can fix the price and not the Government.

32. Let us quote Section 2(x) of the Act.

“Maximum retail price” means the maximum price fixed by an entity at which the Petroleum, Petroleum products and Natural Gas may be sold to the retail consumers and includes all taxes, cess and levies, local or otherwise and freight or commission payable to the dealers.”

It is clear from this definition Section that this is not just a definition clause but it specifically provides that the prices have to be fixed by the entities.

In other words, it enjoins the rights of the entities to fix the maximum retail price.

33. According to the Appellants, they are not fixing the prices of the petroleum products, namely, HSD and MS and it is the Government which fixes the prices and therefore, no direction can be given by the Board to the Appellants with regard to fixation of prices. As indicated earlier under Section 2(x) of the Act, it is only the entities which can fix the price and not the Government. As indicated above, the very definition of Maximum Retail Price pre-supposes that the same has to be fixed by the entities.

34. In the above context, the incidental question that arises is as to whether this power given to the entities to fix the prices can be usurped by the Government? When the Provision says the prices shall be fixed by the entities and once the Government is fixing the prices, would it not bring out the violation or contravention of the Section 2(x) of the Act? When there is a clear violation of Section 2(x), how can it be said that the complainants are not within their rights to file the complaint before the Board which can be taken cognizance of by the Board in terms of Section 12(1)(b)(v)?

35. This Section confers jurisdiction to the Board to receive any complaint from any person and conduct an enquiry and investigation connected with the activities relating to petroleum, petroleum products and natural gas on contravention of any provisions of the Act. As stated earlier, the non-use of the words “notified Petroleum, Petroleum Products and Natural Gas” in both the Sections 12 and 25, in contra-distinction to the use of the phrase in Section 11(f) clearly demonstrates the intention of the Legislature in conferring a wide jurisdiction to the Board to receive, enquire and investigate complaints relating to the disputes between entities arising out of the other provisions of this Act.

36. It cannot be disputed that the Board has got powers to take appropriate measures to prevent and deal with the fraudulent and manipulative transactions. The Regulatory Body has got the powers to take appropriate measures in the overall interest of the consumers. In other words, the jurisdiction of the Board is not restricted to the notified petroleum products alone and on the other hand the Board

can look into various issues connected with/related to the activities in this sector.

37. The instant complaint admittedly is under Section 11(a) of the Act. Therefore, the absence of notification in respect of Section 11(f) is not relevant to the complaint to be considered under Section 11(a) of the Act. Hence, the Board is well within its jurisdiction to consider the complaint filed under Section 12 read with Section 11(a) of the Act. At this stage, it must be made clear that the Board has to ultimately consider as to whether the complaint falls within Section 11(a) or Section 11(f) of the Act and this consideration would depend upon the facts and circumstances which are to be placed before the Board through the materials. Even according to the Board, this question has to be decided only at the time of final disposal. This observation of the Board as referred to in the impugned order would clearly show that the Board has not pre-judged the issue. On the other hand, the Board is inclined to hear both the parties and consider all the materials and decide about this issue in the light of the materials that may be placed by both the parties before the Board while finally disposing of the matter. If the Board ultimately finds that it

falls under Section 11(f) of the Act, then it can reject the complaint on that ground. On the other hand, if it is found that it falls under Section 11(a) of the Act, it can give suitable direction in accordance with law. Therefore, at this stage, we cannot hold that there is no jurisdiction for the Board to entertain the instant complaint. Accordingly, the first contention is rejected.

38. The second objection is that the pricing of petroleum products is a matter of policy of the Government and therefore the Tribunal or the Board cannot interfere with the said policy. Let us analyse this issue now.

39. The Learned Senior Counsel for the Appellants would submit that it is the Central Government which determines the price of the petroleum products and not the Appellants. As we indicated earlier, there is no explanation from the Appellants as to how the Central Government fixes the price regardless of the mandate of Section 2(x). However, it is stated that the Government fixes the prices in pursuance of the policy decision.

40. Hence, let us now go into the question as to whether the Government has fixed the prices under the policy decision. The Learned Counsel for the Appellants has placed the letter No. P-20012/4/2008-PP dated 28.3.2008 sent by the Ministry of Petroleum in order to show that price fixation is made by the Government under policy decision. We have gone through the letter. From the contents of the letter dated 28.3.2008, it is noticed that the Ministry of Petroleum sent a letter to the Appellants informing that this question cannot be gone into as the matter is outside the purview of the Board since the pricing of petroleum products is inherently a policy matter. It is pointed out by the Learned Senior Counsel for the Respondents that even as early as on 28.3.2002 the Central Government issued a gazette notification to show that policy decision had already been taken by the Central Government on 28.3.2002 to allow the new entrants to market the transportation fuels namely MS, HSD etc. as per the guidelines contained in the Ministry of Petroleum and Natural Gas Resolution. The relevant portion of the said notification is as follows:

“Consumer prices of motor spirit and high speed diesel will be market determined from 1.4.2002.

The new entrants including the private sector, will be allowed to market transportation fuels namely motor spirit, high speed diesel and aviation turbine fuel as per the guidelines contained in the Ministry of Petroleum and Natural Gas Resolution no. P-23015/I/2001-Mkt. dated 8.3.2002.”

41. On the strength of this notification, it is contended by the Learned Senior Counsel for the Respondent that in the light of the aforesaid policy decision taken by the Government as contained in the notification dated 28.3.2002, the Respondents made applications for marketing the rights of transportation fuels and made huge investments for the venture and it is on the basis of the said policy decision, the Respondents were permitted to venture into this field of business. According to the Learned Senior Counsel for the Respondent that the Respondents are only seeking to enforce this policy through the notification issued for this purpose through their complaint and they are not seeking for any direction contrary to the said Government policy. In the light of the said statement made by the Learned Senior Counsel for the Respondent, we have to see

whether any other policy decision had already been taken by the Central Government taking away the powers of fixation of prices by these Appellant entities contrary to the earlier notification dated 28.3.2002.

42. The Learned Senior Counsel for the Appellants has cited the letter dated 28.3.2008 sent by the Ministry of Petroleum to the Appellants. He has now produced another letter dated 5.6.2008 along with his written submission before this Tribunal. These letters have been produced to show that the Government has taken a policy decision to fix the prices. Admittedly, both these letters do not refer to the notification dated 28.3.2002 as having been reversed by a new notification. In the first letter dated 28.3.2008, it is merely stated that fixation of price is the policy of the Government. In the second letter dated 5.6.2008, it is mentioned that price fixation of the petrol is done by the Central Government in exercise of its power as sovereign which flows from the Essential Commodities Act, 1955. Both the letters do not answer to the question whether the earlier notification issued by the Government of India on 28.3.2002 under the Essential

Commodities Act as a declared policy of the Government of India has been reversed through fresh notification or not.

43. It is a settled law that administrative instructions issued by one limb of the Government to the Appellant companies would not be construed to be the policy decision taken by the Government. As stated earlier, nothing has been produced to show that the earlier notification has been revoked. In the absence of any fresh notification revoking the earlier gazette policy notification of the Central Government dated 28.3.2002, the mere information or opinion expressed by the Ministry to the Appellant companies, in respect of price fixation can only be considered to be mere administrative instruction of the concerned Ministry and the same cannot be construed to be the policy Notification. If the prices of the petroleum products are fixed by the Central Government as a sovereign, it has to be declared as a public policy after observing formalities as provided under Article 72 of the Constitution.

44. Even according to the Appellants, the Ministry of Petroleum is a dominant shareholder in these companies. It is not the case of the

Appellant that the prices are being fixed by the Government in the capacity of a dominant shareholder. Admittedly, the Appellants have not produced necessary documents to show that the prices are being fixed by the Government as a sovereign under the policy decision taken by the Government. If it is the specific stand of the Appellants that prices are being fixed by the Government as a Sovereign under policy decision, even now it is open to them to produce before the Board the materials to establish the same before the Board and in that event the same can be considered by the Board at the time of final disposal.

45. At this stage, in the absence of any evidence available on record, we are not inclined to hold that prices are fixed by the Central Government under the policy decision. So the second contention also has to fail. Under these circumstances, it would be proper to allow the Board to continue the enquiry over the complaint by providing opportunity to both the parties to adduce the evidence to substantiate their respective plea. Accordingly ordered.

46. However, before parting with this case, we would like to refer to some of the material aspects as pointed out by the Learned Senior Counsel for the Appellant which are to be taken into consideration by the Regulatory Board while deciding the main issue in this case. There are two broad questions that may arise for consideration by the Board. They are as follows:

- (i) Whether any prima facie case is made out to show the act of the Appellants can be termed as against the interest of the consumers or resorting to unfair trade as referred to in Section 11(a) of the Act?
- (ii) Whether the Board is empowered under the Act to settle the disputes like the one raised by the R1 to R3?

On the basis of these questions, the Learned Senior Counsel for the Appellant would point out the following aspects:

- (A) “As per Section 11(a) of the Act, the Board’s main endeavour should be to ensure that the interest of consumers is protected by preventing the unfair trade. Appellant companies have not

increased the prices, even though the price of raw material namely crude oil in the international market had risen substantially. By not increasing the prices they are protecting the interest of the consumers and not going counter to their interest, which would have been the case if the prices had been raised.”

(B) “The reduced rates offered by the Appellant companies which may be under the instruction of the Government were not promotional rates but were considered affordable rates in greater public interest and it is not done with intention of unseating the competition. If these companies were harbouring the intention of predeclaring the pricing to make the competition unviable, there would have been continuous drop in price and made loss even when international prices come down. That is not the case here.”

(C) “Clause 11(a) provides that the Board shall take suitable action to protect the interest of consumers by fostering fair trade and competition among the entities. This Clause is an

encompassing Clause which should cover any activity which can be labeled as unfair trade or unfair competition among the entities. The Clause 11(a) while empowering the Board to look at unfair trade and competition would not include the issue of pricing of Petroleum products from the overall ambit of unfair trade and competition since pricing of Petroleum products can be looked into only after these are notified by the Government.”

47. In our view, these aspects as projected by the Learned Senior Counsel for the Appellant have to be taken note of while disposing of the matter finally. However, we make it clear that we are not inclined to give any finding with reference to the above aspects, but we deem it appropriate to direct the Board to take into account of the same in the light of the materials that may be placed by both the parties before the Board for coming to the final conclusion to find out whether it would attract Section 11(a) of the Act which mainly involves the interest of the consumers. We are of the opinion that it is desirable for the Board to issue notice to the Central Government also in order to consider their stand by giving opportunity to them in the matter so that the Board can have comprehensive picture about the whole

issue that would enable it to come to the proper and final conclusion over the point in issue.

48. With these observations, we dismiss this Appeal. However, we make it clear that we are not expressing any opinion, but we reiterate and direct that the Board shall go into the question whether the complaint strictly falls within the scope of Section 11(a) of the Act in the light of the aspects referred to above and also on consideration of the documents and submissions produced and made by the Learned Counsel for the parties. No costs.

(Mahesh B. Lal)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 5th October, 2009

REPORTABLE