IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 14 OF 2016
AND
IA NO.26 OF 2016

Dated: 2nd September, 2016.

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. B.N. Talukdar, Technical Member (P&NG)

In the matter of:-

1. **KOCHI SALEM PIPELINE PVT. LTD.,**)
3rd Floor,)
BPCL Kochi Refinery City Office,)
Maradu, Ernakulam,)
Kerala-682304.)

2. **BHARAT PETROLEUM CORPORATION LTD.,**)
BPCL Refinery,)
Mahul,)
Mumbai-400074.)

3. **INDIAN OIL CORPORATION LTD.,**)
Having its registered office at)
G-9, Ali Yavar Jung Marg,)
Bandra (East),)
Bombay-400 051.) **... Appellant(s)**

AND

1. Petroleum & Natural Gas Regulatory Board,)
1st Floor, World Trade Centre,)
Babar Road, New Delhi-110 001.)
.) **... Respondent**

Counsel for the Appellant(s) Mr. Rajat Navet
Ms. Sanya Talwar

Counsel for the Respondent(s) Ms. Prashant Bezboruah
Mr. Sumit Kishore

J U D G M E N T

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI – CHAIRPERSON

1. In this appeal filed under Section 33 of the Petroleum and Natural Gas Regulatory Board's Act, 2006 (**"the said Act"**), the Appellants have challenged order dated 24/09/2015 passed by Respondent, Petroleum & Natural Gas Regulatory Board (**"Respondent Board"**).

2. Appellant No.1 is a Joint Venture Company in which Appellant Nos.2 & 3 are shareholders to the extent of 50% each. Appellant No.1 Company has been formed for the specific purpose of constituting, commissioning and operating the Kochi-Coimbatore-Erode-Salem LPG Pipeline (**"the said Pipeline"**).

3. It is necessary to state the gist of the Appellant's case. A consortium of Appellant No.2 (**"Bharat Petroleum Corporation Ltd – BPCL"**) and Appellant No.3 (**"Indian Oil Corporation Ltd.-IOCL"**) with Appellant No.2 as the lead partner has been selected by Respondent Board for the grant of authorization for the said Pipeline. Letter of Intent dated 20/02/2014 (**"LOI"**) was issued by Respondent-Board.

4. In terms of the LOI, Appellant No.2 was directed to submit the Performance Bond/Bank Guarantee of Rs.10.63 crores as per provisions of Regulation 8 of the PNGRB (Authorising Entities to lay, build, operate or expand Petroleum & Petroleum Products Pipelines) Regulations, 2010 (**"the said Regulations"**), which Bank Guarantee was submitted by Appellant No.2 on 22/02/2014. Pursuant thereto Respondent Board issued a Letter of Authorisation (**"LOA"**) dated 26/02/2014 for the said Pipeline.

5. One of the conditions in the said LOA was that the entity was required to submit a Financial Closure Report to Respondent Board within a period of 120 days from the date of authorization under

Regulation 10 of the said Regulations. It was also indicated that furnishing of Performance Bond of Rs.10.63 crores was a guarantee for timely commission of the Project as per prescribed target submitted in the bid and for meeting the performance undertakings during operative phase of the Project.

6. According to the Appellants on account of the fact that the formation of joint venture was to be done only after declaration of the successful bidder, the action for formalization of the mutual agreement between Appellant Nos.2 and 3 commenced only after grant of authorization on 26/02/2014. The formation of the joint venture took some time because various formalities had to be completed between the Public Sector Undertakings, like capital investment approval by the respective boards, take or pay agreement, sharing of utilities between the parent company and the joint venture at receipt/dispatch locations, Battery limit finalization, allotment of space for the joint venture at receipt/dispatch locations, freezing of various parameters, method of governance of joint venture including constitution of boards etc.

7. According to the Appellants, immediately after the issuance of the LOI, Appellant No.2 who was the lead partner of the consortium, started undertaking all necessary activities for timely completion of the Project, including appointment of SBI Capitals for doing an independent financial evaluation of the Project. However, the Financial Closure Report could not be submitted within 120 days of the issuance of the LOA and as such, Appellant No.2 on 13/06/2014 and 25/08/2014, sought extension of time for submitting Financial Closure Report. Respondent Board vide its letter dated 29/09/2014, extended the time for filing of the Financial Closure Report by 15/11/2014.

8. According to the Appellants, in view of the fact that the board of Appellant No.3 had not been able to consider the formation of the joint venture before 15/11/2014 and the board meeting of Appellant No.3 took place only on 15/11/2014, when approval was granted by the Board for formation of the joint venture with Appellant No.2, another request for extension of time till 15/01/2015 for submission of the Financial Closure Report was sought by Appellant No.2 on 25/11/2014. The same was granted

by Respondent Board till 15/01/2015 vide its letter dated 11/12/2014.

9. The proposed pipeline from Kochi Refinery to Coimbatore, had to pass through different districts of Kerala and Tamil Nadu between Take off and Terminal Point. The total length of pipeline, which was to be constructed in the State of Kerala was approximately 250 Kms and the length of the pipeline to be constructed in the State of Tamil Nadu was approximately 208 Kms. Some portion of the pipeline in the State of Kerala was to pass through various forest stretches and along the buffer zone of Peechi Wild Life sanctuary.

10. It is the Appellant's case that application for Environmental Clearance (**"EC"**) of the said Pipeline, was submitted by Appellant No.2 in December, 2012 itself for Kochi-Coimbatore section. The pipeline was initially envisaged by Appellant No.2 only upto Coimbatore as per the expression of interest submitted by them. However, during the public consultations, Respondent Board decided to extend the pipeline upto Salem. Since the original EC

application was under advanced stage of processing, it was decided by Appellant No.2 that the extension of pipeline from Coimbatore to Salem will be taken up as an amendment, as it was involving detailed survey to firm up the route, which was being hindered by land owners and objections from Tamil Nadu Government. Thereafter on 05/03/2013, the Expert Committee gave clearance to the proposal for laying pipeline upto Coimbatore after holding that the proposal did not attract the provisions of EIA Notification 2006. However, subsequently, the Ministry reconsidered the matter and put up the proposal again in the next Expert Committee meeting held on 29/07/2013. As per the deliberations in the meeting, Term of Reference (**"TOR"**) was issued for the proposal vide letter dated 27/09/2013. In compliance to the TOR, EIA/EMP along with forest clearance and other documents were submitted to the Chairman, Kerala State Pollution Control Board (**"KSPCB"**) for public consultation. Thereafter, the KSPCB conducted public hearings in Thrissur, Palakkad, and Kochi Districts on 18/05/2014, 21/05/2014 and 22/05/2014 respectively and the minutes were uploaded in the MOEF website. Thereafter, the proposal was taken up during the Expert Committee meeting held on 29/09/2014 and

it was decided that public hearing needs to be conducted at Coimbatore also as Appellant No.2 was setting up a receipt terminal at Coimbatore and this would also have to be treated as an integrated facility. This was a new requirement given by MOEF which was not included in the original TOR.

11. According to the Appellants, on 17/11/2014, Appellant No.2 submitted an application to Tamil Nadu Pollution Control Board. Repeated follows ups were made by the officials of Appellant No.2 with the Tamil Nadu Pollution Control Board as well as District Collector, Coimbatore and other State Government & PCB officials for expediting the public hearing. However, Appellant No.2 was given to understand that unless the authorities get a formal direction from Tamil Nadu Government about laying of cross country pipelines, which is a policy matter of the Government, they will not be in a position to allot the public hearing date. Since the Appellants were uncertain about when the issue will be cleared by Tamil Nadu Government, Appellant No.2 started looking for alternate land close to Kerala/Tamil Nadu Border and was able to locate one in the Industrial Estate (**"KINFRA"**) so as to meet its

urgent requirement of evacuation of additional LPG post KR expansion, which is progressing on schedule. KINFRA has allotted 18.59 acres of land for the purpose and the payment has been effected. Pursuant to the above, BPCL had also submitted a request to MOEF for reconsideration of its EC proposal delinking Tamil Nadu portion. The MOEF has considered the same and granted Environmental Clearance for laying the pipeline upto Kerala Border vide its order dated 03/07/2015.

12. According to the Appellants inspite of non-formation of the joint venture Company, indecisiveness in firming up the route in Tamil Nadu, which had bearing on Environmental Clearance, non-finalization of Financial Closure Report Appellant No.2 had made considerable progress in the execution of the Project, which is evident from the various progress reports submitted by Appellant No.2 to Respondent Board in the months of January and April,2015.

13. On 22/01/2015, the Joint Venture Company, i.e. Appellant No.1 was formed and time was sought till 15/03/2015 for

submission of the Financial Closure Report by Appellant No.2, vide its letter dated 19/02/2015. However, Respondent Board issued a Show Cause Notice on 03/03/2015 as to why the authorization of the said Pipeline be not cancelled, in view of non-submission of the Financial Closure Report even after extension of time till 15/01/2015. Appellant No.1 filed a response dated 13/03/2015 bringing out the various reasons for the delay in the financial closure. It was also stated therein that the said delay was not intentional and that even otherwise, the Project had not suffered on account of the same, as Appellant No.2 had been managing all the activities, including funding of the Project. Appellant No.1 also sought a personal hearing.

14. Thereafter a personal hearing was granted to Appellant No.1 on 13/04/2015, wherein Appellant No.1 once again brought out all the facts related to financial closure as well as the efforts that were being undertaken to ensure timely completion of the Project despite various hindrances and concerns. Thereafter, as directed, Appellant No.1 also filed a detailed explanation on 16/04/2015 and

sought extension of time till 15/06/2015 for submission of the Financial Closure Report.

15. Pertinently, the Expert Committee cleared EC delinking Tamil Nadu Portion on 21/04/2015 for laying of the pipeline from Kochi to the Kerala-Tamil Nadu Border.

16. Thereafter on 25/05/2015, the State Bank of India sanctioned a term loan of Rs.722.87 crores for the said Pipeline Project and Appellant No.1 vide its letter dated 29/05/2015 informed Respondent Board that the financial closure had been achieved for the Project 15 days prior to the committed date of 15/06/2015.

17. On 27/07/2015 Respondent Board sought confirmation of the acceptance of terms and conditions as stipulated in SBI's Sanction Letter dated 25/05/2015 and also directed Appellant No.2 to submit the progress report of the Project. Appellant No.1 vide its reply dated 07/08/2015 submitted the progress report as on 06/08/2015, acceptance of SBI's Sanction Letter dated 25/05/2015 and the Board Resolution in that regard. Appellant

No.1 also highlighted the fact that the Pipeline Project was now being handled by the joint venture and as such, all correspondences may be addressed to the joint venture at the address mentioned in the said reply.

18. It is the case of the Appellants that between April and August 2015 there was considerable progress in the Project. However, Respondent Board on 24/09/2015 passed the impugned order whereby it has encashed 25% of the Performance Bank Guarantee amounting to Rs.2,65,75,000/- by relying upon Regulation 16 (1) (c) (i) of the said Regulations on the ground that there has been a breach of authorization with respect to achievement of financial closure. The Appellants have assailed the said order in this appeal.

19. We have heard Mr. Rajat Navet learned counsel appearing for the Appellants. We have perused the note submitted by him. Gist of his submissions is as under:

(a) Respondent Board has not exercised the discretion vested in it under Regulation 17 of the said Regulations judiciously.

(b) The Environmental Clearance was granted only on 21/04/2015 and within few days thereafter i.e. on 25/05/2015 financial closure was achieved. Regulation 16 stipulates that *'force majeure'* is a factor which has to be taken into account. Getting Environmental Clearance was beyond the scope of the Appellants. It was a *'force majeure'* event which Respondent Board failed to appreciate.

(c) Without Environmental Clearance, no bank would have sanctioned loan. The State Bank's letter dated 25/05/2015 clearly stipulates obtaining of necessary approval as a precondition for disbursement.

(d) In any case lack of financial closure or delay in formation of the joint venture did not have any adverse effect on the Project. The lead company BPCL had taken all actions for executing the Project at its own costs. In the impugned order it is observed that considerable progress has been achieved in the Project, but while imposing penalty the said aspect has been ignored.

(e) There is no finding that loss has been caused to anyone. Therefore, this penalty amounts to unjust enrichment to the detriment of the Appellants.

(f) Various pleas of the Appellants have not been taken into account.

(g) The encashment of 25% of the Bank Guarantee in terms of Regulation 16 amounts not only to a penalty but also amounts to a default on the part of Appellant No.1. Any subsequent default could result in cancellation of the authorization of Appellant No.1. There is no finding that there was any lack of *bona-fides* or deliberate inaction on the part of the Appellants. Therefore, no penalty, which could have any adverse effect on the Appellant's authorization in the future could have been imposed.

(h) The impugned order directing encashment is erroneous, illegal, non-reasoned and does not amount to judicious exercise of discretion. If ultimately the Project is commissioned within the scheduled time, then the encashment would amount to penalizing the Appellants

without any basis. That is why interference from this Tribunal is necessary. It is not the case of the Appellants that the encashment is fraudulent.

(i) The financial closure was absolutely unconditional. The terms and conditions of the sanction letter were duly accepted by Appellant No.1 as communicated to Respondent Board vide letter dated 07/08/2015.

(j) In the circumstances impugned order is liable to be set aside.

20. We have heard Mr. Prashant Bezboruah, learned counsel appearing for Respondent Board. We have also perused the written submissions. Gist of the submissions is as under:

(a) Delay in achieving financial closure has been admitted by the Appellants. Hence, consequent action under Regulation 16 (1) (c) is justified.

(b) Financial Closure Report was to be submitted within 120 days in terms of the Authorization Letter dated 26/02/2014 and Regulation 10 (5) of the said

Regulations. Numerous extensions and personal hearing was given to the Appellants. But financial closure was not achieved till the date of the impugned order.

(c) The SBI Sanction Letter dated 25/05/2015 made Regulation 10 (4) of the said Regulations applicable which prescribes 180 days for financial closure. The Appellants failed to achieve financial closure within that period.

(d) The SBI Sanction Letter made sanction of loan conditional. It cannot be construed as binding commitment. The Term Sheet also indicates this. Letter of credit norms have been left for negotiation.

(e) The Appellants took almost a year to establish Joint Venture Company.

(f) Financial closure is one of the fundamental conditions to be complied with by an entity without which the entire project may be in jeopardy. Assessment of progress has to be done after the stage of financial closure.

(g) If action is not taken against the defaulting entities it will send a wrong signal to other entities and that would be against the national interest. No interference is therefore necessary with the impugned order.

21. At the outset we must mention that the point regarding interplay between Regulation 10 (6) and Regulation 16 has not been raised by the Appellants either in the appeal or in the rejoinder. It is not raised during the hearing. We therefore clarify that we have not considered the said issue in this judgment.

22. The Appellants have admitted that there is delay in achieving financial closure. What is really in issue in this case is the encashment of 25% of the Performance Bank Guarantee by Respondent Board for delay in achieving financial closure under Regulation 16 (1) (c) (i) of the said Regulations. The main contention of the Appellants is that Respondent Board has not exercised the discretion vested in it under Regulation 16 judiciously.

23. In this connection it is pertinent to highlight that 25% of the Performance Bank Guarantee amount i.e. Rs.2,65,75,000/- has already been encashed by Respondent Board and has also been replenished by the Appellants in terms of the impugned order and the proviso to Regulation 16 (1) (c) of the said Regulations.

24. The law relating to Bank Guarantees has been well settled by the Supreme Court in several judgments. Unless there is fraud of the beneficiary or irretrievable harm or injury the Courts are not to interfere with the encashment of Bank Guarantees. The contract between the Bank and the beneficiary is held to be an independent contract irrespective of the dispute between the bank's customer and the beneficiary. The Delhi High Court has in a recent judgment in ***Siti Energy Limited & Anr vs. PNGRB dated 02/02/2016 in W.P. (c) 125/2016*** where challenge to the validity of Regulations 7 and 18 of the said Regulations was raised, had an occasion to deal with the application praying that Respondent Board may be

restrained from encashing Performance Bank Guarantee. The Delhi High Court reiterated the principles laid down by the Supreme Court with regard to the said issue. Following are the relevant observations of the Delhi High Court.

> *"25. The law relating invocation of bank guarantees is no longer res integra. The law is well settled that the interference by the Courts is permissible only where the invocation of the bank guarantee is against the terms of the guarantee or if there is any fraud. In the absence of the same, the bank is liable to pay the guaranteed amount without any demur whatsoever and the bank is bound to honour the guarantee irrespective of any dispute raised by is customer since a bank guarantee is an independent and a separate contract. It is also a well settled principle that fraud, if any, must be of an egregious nature, which would vitiate the very foundation of such a bank guarantee and the beneficiary seeks to take advantage of the situation. Allowing encashment of bank guarantee would result in irretrievable harm or injustice to one of the parties concerned has also been recognized by the Courts as a justifiable ground for interference, however, the harm or injustice contemplated must be of such an a exceptional and irretrievable nature as would override the terms of the guarantee [vide* ***U.P. Cooperative Federation Ltd. vs. Singh Consultants and Engineers (P) Ltd. (1988) 1 SCC 174; Vinitec Electronics Private Ltd. vs. HCL Infosystems Ltd. (2008) 1 SCC 544; Himadri Chemicals***

> ***Industries Ltd. vs. Coal Tar Refining Company (2007) 8 SCC 110; Mahatama Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engg. Coop. Ltd. (2007) 6 SCC 470****.] In a recent decision* ***M/s. Adani Agri Fresh Ltd. vs. Mahboob Sharif & Ors. (2015) SCC OnLine SC 1302****, the Supreme Court while reiterating the principles of law laid down in the above decisions further explained that the fraud, if any, must be of an egregious nature as to vitiate the underline transaction."*

25. Counsel for the Appellants has clearly stated that the Appellants are not alleging fraud. Having regard to the principles laid down by the Supreme Court, we are of the opinion that this is not a case warranting our interference, particularly when 25% of the Performance Bank Guarantee has already been encashed and the Appellants have replenished the said amount in terms of the impugned order and the proviso to Regulation 16 (1) (c) of the said Regulations. On this ground alone the appeal deserves to be dismissed. However, having examined the case on merits we are of the opinion that there is no injudicious exercise of discretion by Respondent Board as alleged. We shall now discuss the reasons for this conclusion.

26. The Appellants were granted authorization on 26/02/2014. The Authorization Letter clearly stated that the Appellants shall submit a Financial Closure Report within 120 days as per Regulation 10 (5) of the said Regulations i.e. by 25/06/2014. Admittedly numerous extensions were given to the Appellants till 15/01/2015. Personal hearing was given on 13/04/2015. However the Appellants did not achieve financial closure till the impugned order. The SBI Sanction Letter dated 25/05/2015 accepted by the Appellants would make Regulation 10 (4) of the said Regulations applicable to the Appellants. It states that the authorized entity shall obtain financial closure of the project from a scheduled bank or financial institution within a period of 180 days from the date of authorization. The Appellants did not achieve financial closure even within 180 days.

27. Respondent Board has observed that the SBI Sanction Letter dated 26/05/2015 is conditional. We agree with these observations. It states that until agreements specified therein are executed there is no obligation or commitment on the part of the bank to advance money. It clearly states that the said

communication should not be construed as giving rise to any binding obligation on the part of the Bank. Respondent Board has rightly observed that terms and conditions of the said letter have been accepted by the Appellants except for Letter of Credit norms which are left for negotiation. In fact, the Term Sheet which is annexure to the SBI Sanction Letter clearly states that it cannot be construed as an obligation on the part of the Bank to enter into financing documents. Since the SBI Sanction Letter dated 25/05/2015 is conditional, financial closure cannot be said to have been achieved by 25/05/2015 as contended. The Appellants were well aware of the requirement of financial closure as the Bid Document provides for it. The Appellants took almost a year to establish the Joint Venture Company. All these circumstances appear to have weighed with Respondent Board while exercising its discretion to encash 25% of the Performance Bank Guarantee as per Regulation 16 (1) (c) (i) of the said Regulations.

28. Exercise of discretion cannot be interfered with unless it is capricious, arbitrary or injudicious. Such is not the case here. Moreover as we have already noted here we are concerned with

encashment of Bank Guarantee where the interference of Courts is extremely limited. It is true that the Appellants had to get Environmental Clearance which was not in their hands. It is also true that Regulation 16 states that an authorized entity has to abide by all the terms and conditions specified in the said Regulations. But it has carved out an exception for *'force majeure'*. It is also true that clause 32.0 of the Bid document which relates to *'force majeure' inter alia* states that restrictions imposed by Central Government or other statutory bodies which prevent or delay the execution of obligations under the said Regulations fall in the scope of *'force majeure'*. But it is the case of Respondent Board that in the various explanations provided by the Appellants for failure to achieve financial closure no mention was made that delay in financial closure was due to pending environmental clearance. We have noticed that in reply dated 13/03/2015 to the Show Cause Notice dated 03/03/2015 no such specific averment was made. Besides we notice that Respondent Board had given sufficient extensions to the Appellants. Even personal hearing was given to the Appellants. In such circumstances the impugned exercise of discretion cannot be questioned particularly when the bank

guarantee has already been encashed and the same has also been replenished by the Appellants. That delay in forming Joint Venture Company did not have adverse financial impact is no ground to condone the said lapse. In matters such as this where large stakes are involved and successful and timely completion of the Project is expected in public interest, importance of prescribed timelines cannot be diluted. An unduly lenient approach will set a bad precedent. Respondent Board has observed that it has given the Appellants ample opportunities for being heard and reasonable time to fulfill their obligations through various communications issued from time to time. This observation is not without any basis. We have also noticed that Respondent Board has noted that as per monthly progress report of August, 2015, considerable progress has been achieved with regard to ROU acquisition in Kerala but there is no sufficient progress of ROU acquisition in Tamil Nadu. Thus approach of Respondent Board appears to be balanced. It is feared by the Appellants that since the present encashment amounts to a default on the part of Appellant No.1, any subsequent default could result in cancellation of the authorization of Appellant No.1. If such a provision is there in the relevant regulations we cannot pass any

order restraining Respondent Board from implementing it if a case is made out. Such a hypothetical argument cannot be entertained. The Appellants will have to ensure that they commit no further default, which could attract cancellation of the authorization. We are sure that Respondent Board will, as an important Sectoral Regulator balance the interest of the Appellants and the consumers while dealing with this matter.

29. With these observations the appeal is dismissed.

30. Pronounced in the Open Court on this **2nd day of September, 2016.**

(B.N. Talukdar)
Technical Member(P&NG)

(Justice Ranjana P. Desai)
Chairperson

√**REPORTABLE / ~~NON-REPORTABALE~~**