

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
[APPELLATE JURISDICTION]**

**APPEAL NO. 51 OF 2017 &
IA NO. 143 OF 2017**

Dated: 8th October, 2018

**Present: Hon'ble Mr. B.N. Talukdar, Technical Member (P&NG)
Hon'ble Mr. Justice N.K. Patil, Judicial Member**

IN THE MATTER OF:

**CENTRAL U.P. GAS LIMITED)
Having its office at:)
7th Floor, A1/4, UPSIDC Complex,)
Lakhanpur, Kanpur,)
Uttar Pradesh-208024) **...Appellant****

AND

**THE PETROLEUM & NATURAL GAS)
REGULATORY BOARD)
Having its registered office at:)
First Floor, World Trade Center,)
Babar Road, Barakhamba Road,)
New Delhi-110001) **...Respondent****

Counsel for the Appellant(s) : Mr. Vivek Kohli
Ms. Neetika Bajaj
Mr. Nikhil Mathur
Ms. Pankhuri Jain
Ms. Astha Chawla
Mr. Harleen Bains

Counsel for the Respondent(s) : Mr. Prashant Bezboruah

J U D G M E N T

PER HON'BLE MR. B.N. TALUKDAR, TECHNICAL MEMBER (P&NG)

1. The Appellant questioning the correctness of the impugned order dated 30.12.2016 passed by the Petroleum and Natural Gas Regulatory Board in respect of the authorization dated 26.02.2014 for city gas distribution network development in the Jhansi geographical area, has challenged under Section 33 of the Petroleum and Natural Gas Regulatory Board Act, 2006 for encashing a Performance Bank Guarantee for an amount of Rs. 1,50,00,000.00 (Rupees One Crore and Fifty Lakhs only). The Performance Bank Guarantee bearing No. 0003GM01140380501 was furnished by the Appellant in connection with its bid submitted to the Petroleum and Natural Gas Regulatory Board for the geographical area of Jhansi for the city gas development network presented in this appeal.

2. The Appellant, Central U.P. Gas Ltd. ("**the Appellant**"), a joint venture between India's two leading PSUs i.e. GAIL

(India) Limited and Bharat Petroleum Corporation Limited, came into existence on 25.02.2005. The Appellant was constituted for developing city gas distribution project in Uttar Pradesh.

3. The Respondent, the Petroleum and Natural Gas Regulatory Board, (the Board) is a statutory body constituted under the provisions of the Petroleum and Natural Gas Regulatory Board Act, 2006 ("PNGRB Act") to regulate "the refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas excluding production of crude oil and natural gas so as to protect the interests of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas and to ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country and to promote competitive markets and for matters connected therewith or incidental thereto".

BRIEF FACTS OF THE CASE:

4. The case of the Appellant is that pursuant to the issuance of the Board's competitive bid for grant of authorization for laying, building, operating or expanding City Gas Distribution (CGD) network in the Jhansi geographical area (GA), the Appellant submitted its bid on 09.01.2014 and the Appellant was authorized vide authorization letter dated 26.02.2014 by the Board to lay, build, operate or expand CGD network in the Jhansi GA. This authorization was issued to the Appellant after furnishing a performance bank guarantee (PBG) by the Appellant for an amount of Rs. 1,50,00,000.00 (Rupees One Crore and Fifty Lakhs only) on 07.02.2014. The authorization was accepted by the Appellant on 04.03.2014.

5. The CGD network consists of pipelines across the length and breadth of the city/town reaching out to industrial, commercial, residential and vehicular consumers. As per the agreed terms and conditions of the authorization letter, the Appellant was required to achieve the following

year-wise targets/project milestones in respect of two items i.e. laying of steel pipeline (inch-km) and domestic piped natural gas (PNG) connections:-

The milestones for the Project Implementation as per BID		
Yearwise Targets	PNG Domestic Connections	Inch-Km of Steel Pipeline
Year 1	617	23.60
Year 2	3704	37.92
Year 3	6215	10.40
Year 4	6585	0
Year 5	6585	0

6. After accepting the authorization on 04.03.2014, the Appellant started working in the Jhansi GA. The Appellant started communicating to various authorities for making land available for city gate station (CGS) and mother station. In April, 2014, the Appellant issued separate letters to Jhansi Nagar Nigam and Jhansi Development Authority. The Secretary to the Jhansi Development Authority also took prompt action by writing a letter to the General Manager, District Industries Center of Jhansi for grant of land for CGS and mother station in April, 2014 itself.

7. After conducting a joint survey with the officials of Jhansi Nagar Nigam, a piece of land was identified at Mauja Lahargrid at Jhansi. On receipt of a letter from Jhansi Nagar Nigam on 01.09.2014, the Appellant made a payment of Rs. 66,00,000.00 (Rupees Sixty Six Lakhs only) on 03.09.2014 for initiating the formalities for transfer of the plot of land.

8. It is the case of the Appellant that in spite of respected follow-ups and putting in stupendous efforts, the possession of the land was not yet transferred to the Appellant. The matter was pending at Urban Development Ministry, Uttar Pradesh. The Municipal Commissioner, Jhansi Nagar Nigam also on 13.05.2016 issued a letter to Secretary, Urban Development Department, U.P. requesting allotment of the land to the Appellant. The Joint Secretary, Ministry of Petroleum and Natural Gas (MoP&NG) also requested the Secretary, Urban Development Department, U.P. vide letter dated 03.11.2016. As per the Appellant, because of non-

availability of land, it has not been in a position to commence the construction activities in the Jhansi GA.

9. Apart from the issue of land, the quality (composition) of gas is a very material fact. As per specifications of the natural gas to be supplied in Jhansi provided by the GAIL (India) Ltd., the gas is very rich (low methane content) in nature. As per the IS norms, the gas to be available at Jhansi is not suitable for Compressed Natural Gas (CNG) use. The recommended level of methane content for CGD use is around 90%. GAIL (India) Ltd. vide letter dated 29.11.2016 again informed the Appellant that the gas composition in Vijaipur-Auraiya section of HVJ Pipeline has further got richer (having less methane content) due to commissioning of C2-C3 Gas Processing Plant at Vijaipur. Because of non-availability of suitable gas, no action could be taken on ground.
10. Hence the things thus stood that the Board issued a show cause notice to the Appellant vide letter dated 04.11.2016 asking the Appellant to appear before the Board's office

on 30.11.2016 and explain the reasons as to why the PBG furnished by the Appellant should not be encashed in terms of Regulation 16 of the PNGRB (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations 2008. While appearing on 30.11.2016, the Appellant explained the reasons for not fulfilling the obligations under the authorization and hence PBG should not be encashed. In this respect, the Appellant filed its Written Submissions also on 15.12.2016.

11. As directed by the Board vide order dated 30.11.2016, the Appellant also carried out a spectrum analysis of natural gas to be available for the project by engaging a third party certified by NABL in accordance with the standard ISO/IEC 17025:2005, Intertek India Private Limited.
12. On perusal of the spectrum analysis report, it was observed that there was a variation in the methane content of natural gas at both the sides of PATA Petrochemical Plant. The samples for testing were

collected from both upstream and downstream section of PATA Petrochemical Plant at different time slots.

13. The change in gas specification is finally resulting into difference in gas quality in Kanpur and Jhansi areas in spite of the fact that both the cities are to be fed by the same gas pipeline.
14. Subsequently, the Appellant also wrote a letter dated 23.12.2016 to the Board explaining the constraints being faced by the Appellant and requested the Board to grant the second hearing in the interest of justice and not to encash the PBG. Apprehending that the Board would encash the PBG, the Appellant filed a writ petition bearing W.P. (C) No. 12244 of 2016 on 28.12.2016 before the Delhi High Court praying for issuance of Writ of Mandamus or any other Writ, Order or Directions in the nature of Mandamus directing the Board not to encash the PBG.
15. The above writ petition had come up for consideration before the Vacation Bench of Delhi High Court on 28.12.2016 upon mentioning. On service of advance copy,

the counsel of the Board appearing on the same date submitted that the petition filed by the Appellant was premature as no precipitate action had taken against the Appellant for encashment of PBG. The counsel also submitted that if any action taken, the same would be taken in accordance with law. The matter was listed before the Roster Bench of Delhi High Court on 02.01.2017.

16. It is shock and surprise to the Appellant that the Board passed the order dated 30.12.2016 for encashing the PBG of the Appellant. The Appellant is questioning the correctness of the impugned order passed by the Board in the instant appeal.
17. On the same date i.e. 30.12.2016, the Appellant wrote a letter to the Board saying that the matter is sub-judice and requested the Board to hold invocation of the PBG/any action against the Appellant till the hearing on 02.01.2017.

18. The writ petition filed by the Appellant had come up for consideration on 02.01.2017. In view of the impugned order passed by the Board on 30.12.2016, the Appellant sought leave to withdraw the writ petition with a liberty to redress the relevant provision of PNGRB Act, 2006 assailing the correctness of the impugned order dated 30.12.2016 since the PBG had already been encashed by the Board. Accordingly the writ petition filed by the Appellant was dismissed as withdrawn with a liberty to redress his grievance before this Tribunal.
19. Being aggrieved by the impugned order passed by the Board on 30.12.2016, the Appellant filed the present appeal.
20. We have heard Mr. Vivek Kohli, learned counsel appearing for the Appellant and also perused the written submissions filed by the Appellant. Gist of the submissions is as under: -
- a. Non-availability of land for installation of CGS and mother station cannot be a failure on the part of the

Appellant. Prompt action was taken to initiate the project. The authorization was accepted on 04.03.2014 and immediately thereafter, communications were started through letters to various agencies for purchasing the plot of land. All actions within the control of the Appellant and expected of the Appellant have been discharged in the mostly timely manner possible. Repeated follow-ups were also done with the relevant authorities including making full payment to Jhansi Nagar Nigam against purchase of the plot of land. In spite of all the efforts made, the possession of the land is not yet transferred to the Appellant.

- b. The project involves both PNG and CNG aspects of business. PNG involvement in the entire project is hardly around 25% or less and majority depends on development of CNG distribution network. Under this situation, the CGD network project in Jhansi GA is not economically viable based on only PNG distribution network.

- c. Non-availability of suitable gas for CNG distribution cannot be attributed to the Appellant as failure. GAIL (India) Ltd. is the supplier of gas for the project. Only on 20.11.2016 it intimated to the Appellant that action had been taken to lay a new spur line along a route passing near Jhansi which would make the required gas available for CNG operations and that too with expected date of availability only in December, 2019.
- d. Because of non-availability of land and suitable gas with requisite composition, an extension for 2 years of time was requested to the Board on 30.07.2016 to fulfill the terms and conditions of authorization which was not agreed to by the Board without explaining any reasons for non-extension of time. Had the extension been given that time, the project would have been completed accordingly.
- e. The Regulation 16 of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build,

Operate of Expand City or Local Natural Gas Distribution Networks) Regulations, 2008 provides the provisions to follow for encasing PBG which the Board did not follow. As per this Regulation, the Board ought to have issued notice allowing reasonable time to fulfill the obligation.

- f. Non-availability of land and suitable gas are Force Majeure conditions since these are beyond the scope of the Appellant. In the event of prevailing Force Majeure conditions, the Appellant cannot be held responsible for non-performance of its obligations.

- g. The Board did not carry out its obligations prior to issuing the bid document. No preliminary assessment was carried out by the Board with respect to natural gas availability position and other relevant issues. As per Regulation 6 of the Authorization Regulation, the Board may *suo-moto* form a view regarding the development of a City Gas Distribution Network in the specific city or a geographic area and in such

case, the procedure as specified in Regulation 5 (except aspects relating to expression of interest shall be replaced by project details as prepared by the Board) shall apply. As per Regulation 5, the Respondent shall carry out a preliminary assessment of the project details with respect to the following namely: -

- a) Natural gas availability position
 - b) Possible connectivity with an existing or proposed natural gas pipeline for supply of natural gas to the city gate of the proposed CGD network, including LNG supplies by tank trucks or tank wagons and CNG by cascades;
and
 - c) Any other relevant issue as the Board may consider necessary.
- h. The action of the Board of encashing the PBG is contrary to the assurance given by the Board before

the High Court of Delhi on 28.12.2016 in Writ Petition (C) No. 12244 of 2016 filed by the Appellant.

21. We have heard Mr. Prashant Bezboruah, learned counsel appearing for the Board and perused the submissions of the Appellant. Gist of the submissions is as under: -

- (i) The PBG furnished by the Appellant has been encashed since the terms and conditions of grant of authorization dated 26.02.2014 had not been complied with by the Appellant even after lapse of almost 3 years since authorization out of a total exclusivity period of 5 years. The PBG has been encashed in public interest since an important GA had been kept dry for so many years. At the time of encashment of PBG, the Appellant had achieved zero progress/targets. The following tabulation would show the targets to be achieved and the progress actually made as on the date of the impugned order.

Year wise targets	PNG domestic targets as per the authorization	Actual PNG targets achieved as on the date of the Impugned Order	Inch_Km targets as per the authorization	Actual Inch_Km target achieved as on the date of the Impugned Order
Year 1	617	0	23.60	0
Year 2	3704	0	37.92	0
Year 3	6215	0	10.40	0
Year 4	6585	0	0	0
Year 5	6585	0	0	0

Above tabulation clearly shows the lack of seriousness of the Appellant in completing its targets under one pretext or the other.

- (ii) In the context of suitable gas not being available, it is pertinent to mention that the Appellant itself had initially submitted the information in terms of Section 17 of the Act and Regulation 17 of the Authorization Regulations to the Board about the Jhansi GA. Therefore, the Appellant was well aware of the gas availability, infrastructure, economic viability and ease of operation and maintenance of the Jhansi GA when it claimed to have been authorized by the Central Government for the Jhansi GA. Though the

Appellant claimed so, since the Appellant did not have any Central Government authorization at that point of time, the Board decided to initiate a bidding process for the Jhansi GA, after a public consultation process.

- (iii) The Appellant submitted its bid and also accepted the terms and conditions of the authorization knowing fully well the nature and availability of the gas in the area. If at all it had any grievance with the nature of the gas available in the Jhansi GA, it should have raised this issue with the Board after the Bid Document was issued and before submitting its bid so that the Board could examine these aspects. It is also pertinent to mention that the Appellant is a Joint Venture between GAIL (India) Ltd., BPCL and IGL and GAIL (India) Ltd. is the supplier of the gas. The Appellant is therefore deemed to be aware of the nature of gas available in the Jhansi GA prior to submitting its bid and accepting the terms and conditions of the authorization.

- (iv) The Appellant knows fully well that the gas available is suitable for PNG connections and hence, the Appellant cannot sit and do nothing with the excuse of the gas being not suitable for CNG. For PNG connections, there was zero progress in the project till the date of encashment of PBG.
- (v) It is further submitted that the entire Scheme of the PNGRB Act, 2006 and the Regulations framed there under provide for the protection of public interest as well as the protection of the interest of entities as important mandates of the PNGRB. However, where an entity consistently and deliberately defaults and in fact, its defaults are detrimental to public interest, the Board being the sectoral Regulator has to necessarily apply the law and comply with its mandate under the Act.
- (vi) Since the Appellant deliberately did not make any progress with one pretext or the other, there is no Force Majeure condition involved restricting the

Appellant from making any progress in the project. As such Force Majeure conditions did not apply in the present matter. No restrictions were imposed by the Central Government or other statutory bodies preventing/delaying the execution of obligations. There was also no Force Majeure incidence reported by the Appellant within one week of occurrence of the incidence which is a stipulation mentioned in the Force Majeure clause.

- (vii) The Board had already taken lenient view towards overall failure of the Appellant. As per terms and conditions of authorization, Financial Closure (FC) was to have been done by the Appellant by 25th June, 2014, which they did only on 10.04.2015. As per provisions of Regulation 9 read with Regulation 5 (6) of the Authorization Regulations, the Appellant was to furnish a PBG of an amount of Rs. 6,00,00,000/- (Rupees Six Crores only), but till the date of notice for encashment of PBG, the Appellant has submitted PBG only for an amount of Rs.

1,50,00,000/- (Rupees One Crore Fifty Lakhs only) which in itself is a violation of the applicable regulations.

(viii) Under Regulation 10 (2) of the Authorization Regulations, the grant of authorization is subject to the entity achieving a firm natural gas tie-up. In terms of Regulations 11 (1) and (3) of the Authorization Regulations, the entity is required to have a firm gas supply agreement in place within a period of 180 days from the date of grant of authorization. Therefore, the onus lies on the entity to arrange for supply of suitable natural gas.

(ix) As regards the order of the High Court of Delhi dated 28.12.2016, no stay on encashment of PBG was granted by the High Court till the next date of hearing. The High Court also recorded the statement of the counsel of the Board in the order dated 28.12.2016 that action, if any, would be taken as per law. This implies that the High Court was of the view

that Board could proceed further if it considered it necessary in accordance with law. Hence, encashing PBG before the next hearing on 02.01.2017 by the Board was not a case of contempt of Court.

- (x) In relation to the law of encashment of PBG, the position of law is well settled by a plethora of judgments of the Hon'ble Supreme Court of India that bank guarantee encashment should be interfered with by Courts only in the event of fraud of egregious nature or irretrievable injustice or where the Bank Guarantee has been invoked against the terms and conditions or the decision is arbitrary, irrational, unreasonable, malafide, biased or against public interest. In the present appeal there is neither any fraud of egregious nature or otherwise on the part of the Board nor any irretrievable injustice to the Appellant on encashment of PBG.

In the context of PBG encashment law, the following two recent judgments of Hon'ble Supreme Court of India and High Court of Delhi are relied on:

- *Gujarat Maritime Board Vs. Larsen and Toubro Infrastructure Development Projects Limited and Another – (2016) 10 SCC 46 – Paras 9 to 13 pages 52 to 55 of the judgment is relied on.*
- *Judgment of the Division Bench of the High Court of Delhi in C.M. No. 570 of 2016 in W.P. (C) No. 125 of 2016 – M/s Siti Energy Ltd. Vs. PNGRB. _____ directly relevant for the present matter.*

The learned counsel appearing on behalf of the Appellant placed reliance in the judgments of Hon'ble Supreme Court of India and also in the judgment of this Tribunal to substantiate his submissions which are as follows: -

- *General Electric Technical Services Co. Inc. Vs. Punj Sons (P) Ltd., (1991) 4 SCC 230 para 9 page 237;*
- *Centax (India) Ltd. Vs. Vinmar Impex Inc., (1986) 4 SCC 136 para 5 page 139;*
- *U.P. Co-operative Federation Ltd. Vs. Singh Consultants & Engineers (P) Limited (1988) 1 SCC 174 para 21 page 186 and para 34 page 190;*
- *Svenska Handelsbanken Vs. M/s Indian Charge Chrome (1994) 1 SCC 502 paras 86 and 88 page 530;*
- *U.P. State Sugar Corporation Vs. Sumac International Ltd. (1997) 1 SCC 567 para 12 page 574 and para 14 page 575;*
- *Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company (2007) 8 SCC 110 para 14 page 117;*
- *Vinetec Electronics Pvt. Ltd. Vs. HCL Infosystems (2008) 1 SCC 544 para 11 page 547 and para 12 page 548;*

- *Jagdish Mandal Vs. State of Orissa (2007) 14 SCC 517 para 22 page 531;*
- *Michigan Rubber (India) Ltd. Vs. State of Karnataka (2012) 8 SCC 216 para 24 page 229;*

Therefore, the learned counsel appearing on behalf of the Respondent vehemently submitted that the impugned order passed by the Board is in consonance with the relevant provisions of the PNGRB Act, 2006 and Rules. There is no error or any legal infirmity in the impugned order and it does not call for. The appeal filed by the Appellant may be dismissed as devoid of merits.

IN OUR CONSIDERATION

22. It is now necessary to first have a look at the facts and circumstances of the case. The Board authorized the Appellant to lay, build, operate or expand city gas development network in Jhansi GA vide its letter dated 26.02.2014 which the Appellant accepted on 04.03.2014. Prior to this authorization, the Appellant was required to

furnish a PBG of an amount of Rs. 6,00,00,000/- (Rupees Six Crores only) out of which the Appellant furnished a PBG of Rs. 1,50,00,000/- (Rupees One Crore and Fifty Lakhs only) i.e. 25% of the total requirement of Rs. 6,00,00,000/- (Rupees Six Crores only) on 07.02.2014.

23. As per the terms and conditions of the authorization, the Appellant was required to accomplish certain annual physical targets in terms of certain agreed number of domestic PNG connections and laying of certain agreed number of inch-kms of steel pipelines during an exclusivity period of 5 years from the date of authorization.
24. The consequences of defaults in meeting these targets and termination of authorization procedure are accordingly spelt out in Regulation 16 of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008. The said Regulation 16 is reproduced below for our due reference in the subsequent discussion.

"16. Consequences of default and termination of authorization procedure.

(1) An authorized entity shall abide by all the terms and conditions specified in these regulations and any failure in doing so, except for *force majeure*, shall be dealt with as per the following procedure, namely:

(a) the Board shall issue a notice to the defaulting entity allowing it a reasonable time to fulfill its obligations under the regulations.

(b) no further action shall be taken in case remedial action is taken by the entity within the specified period to the satisfaction of the Board;

(c) in case of failure to take remedial action, the Board may encash the performance bond of the entity equal to percentage shortfall in meeting targets of inch-kms and/or domestic connections. Provided that, the value so encashed would be refunded, if the entity achieves the cumulative targets at the end of exclusivity period for exemption from the purview of common carrier or contract carrier. In case of failure to abide by other terms and conditions specified in these regulations, performance bond shall be encashed as under:

(i) 25% of the amount of the performance bond for the first default; and

(ii) 50% of the amount of the performance bond for the second default:

Provided that the entity shall make good the encashed performance bond in each of the above cases within two weeks of encashment failing which the remaining amount of the performance

bond shall also be encashed and authorization of the entity terminated.

(iii) 100% of the amount of performance bond for the third default and simultaneous termination of authorization of the entity.

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

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

Sub-Regulation 16 (1) (c) (i) is relevant in the instant case.

25. The Appellant has admittedly not been able to make any progress at all in meeting the physical targets till the date of the impugned order dated 30.12.2016, encashing 25% of PBG. The real issue in this matter is this encashment of PBG by the Board for delay in achieving the physical targets.

26. It is emerged from the impugned order passed by the Respondent Board that it has rightly considered the

written submission filed by the Appellant and also taken into consideration the other relevant materials available on records. . Therefore the learned counsel appearing on behalf of the Board Mr. Prashant Bezboruah submitted that the Board in fact has taken lenient view towards the Financial Closure and non-furnishing of full amount of PBG by the Appellant. We are not discussing these issues since these are not relevant reasons for encashing the PBG. We are not considering the issue of various statements made by the Appellant as well as the Respondent Board during proceedings before the High Court of Delhi in Writ Petition No. 12244 of 2016 between the same entities since the case was finally withdrawn by the Appellant from the High Court.

27. Principal submissions of learned counsel appearing on behalf of the Appellant are that the Board has unreasonably encashed the PBG without considering the constraints faced by the Appellant which were beyond the control of the Appellant, time extension sought by the Appellant to fulfill the terms and conditions of

authorization was denied by the Board and due procedure as per Regulation 16 of the Authorization Regulations was not followed by the Board including not giving sufficient personal hearing to the Appellant before encashing the PBG.

28. It is a fact that immediately after accepting the authorization on 04.03.2014, the Appellant started communicating to various agencies viz Jhansi Nagar Nigam, Jhansi Development Authority etc. in the subsequent month April, 2014 itself for allocation of land for setting up of the City Gate Station (CGS) and Mother Station. It is also fact that the Appellant also involved the State Secretariat at Lucknow, Urban Development Authority, U.P. and also Ministry of Petroleum and Natural Gas at the center. It is also fact that the Appellant made a payment of Rs. 66,00,000/- (Rupees Sixty Six Lakhs only) against purchase of the said plot of land. We also have taken note that the land was still not available till the time of last communication by the Appellant to the Board before encashment of the PBG. We, however, do not

observe any issue involving environmental clearance in this matter. As we observe, it is simply an administrative issue involving the concerned agencies in the State of U.P. and the Appellant. The situation definitely indicates that there was lack of effort on the part of the Appellant to get the possession of the land. We do not observe any other effort made by the Appellant except writing letters to the agencies strongly indicating lack of seriousness on the part of the Appellant.

29. What had emerged from the written submissions made by the Appellant is that the composition of gas to be made available by GAIL (India) Ltd. is not suitable for CNG distribution. The methane content of the gas is lower than the stipulated level. We also have taken note the composition of gas measured by a third party indicating non-suitability of the gas for CNG distribution. This fact has also not been denied by the Board. The issue remains that the supplier of the gas for Jhansi GA is GAIL (India) Ltd. who is the joint venture partner in the Appellant's company. This leads us to think that the Appellant was

well aware of this fact at the time of bidding. The Board's contention is that though this gas is not suitable for CNG, but the same is suitable for PNG and PNG connection is only appearing as an item in the physical targets for monitoring and not the CNG parameter. The Appellant could have gone ahead with the PNG part of the project without waiting for CNG distribution. The Board has rightly observed in the impugned order that the Appellant also agreed to the fact that the gas is suitable for PNG connections. On this issue, the Appellant has brought in the aspect of economic non-viability of the project based on only the PNG part of the business. As per the Appellant, the demand of PNG across India including the operational authorized areas of the Appellant is very less and the percentage share of PNG in total sales in Appellant's already authorized areas varies from 15.99% to 24.10%, whereas the share of CNG in total sales varies from 75.90% to 84.01% and hence the Appellant cannot lay a complete city distribution network only for distribution of PNG. **This statement of the Appellant is found to be self defeating. This shows that the**

Appellant was well aware of this situation well in advance including non-availability of suitable gas for CNG. The Appellant in spite of having this knowledge went ahead in bidding for the Jhansi GA which does not really leave a scope for them for blaming other agencies.

Emphasis supplied

30. After a lapse of more than 2 years from the date of authorization, the Appellant on 30.07.2016 wrote to the Board asking for 2 years extension to achieve the project milestones which the Board denied stating that the time extension sought was unreasonable. It is true that as stated by the Appellant, the Board did not spell any reasons in details to call the request unreasonable. It is also true that the Appellant did not start any activity on the ground in the project till that time. As per the Appellant, one of the main reasons for not taking off the project is non-availability of suitable gas for CNG distribution. As mentioned by the learned counsel appearing for the Appellant, the Appellant expects to get

the suitable gas by December, 2019 which was communicated by GAIL (India) Ltd. to the Appellant vide its letter dated 29.11.2016. This communication itself indicates that the Appellant might not start the project till December, 2019 which itself is outside the time frame stipulated in the authorization. This view may be drawn because, the Appellant did not even start the PNG activities pending availability of suitable gas for CNG distribution so far. After careful consideration of the reasoning assigned by the Respondent Board, we find that it has rightly justified not to consider the extension for another 2 years as requested by the Appellant.

31. As regards the contention of the Appellant that the Board did not give it sufficient opportunities/hearing before encashment, the Board's contention is that the Board was monitoring the progress of the project and was going through the Appellant's own quarterly progress reports submitted to the Board so far. The Regulation 13 (3) of the Authorization Regulations empowers the Board to monitor the progress of the entity in achieving the various

targets stipulated in the authorization. Only after a lapse of around 3 years from the date of authorization, the Board served the show-cause notice to the Appellant on 04.11.2016 quoting Regulation 16 of the Authorization Regulations read with Section 23 of the PNGRB Act, 2006. The Appellant was accordingly heard on 30.11.2016. As submitted by the Board, sufficient time since the date of authorization of the project was allowed to the Appellant without penalizing the Appellant for not fulfilling the annual targets. Proper personal hearing was also given to the Appellant after serving the show-cause notice and based on Regulation 16 (1) (c) (i) of the Authorization Regulations, the Board finally encashed 25% of the PBG.

32. We have taken note from the written submission of the Respondent Board in reply to the appeal in regards to the achievements in physical parameters vis-à-vis the targets as below as per the quarterly progress reports submitted by the Appellant to the Board as below.

Year wise targets	PNG domestic targets as per the authorization	Actual PNG targets achieved as on the date of the Impugned Order	Inch_Km targets as per the authorization	Actual Inch_Km target achieved as on the date of the Impugned Order
Year 1	617	0	23.60	0
Year 2	3704	0	37.92	0
Year 3	6215	0	10.40	0
Year 4	6585	0	0	0
Year 5	6585	0	0	0

33. Above status is as on the date of the impugned order dated 30.12.2016. We also have taken note from Annexure-1 of the written submission made by the Board on 04.09.2017 giving the quarterly progress report submitted by the Appellant for the quarter April, 2017 – June, 2017 that the physical achievements made by the Appellant was zero even till June, 2017. It is significant to note that the matter is pending adjudication before this Tribunal and the Appellant has not been brought to our notice regarding making any progress in the physical parameters by the learned counsel appearing for the Appellant at all. In terms of the public interest also, we are of the opinion that successful and timely completion of the project is of paramount importance.

34. On this ground itself, the present appeal deserves to be dismissed. Having examined the case on merits, we are of the considered opinion that there has been no injudicious exercise of discretion by the Board as alleged. We, however, would now like to examine the case from the point of view of law.
35. To start with, it is pertinent to highlight here that the PBG furnished by the Appellant has already been encashed by the Respondent Board and the same has been replenished by the Appellant in terms of the impugned order and the proviso to Regulation 16 (1) (c) of the Authorization Regulations.
36. In view of the well settled principles of law laid down by the Apex Court and also by this Tribunal in connection with bank guarantee, this Hon'ble Tribunal cannot interfere with the encashment of bank guarantee unless it is pointed out that there is a fraud on the part of the beneficiary or irretrievable harm or injury involved in the case.

37. In the instant case, no fraud on the part of the Board has ever been reported before this Court by the Appellant nor any irretrievable harm/injury caused to the Appellant reported. We place reliance on the Delhi High Court's judgment dated 02.02.2016 in **Siti Energy Ltd. and Anr. Vs. PNGRB in W.P. (C) No. 125 of 2016** which is very relevant to the present case. In this Court also, in **Appeal No. 14 of 2016 – Kochi Salem Pipeline Pvt. Ltd. & Ors. Vs. PNGRB**, we rely on the above judgment of the Delhi High Court.

38. It is worthwhile to extract the relevant portion of the para 25 of the judgment of Delhi High Court which reads thus:-

"25. The law relating to 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 its 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 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."*

Emphasis supplied

39. Having regard to the well settled principles laid down by the Apex Court, the High Court of Delhi and this Tribunal as stated supra, in view of the well considered order passed by the Respondent Board by assigning a valid and cogent reason and also taking into consideration that the PBG has already been encashed by the Board and the same is also replenished by the Appellant, the appeal filed by the Appellant is liable to be dismissed.

Having regard to the facts and circumstances of the case as stated supra, the appeal filed by the Appellant is dismissed as devoid of merits.

In view of the dismissal of the appeal, the relief sought in IA No. 143 of 2017 in Appeal No. 51 of 2017 does not survive for consideration, hence stand disposed of.

Pronounced in the Open Court on this **8th day of October, 2018.**

Justice N.K. Patil
[Judicial Member]

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

✓ **REPORTABLE/~~NON-REPORTABLE~~**