

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 11th September, 2014**

+ **W.P.(C) No.3698/2013 & CM No.6929/2013 (for stay)**

GAIL (INDIA) LIMITED **..... Petitioner**

Through: Mr. Parag P. Tripathi, Sr. Adv. with
Mr. Pragyan Pradip Sharma, Ms. Monisha
H. Bhargava, Ms. Richa Singh, Advs.

Versus

**PETROLEUM AND NATURAL GAS
REGULATORY BOARD & ORS.** **..... Respondents**

Through: Mr. Saurav Agrawal, Adv. with Mr.
Rakesh Dewan, Adv. for R-1.
Mr. Jayant Bhushan, Sr. Adv. with Mr.
Sakya Singh Chaudhari, Adv. for R-2.
Mr. Gopal Jain, Sr. Adv. with Mr. Alok
Shankar, Adv. for R-3 to 5.
Mr. Sumeet Pushkarna, Adv. with Ms. Sara
Sundaram, Mr. Prashant Narain, Adv. for
UOI.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The petition, (i) impugns the various Guidelines including the Petroleum and Natural Gas Regulatory Board (Development of Model GTA) Guidelines, 2012 (Model GTA Guidelines) issued by the respondent No. 1 Petroleum and Natural Gas Regulatory Board (PNGRB); (ii) impugns the PNGRB (Determination of Natural Gas Pipeline Tariff) Amendment Regulations, 2012 on account of being contrary to the

provisions of the Petroleum and Natural Gas Regulatory Board Act, 2006 (PNGRB Act); (iii) seeks a declaration that the various Guidelines including the Model GTA Guidelines issued by the PNGRB are not statutory and cannot be enforced on the petitioner; (iv) impugns the notices dated 26th March, 2013 issued by the PNGRB to the petitioner; and, (v) seeks a declaration that the PNGRB cannot adjudicate disputes between the entities qua transportation where an arbitration agreement exists between the said entities.

2. It is the case of the petitioner:-

(a) that it is engaged in the activity of transportation, distribution, marketing and sale of petroleum products and natural gas;

(b) that the petitioner is aggrieved from the issuance by the PNGRB of various Guidelines particularly the Model GTA Guidelines purporting to regulate Gas Transmission Agreement (GTA) between a transporter like the petitioner and a third party shipper;

(c) that the said Guidelines seek to affect the 'Ship-or-Pay Charges'; the Ship-or-Pay Charges are akin to minimum demand charges which, irrespective of whether the shipper ships entire

contractual quantity of gas or only a part thereof, has to pay on the basis of Ship-or-Pay quantity;

(d) that the Ship-or-Pay Charges are fixed @ 95% of the tariff for the entire contractual quantity of gas which a shipper is entitled to ship through the pipeline of the transporter under the GTA, irrespective of the number of units actually shipped by the shipper;

(e) that Ship-or-Pay is a standard term in all gas pipeline contracts for transportation of gas, as principally in these GTAs what is really recovered is the regulated tariff as notified by the PNGRB from time to time;

(f) that the impugned Guidelines seek to limit the contractual freedom of the transporter and shipper to determine Ship-or-Pay Charges; the same also seeks to limit the contractual freedom of the transporter and shipper to determine the Force Majeure clause;

(g) that the PNGRB has no power or jurisdiction under the PNGRB Act to issue any Guidelines; in the circumstances, Guidelines if any issued by the PNGRB can at best be advisory or guiding in nature; however the PNGRB, by treating the Guidelines to be mandatory, has sought compliance thereof by the petitioner and

issued notices to the petitioner on complaints filed by entities seeking enforcement of the said Guidelines against the petitioner;

(h) that the PNGRB, by issuing the impugned Guidelines imposing the Model terms and making it mandatory to amend the existing GTAs to bring them in consonance with the Model GTA as per the said Guidelines, is encroaching upon the right of the transporter like the petitioner to enter into GTAs on agreed terms;

(i) that the contractual freedom of the petitioner can only be curtailed by a statutory provision i.e. by legislation or at best by a delegated legislation; the impugned Guidelines are neither legislation nor even the result of exercise of delegated legislation; the provision for delegated legislation under the PNGRB Act is the Regulations under Section 61 thereof;

(j) per contra, the Guidelines are simply executive directions issued by the PNGRB, and by executive fiat contractual rights and freedom cannot be curtailed or terminated; the Guidelines are thus *ultra vires* Articles 14, 19(1)(g) and 300A of the Constitution of India;

(k) that the PNGRB Act does not confer any jurisdiction on the

PNGRB to determine the terms of GTA, it only permits fixation of the transportation tariff / rate under Section 22 and for which purpose appropriate Regulations under Section 61 have to be made; as per Section 62, the Regulations so framed have to be placed before the Parliament;

(l) that even if the Ship-or-Pay clause in the GTA is an element of fixation of transportation tariff, the same can only be regulated by Regulations under Sections 61 – 62, by placing the same before the Parliament;

(m) that the Ship-or-Pay or the Force Majeure clause are not a part of transportation tariff and can never be part of transportation tariff and thus PNGRB has no power even to regulate the same;

(n) that the Guidelines are contrary to the PNGRB (Determination of Natural Gas Pipeline Tariff) Regulations, 2008 (Tariff Regulations) and adversely affect the revenue of the petitioner and take away the right of the petitioner under the GTAs voluntarily entered into between the petitioner and the shipper;

(o) that the shippers have filed complaints before the PNGRB against the petitioner, seeking enforcement of the said Guidelines;

(p) that PNGRB has no jurisdiction to entertain disputes between entities where an arbitration agreement exists with respect to transportation; however the complaints against the petitioner have been entertained;

(q) that as per the scheme of Section 12(1) of the PNGRB Act, PNGRB can entertain and adjudicate disputes *inter alia* qua transportation; however in case arbitration agreement exists between the parties, the jurisdiction of the PNGRB has been barred by the legislature by putting an embargo thereon.

3. Notice of the petition was issued and vide order dated 30th May, 2013, PNGRB was restrained from passing any final orders on the complaints against the petitioner and which are the subject matter of the petition.

4. Lanco Kondapalli Power Limited filed an application for impleadment and which was allowed vide order dated 30th May, 2013 on the ground of the complaint against the petitioner being at the instance of the said Lanco Kondapalli Power Limited (Lanco). Thereafter, GMR Energy Limited (GMR Energy), GMR Vemagiri Power Generation Limited (GMR Vemagiri) and Tata Power Delhi Distribution Limited (Tata) also applied for impleadment and were allowed to be impleaded vide order dated

24th October, 2013. Vide order dated 25th November, 2013, Union of India (UOI) was also ordered to be impleaded as a respondent to the writ petition. PNGRB, Lanco and UOI have filed their counter affidavits and GMR Energy, GMR Vemagiri and Tata have relied on the contents of their impleadment applications in opposition to the writ petition.

5. We have heard the senior counsel for the petitioner, the counsel for the PNGRB, the senior counsel for Lanco and the senior counsel for GMR Energy, GMR Vemagiri and Tata. The counsel for UOI has supported the petition. Opportunity for filing written submissions was given and has been availed of by the counsels for the petitioner, PNGRB and Lanco.

6. The senior counsel for the petitioner has explained:-

(I) that the petitioner is engaged *inter alia* in the business of transmission/processing of natural gas and owns and operates natural gas pipelines/processing plants;

(II) that the respondents Lanco, GMR Energy, GMR Vemagiri and Tata have separately entered into GTAs with the petitioner for transportation of their gas through the pipelines of the petitioner; in the said GTAs, the petitioner is called the 'Transporter' and Lanco, GMR Energy, GMR Vemagiri and Tata are respectively called as

‘Shipper’;

(III) that the shipper, under the GTAs have agreed to pay transmission and other charges to the petitioner, being the transporter, on the terms as provided therein and for the allocated quantity of gas which the shipper is entitled to transport through the pipelines of the petitioner;

(IV) that it is further a term of the GTAs that even if the shipper does not transport the allocated quantity of gas through the pipelines of the petitioner, the shipper would still pay transportation charges equal to the charges for transportation of 95% of the allocated quantity of gas; such a clause, known as the ‘Ship-or-Pay’ was inserted by the petitioner in the GTAs because the petitioner is required to reserve its pipeline for the allocated quantity of gas i.e. the maximum quantity of gas which the shipper is entitled to transport under the GTA irrespective of whether the shipper actually transports such quantity of gas or not;

(V) that the GTAs also provide for settlement of disputes if any, by arbitration in the manner provided therein;

(VI) however, the Model GTA Guidelines issued by the PNGRB

entitle a transporter as the petitioner to under such Ship-or-Pay clause, recover only 90% instead of 95% of the booked capacity and further provide that a transporter shall not be entitled to the said 90% also, if the failure of the shipper to transport the allocated quantity is for reasons beyond the control of shipper and which includes failure on account of shipper's entitlement to gas having been reduced by the Government;

(VII) that owing to the fall in gas production, the Government has reduced the entitlement of shippers to gas and under the Model GTA Guidelines, the transporter is not entitled to Ship-or-Pay Charges even to the extent of 90% of the allocated quantity from the shippers for the said reasons;

(VIII) attention is invited to Section 11(e)(ii) of the PNGRB Act to contend that the PNGRB is entitled to regulate by Regulations transportation rates for common carriers or contract carriers;

(IX) attention is next invited to Section 61(2)(e) of the PNGRB Act empowering the PNGRB to, by making Regulations consistent with the Act and the Rules made thereunder, regulate open access to and transportation rate for the common carrier or contract carrier or city or

local natural gas distribution network *inter alia* referred to in Section 11(e);

(X) attention is next invited to Section 62 to contend that the Regulations so framed are required to be laid before the Parliament;

(XI) attention is next invited to the Tariff Regulations, Regulation 6 (as amended in 2012) whereof empowers the Board to make guidelines from time to time relating to determination of natural gas pipeline tariff and it is argued that the Model GTA Guidelines have been made in exercise of the powers under the said Regulation 6;

(XII) it is argued that as per Section 11(e)(ii) read with Section 61(2)(e), the PNGRB could regulate tariff only by Regulations; however what is sought to be done is to regulate tariff by interfering with the Ship-or-Pay clause in the GTAs by means of Guidelines;

(XIII) that the same amounts to taking away the contractual rights of the petitioner, to under the ship or pay clause in the GTAs recover 95% of the charges for the allocated quantity, by executive action.

7. The PNGRB in its counter affidavit has pleaded:-

(A) that the petitioner as a transporter enjoys a dominant position

but PNGRB is empowered to regulate the manner in which the petitioner as a common carrier provides transportation services to the shipper, so as to ensure non-discriminatory open access, regulated transportation tariff and fair trade and competition;

(B) that the terms and conditions on which the common carrier/contract carrier as the petitioner provides the facility of transportation to the shipper, is a matter relating to transportation and distribution of natural gas;

(C) that the PNGRB is authorized to receive, entertain and adjudicate complaints and decide disputes amongst entities in relation to any matter relating *inter alia* to transportation and distribution of natural gas;

(D) that taking note of the absence of uniformity and iniquitous provisions in various GTAs, PNGRB prepared a preliminary document in an attempt to ensure uniformity and equity in major provisions of the GTAs across all transporters;

(E) that the Model GTA Guidelines were issued after detailed consultation and discussion with all stakeholders;

(F) that it is not mandatory that the PNGRB regulates by way of

Regulations only; the PNGRB is empowered to pass orders and issue directions;

(G) that the Tariff Regulations vide Regulation 6 supra specifically empower the PNGRB to issue Guidelines relating to GTAs;

(H) that even *de hors* the Guidelines, if a shipper makes a complaint to PNGRB that a particular clause in the existing GTA is discriminatory or unfair, PNGRB has jurisdiction over such a dispute and is empowered to adjudicate and pass a direction.

8. The counsel for PNGRB has:-

(i) drawn attention to the Preamble to the PNGRB Act which provides for the establishment of the PNGRB to *inter alia* regulate refining, restoration, transportation, distribution, marketing and sale of natural gas so as to protect the interests of the consumers and entities engaged in specified activities relating to natural gas and to ensure uninterrupted and adequate supply of natural gas in all parts of country and to promote competitive markets and for matters connected therewith and incidental thereto;

(ii) invited attention to Section 2(j) of the PNGRB Act which defines a 'common carrier' *inter alia* as pipelines for transportation of

natural gas by more than one entity as the PNGRB may declare or authorize from time to time on a non-discriminatory open access basis;

(iii) drawn attention to one of the complaints received by the PNGRB against the common carrier *inter alia* of charging 95% of the price of transportation of allocated quantity of gas, even though entitlement of the shipper to gas had fallen owing to fall in production of gas;

(iv) invited attention to various documents to show the wide consultation held prior to issuing the Model GTA Guidelines;

(v) contended that the PNGRB is still at an exploratory stage and is surveying the situation and the petitioner, if has a grievance with respect to the ship or pay clause or with respect to the Force Majeure clause, should place its case before the PNGRB and PNGRB, if satisfied with the explanation or the requirement of the petitioner to charge minimum 95% of the transportation charges for the allocated quantity, irrespective of the reasons for non-availability of gas with the shipper, the PNGRB may still rectify the Model GTA Guidelines.

9. The counsel for UOI besides stating that the UOI is supporting the

petitioner, has drawn attention to the counter affidavit of the UOI where it is *inter alia* stated that the Model GTA Guidelines have not been laid before the Parliament in terms of Section 62 of the PNGRB Act and that the UOI has no role pertaining to the Guidelines in question.

10. Lanco in its counter affidavit has pleaded:-

(a) that the need for Model GTA Guidelines arose since the petitioner was repeatedly and constantly refusing to honour the terms of the Transportation Agreement to the extent they provide for waiver of liability of the shippers to pay charges under the Force Majeure conditions; one of the constituents of Force Majeure as defined in the said Agreement is the act of the Government preventing the shipper from performing its obligations under the Agreement; owing to the fall in gas production, the allocation of gas by the Government to the shippers has been reduced significantly, preventing them from meeting their shipping obligations under the GTAs;

(b) that the petitioner controls about 75% of the gas transmission business in India and therefore enjoys a dominant position and is able to impose unfair and unjust terms against the shippers who are using the petitioner's pipelines for transportation of gas;

(c) that in view of the exorbitant charges recovered by the petitioner from time to time, Lanco had paid more than Rs.700 crores to the petitioner from September, 2001 onwards for a pipeline, the original cost of which was around Rs.175 crores; this is in addition to similar charges that have been recovered from other shippers for using the same pipelines;

(d) that it is for this reason only that the transportation charges have been reduced by the PNGRB at about 80%.

11. The senior counsel for Lanco has explained:-

(I) that the Model GTA Guidelines promote fair trade;

(II) that non-use by the shippers of the pipelines of the petitioner for transportation of allocated quantity of gas under the GTAs is owing to Government directives;

(III) that the Guidelines have been issued in exercise of power under Section 11(a) of the PNGRB Act;

(IV) that Section 11(a) of the PNGRB Act requires the PNGRB to perform the function of protecting the interests of consumers by fostering fair trade and competition amongst the entities; the same is not required to be by way of Regulations;

(V) that out of all the functions and powers of the PNGRB described in clauses (a) to (j) of Section 11, only some of the functions/powers i.e. under Clauses (e), (f)(v), (g) and (i) are required to be by way of Regulations;

(VI) that it is important to regulate the cost of transportation of gas because if the cost of gas, owing to the high transportation charges, goes up, the cost of electricity will go up increasing the burden on the consumers thereof;

(VII) that Section 11(e) (ii) refers only to 'rate' and thus only the rate of transportation is to be fixed by Regulations and not the other terms and conditions viz. of ship or pay or Force Majeure;

(VIII) that the petitioner can lay pipelines only under the authority of PNGRB;

(IX) attention is invited to Schedule D of the PNGRB (Authorizing Entities to Lay, Build, Operate and Expand Natural Gas Pipelines) Regulations, 2008 which provides the format of the authorization for laying, building, operating or expanding natural gas pipelines and Condition 12 of which authorization is that the entity so authorized shall comply with any other term or condition which may be notified

by PNGRB in public interest from time to time. It is thus contended that the petitioner, as a condition for the grant of authorization under which it has laid the said pipelines, has agreed to be bound by the terms and conditions of the PNGRB and is estopped from protesting now;

(X) that the intention of the petitioner in filing this petition being only to exploit its dominant position, this Court in exercise of its discretionary jurisdiction, should refuse to entertain the petition;

(XI) copy of the PNGRB (Access Code for Common Carrier or Contract Carrier Natural Gas Pipelines) Regulations, 2008 (Access Code Regulations) has been handed over and with reference to Regulation 15 thereof titled 'Information about Force Majeure', it is argued that if Force Majeure was part of tariff, there would not have been separate Regulations therefor.

12. The senior counsel for GMR Energy, GMR Vemagiri and Tata has argued:-

(a) that the Model GTA Guidelines issued on 15th November, 2012 were not challenged;

(b) that the petitioner did not feel the need to challenge the said

Guidelines till the order dated 12th April, 2013 of the PNGRB on the complaint of GMR Energy and GMR Vemagiri directing the petitioner not to take any coercive or precipitative steps to enforce payments from GMR Energy and GMR Vemagiri for invoices which were raised and outstanding after the date of issuance of the Guidelines;

- (c) attention is again invited to the Preamble of the PNGRB Act;
- (d) that the Supreme Court has held that, to regulate does not mean by regulations only. Attention in this regard is invited to para 55 of *PTC India Ltd. Vs. Central Electricity Regulatory Commission* (2010) 4 SCC 603;
- (e) that of all the functions and powers to be exercised by the PNGRB under Section 11 of the PNGRB Act only some are required to be by way of Regulations;
- (f) attention is drawn to the objectives for issuing the Model GTA Guidelines, as set out in Clause 5 thereof, to show the same to be, to create a basic framework whereby various provisions of the GTAs executed between transporters and shippers of natural gas ensure adherence to the principles of uniformity and equity for promoting

fair play and it is argued that the Model GTA Guidelines have been issued after engaging in elaborate discussions with transporters and shippers.

13. The counsel for the PNGRB further referred to *Delhi Development Authority Vs. Vijaya C. Gurshaney* (2003) 7 SCC 301 laying down that DDA being a creature of the statute, any policy decisions or guidelines formulated by it will have a binding effect in the absence of Rules to the contrary. Attention is also invited to *Toubro Infotech and Industries Ltd. Vs. Securities and Exchange Board of India* (2005) 3 Company Law Journal 305 where the Securities Appellate Tribunal, Mumbai relying on *Vijaya C. Gurshaney* (supra) though observing that the guidelines issued by Securities and Exchange Board of India (SEBI) are not regulations and owing whereto violation of the guidelines cannot be said to be punitive in nature but holding the same to be of binding nature.

14. The counsel for the petitioner in rejoinder invited attention to the order dated 20th June, 2014 of PNGRB in a dispute between the petitioner and GVK Industries Ltd. Phase-II to contend that notwithstanding the interim order in these proceedings, the PNGRB has dismissed the complaint of the petitioner.

15. Section 11(e) of the PNGRB Act mandates the PNGRB to regulate by Regulations *inter alia* the ‘transportation rates’ for common carrier or contract carrier. Section 2(j) of the Act defines a common carrier as meaning pipelines for transportation *inter alia* of natural gas by more than one carrier. It is not in dispute for the present purpose that the petitioner is a common carrier. We had during the hearing invited attention of the counsels to Section 22 of the PNGRB Act titled ‘Transportation Tariff’ and mandating the PNGRB to lay down 'by Regulations' the transportation tariff for common carriers or contract carriers and the manner of determining such tariff. We had during the hearing enquired from the counsels, whether ‘to regulate transportation rates’ and/or to ‘lay down transportation tariff’ would mean merely the rate of transportation on a per unit of gas basis or would also include the power to regulate other terms and conditions of the Transportation Agreement which may affect the rate. We had in this regard also invited attention of the counsels to Section 2(zn) of the PNGRB Act to which none of the counsels had referred and which defines ‘transportation rate’ in relation to common carrier or contract carrier as “rate for moving each unit of natural gas as may be fixed by Regulations”. In fact, it was on the said aspect, the counsels had stated that they will file written

submissions.

16. We may in this regard notice that atleast the Division Bench of the Gauhati High Court in *Sri Nomal Baruah Vs. Md. Zamatul Islam* MANU/GH/0603/2013, in the context of the Essential Commodities Act, 1955 has held that while ‘fixing the price’ of a commodity means the price at which an essential commodity has to be sold meaning thereby that the commodity can neither be sold at a rate lower than the price fixed nor at a rate higher than the price fixed, the expression ‘controlling the price’ means limiting, restricting or managing the price. It was further held that the consequential impact of controlling of price would be that the maximum price at which the commodity can be sold may be prescribed but there need not necessarily and invariably be a minimum price below which no essential commodity can be sold or bought. It was yet further held that though the power to control the price would include fixing the price but fixing the price will not include controlling the price; controlling the price is a genus and fixing the prices is a species.

17. We had similarly during the hearing invited the attention of the counsels to the judgment of the Division Bench of this Court (of which one of us i.e. Rajiv Sahai Endlaw, J. was a member) in *Indraprastha Gas Ltd.*

Vs. Petroleum and Natural Gas Regulatory Board MANU/DE/2313/2012 dealing with a challenge to the entitlement of the PNGRB to fix the price to be charged by a marketer of gas from its consumers and holding that the PNGRB is not empowered to fix or regulate the Maximum Retail Price at which gas is to be sold by the Indraprastha Gas Ltd. to the consumer or to fix any component of network tariff or compression charge for an entity as the Indraprastha Gas Ltd. having its own distribution network, and declaring the provisions of the PNGRB (Determination of Network Tariff for City or Local Natural Gas Distribution Networks and Compression Charge for CNG) Regulations, 2008 to the extent empowering the PNGRB to so fix the Maximum Retail Price/charges to be bad and illegal. We enquired the fate of the appeal if any preferred against the said judgment. We were informed that an appeal has been preferred but there is no interim order therein and the same is still pending consideration.

18. Though written submissions as aforesaid have been filed but do not address the aforesaid queries.

19. On the basis of the aforesaid pleadings, arguments and our queries aforesaid, in our opinion, the following questions arise for consideration:-

A. Whether the provisions of the Model GTA Guidelines, to the extent

they affect the price/amount which the petitioner as a transporter/common carrier is entitled to charge from the shippers of gas for transportation of the gas through its pipelines, amount to regulating the transportation rates within the meaning of Section 11(e)(ii) of the PNGRB Act and/or to laying down the transportation tariff for common carriers and the manner of determination of such tariff within the meaning of Section 22 of the said Act.

- B. If the answer to the above is in the affirmative and which as per Sections 11(e)(ii) and 22 can be done by Regulations, whether the PNGRB is entitled under the other provisions of the Act, to also do the same otherwise than by Regulations.
- C. If the answer to the above is in the negative, whether the PNGRB was entitled to, by Regulations, delegate the said power to others or even to itself, to be done otherwise than by Regulations.

20. We will proceed to discuss in seriatim the aforesaid issues which arise for consideration inasmuch as if the answer to the first of the aforesaid questions were to be in the negative and it were to be held that the interference by the Model GTA Guidelines in the Ship-or-Pay Charges or the Force Majeure clause agreed to by the petitioner as transporter/common

carrier and the newly impleaded respondents Lanco, GMR Energy, GMR Vemagiri and Tata as shippers, prior to the coming into force of the Model GTA Guidelines, does not amount to regulating the transportation rate or to laying down the transportation tariff and/or the manner of determination thereof, then the argument of the petitioner that transportation rate can be regulated and transportation tariff can be laid down only by Regulations and not otherwise would fall and there would be no need to adjudicate the other two questions.

21. On reading the definition in Section 2(zn) of 'transportation rate' as the rate for moving each unit of natural gas as may be fixed by Regulations, on first blush it appeared that what is required to be done under Sections 11(e)(ii) and 22 by Regulations is only the fixation of rate of transportation for per unit of gas and would not concern the other terms and conditions of such transportation which may be agreed upon between the transporter/common carrier and the shipper. If that were to be the case, then what has been mandated to be done by Regulations is only the fixing of such rate of per unit of gas to be transported, and the PNGRB, in the performance of its other functions (which can be performed without framing Regulations) if any, would not be required to, in interference with such

other clauses of Transportation Agreement, do the same only by Regulations. However, what perturbed us was that while Section 2(zn) provides for the transportation rate to be 'fixed' by Regulations, Section 11(e)(ii) instead of the word 'fix' the transportation rate uses the word 'regulate' the transportation rate and Section 22 uses the phrase 'lay down the transportation tariffs' and the phrase 'manner of determining such tariffs'. We wondered whether the power to 'regulate' the transportation rate and /or the power to 'lay down the transportation tariff and the manner of determining such tariff' is wider than the power to 'fix' the transportation rate and, would also include other terms and conditions of Transportation Agreement which would have a bearing on the transportation rate. Neither counsel controverted that the change sought to be affected by the provisions aforesaid of the Model GTA Guidelines in the Ship-or-Pay Charges and in the Force Majeure clause would affect the total amount payable by the shippers to the transporter / common carrier. We also wondered, what is the difference between 'rate' and 'tariff' and whether the power to lay down the transportation tariff for common carriers under Section 22 is wider than the power to fix the transportation rate, though both are required to be done by Regulations.

22. Our own research has unearthed the judgment of the Division Bench of Allahabad High Court in *Hari Shankar Vs. U.P. State Electricity Board* AIR 1974 Allahabad 70 which was directly concerned with a similar issue as arises here. The question there was whether the power under Section 49 of the Electricity (Supply) Act, 1948 to frame tariff would entitle the Electricity Board to vary the minimum guaranteed charges. Relying on the definition of the word ‘Tariff’ in Webster's Third New International Dictionary *inter alia* as “published schedule of rates, rating or charges with society (*sic* for associated) rules, regulations, routes and information issued by the carriers or their agents and filed with a public regulatory agency” it was held that the term ‘tariff’ includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. It was further held that when the electrical supply is being made on the footing that the consumer will pay the minimum guaranteed charges, this charge is one of the terms or conditions for the supply and by it the supplier ensures the receipt of a minimum amount for the supply of electricity. It was further held that in a sense the fixation of this charge would be included in the fixation of rates for the supply of electricity. It was thus held that the word tariff would include the power to fix minimum guaranteed charges.

23. We find the Supreme Court also, in *PTC India Ltd.* (supra) followed in *Transmission Corporation of Andhra Pradesh Ltd. Vs. Sai Renewable Power Pvt. Ltd.* (2011) 11 SCC 34, while observing that the term tariff had not been defined in the Electricity Act, 2003, to have still held that the term tariff includes within its ambit not only the fixation of rates but also the rules and regulations relating to it.

24. In view of the said pronouncements, we need not look further and hold that even though the power to fix transportation rate referred to in Section 2(zn) may be a power to fix only the rate for moving each unit of natural gas and may not include the power to interfere with the terms and conditions of Transportation Agreement and on the same reasoning even through the power under Section 11(e)(ii) to regulate the transportation rate may be a power only to regulate the rate for moving each unit of natural gas but the power under Section 22 to lay down the transportation tariff and the manner of determining such tariff would certainly include the power to interfere with the other terms and conditions of the Transportation Agreement having impact on the total amount payable by a shipper to a transporter under a Transportation Agreement. Accordingly, we conclude that the provisions of the Model GTA Guidelines, to the extent they alter the

price/amount which the petitioner as a transporter/common carrier is entitled to charge from the shippers of gas, for transportation of gas through its pipelines, amount to laying down the transportation tariff and the manner of determination of such tariff within the meaning of Section 22 of the Act and answer question 'A' in para 19 hereinabove accordingly.

25. That takes us to the second issue. The contention of the counsels for the respondents is that even though Section 11(e)(ii) and Section 22 lay down that transportation tariff and the manner of determination thereof shall be laid down by Regulations but the same is not necessarily to be laid down by Regulations as it is essential for the PNGRB, in discharge of its other functions and for which no Regulations are required, to lay down such tariff.

26. We are unable to accept the said contention. The settled principle of law recently reiterated in *Selvi J. Jayalalitha Vs. State of Karnataka* (2014) 2 SCC 401 and *Association of Management of Private Colleges Vs. AICTE* (2013) 8 SCC 271 is that when the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. To put it differently, where a statute requires to do a certain thing in a certain way, the thing must be done in that way and not contrary to it at all and other methods or modes of performance

are impliedly and expressly forbidden. It was further held that if a statute has conferred a power to do an act and has laid down the method in which that power is to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. It has been explained that the principle behind this rule, adopted first as far back as in the year 1876, is that if this were not so, the statutory provision might as well not have been enacted.

27. This Court in *Indraprastha Gas Ltd.* (supra) has held that though the PNGRB Act is a regulatory Act but that alone would not entitle the PNGRB to fix, regulate or control prices in relation to the commodities to which the said Act applies, without specific provision to the said effect in the statute. A plethora of judgments of the Supreme Court were relied upon in this regard. It is not deemed appropriate to burden this judgment therewith. Undoubtedly, Section 22 of the Act empowers the Board to lay down the transportation tariff and the manner of determining such tariff but by Regulations. Applying the aforesaid principle, it follows that laying down of transportation tariff and the manner of determining such tariff can be by Regulations only and in no other form.

28. As far as the argument of the counsels for the respondents, of the Ship-or-Pay Charges and Force Majeure clause being relevant to other aspects viz. of protection of interest of consumers, fostering fair trade and competition amongst the entities, also being the functions of the PNGRB under Section 11(a) of the Act and for discharge of which functions no Regulations are to be framed, is concerned, we may also notice that Section 22 requiring the transportation tariff to be laid down by Regulations is 'Subject to the provisions of the Act'. We have wondered whether the purport thereof is to make the power of the PNGRB to lay down the transportation tariff by Regulations subject to the other functions of the PNGRB. We are however unable to hold so also. Wherever the PNGRB Act makes provision for fixation of transportation rate or for regulation of transportation rate or for laying down of transportation tariff and the manner of determination of such tariff, it further stipulates that the same has to be done by Regulations. The other functions prescribed of the PNGRB and performance of which is not required to be by Regulations nowhere relate to the tariff and are general in nature. To hold that the PNGRB in performance of its functions of protecting the interest of consumers by fostering fair trade and competition amongst the entities, within the meaning

of Section 11(a) and/or of monitoring prices and taking corrective measures to prevent restrictive trade practices by entities, within the meaning of Section 11(f)(iii) and/or of monitoring transportation rates and taking corrective action to prevent restrictive trade practices by the entities, within the meaning of Section 11(f)(vi), is also entitled to lay down transportation tariff and the manner of determining such tariff would amount to making the part of Section 22, of laying down transportation tariff and manner of determining such tariff only by Regulations, otiose. The golden rule of interpretation recently reiterated in *Commercial Tax Officer, Rajasthan Vs. Binani Cements Ltd.* 2014 (2) SCALE 436 is of harmonious construction i.e. where there is a general provision of law dealing with a subject and a special provision dealing with the same subject, the special prevails over the general. It was explained that if it is not constructed in that way, the result would be that the special provision would be wholly defeated. It was further explained that wherever there is a particular enactment and a general enactment in the same statute and the general enactment taken in its most comprehensive sense would overrule the particular enactment, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply. It

was yet further reasoned that no rule of construction can require that when words of one part of the statute convey a clear meaning, it shall be necessary to introduce another part of the statute which speaks with less perspicuity and of which the words may be capable of such construction, as by possibility to diminish the efficacy of first part. Similarly, in ***Hardeep Singh Vs. State of Punjab*** (2014) 3 SCC 92 it was reiterated that an interpretation which renders a provision otiose should be avoided, otherwise it would mean that in enacting such a provision, the legislature was involved in an exercise in futility and the product came as a purposeless piece of legislation and that the provision had been enacted without any purpose and the entire exercise to enact such a provision was most unwarranted, besides being uncharitable.

29. The preface to Section 22, making the same 'Subject to the provisions of the Act' cannot also be read as making the aforesaid well settled principles of law inapplicable to interpretation thereof. As aforesaid, none of the other provisions of the Act prescribe as a function of the PNGRB or empower the PNGRB to lay down transportation tariff and the manner of determining such tariff. Though the Supreme Court in ***U.P. State Electricity Board, Lucknow Vs. City Board, Mussoorie*** (1985) 2 SCC 16

followed in *Meghalaya State Electricity Board Vs. Jagadindra Arjun* (2001) 6 SCC 446 has held that a provision in the statute, to fix the tariff in accordance with any Regulations made in this behalf only means that the tariff shall be in accordance with such Regulations, if any and does not mean that the tariff cannot be fixed without Regulations and in *Accountant General, State of M.P. Vs. S.K. Dubey* (2012) 4 SCC 578 held that a provision in a statute of fixing the salary and other allowances in accordance with the Rules framed by the State Govt. has to be read as "in accordance with the rules, if any prescribed by the State Government and not that in the absence of the Rules the salary and allowances cannot be fixed" and that such provisions cannot be interpreted as mandating what is required to be done, by Regulations only, but in all those statutes under consideration the statutory provisions in the Act enabled the thing to be done but in accordance with the Rules/Regulations (we may record that the matter has been referred to a larger Bench). In the PNGRB Act on the contrary, each of the provisions thereof dealing with fixing the transportation rate, regulating the transportation rate and/or laying down the transportation tariff and the manner of determining such tariff, expressly provide the same to be done by Regulations and thus the preface to Section 22 cannot be read as

permitting transportation tariff and the manner of determining such tariff to be laid down otherwise than by way of Regulations. Also, in the PNGRB Act, wherever the legislature felt the need, has used the same language as in the statues under consideration in *U.P. State Electricity Board, Meghalaya State Electricity Board* and *Accountant General* (supra). Reference in this regard can be made to Section 10(4) of the Act read with Section 61(2)(c) of the Act, empowering the Board to appoint consultants on such terms and conditions as may be determined by Regulations. The same has to be interpreted as not prohibiting the PNGRB from fixing the terms and conditions of appointing consultants, save by Regulations. The language of Section 22 is clearly distinct. We therefore hold that the PNGRB is not entitled/empowered to lay down transportation tariff and the manner of determining such tariff otherwise than by way of Regulations and answer question 'B' in para 19 hereinabove accordingly.

30. It is not as if the PNGRB in exercise of powers under Section 22 read with Section 61(2)(t) has not made any Regulations for laying down the transportation tariff and the manner of determining such tariff. The Tariff Regulations aforesaid were framed as far back as in the year 2008. However, the same are not found to determine the transportation tariff.

Rather, Regulation 6 thereof empowers the PNGRB to make guidelines relating to determination of tariff; and that is the issue 'C' culled out by us in para 19 hereinabove, that whether PNGRB is entitled to delegate a power which it has been empowered to exercise only by Regulations, to others or even to itself, to be done otherwise than by Regulations.

31. The answer thereto is to be found in Section 58 of the PNGRB Act itself which provides that the PNGRB may by general or special order in writing, delegate to any member or officer of the PNGRB such of its powers and functions under the PNGRB Act as it may deem necessary, except *inter alia* the power to make Regulations under Section 61 of the Act. What follows is that the power to make Regulations laying down the transportation tariff and the manner of determining such tariff under Section 22(1) of the Act cannot be delegated by the PNGRB. We have already held hereinabove that laying down of transportation tariff and the manner of determining such tariff cannot be done except by Regulations.

32. *De hors* Section 58 also, the settled position in law (see ***Sidhartha Sarawgi Vs. Board of Trustees for the Port of Kolkata*** 2014 (5) SCALE 113) is that a discretion conferred by a statute on any authority is intended to be exercised by that authority and by no other in the absence of authority

in the statute to indicate to the contrary.

33. A question may arise that if PNGRB, by way of Regulations, is empowered to lay down transportation tariff, why it cannot otherwise or by issuing guidelines or directions, so lay down transportation tariff. Again, to hold so would amount to nullifying the words “by regulations” used in Section 11(e) and Section 22 of the Act. Section 2(zh) defines “regulations” as Regulations made by the PNGRB under the PNGRB Act. The Division Bench of this Court in *Indraprastha Gas Ltd.* (supra), relying on a plethora of judgments of the Supreme Court, has held that price fixation/regulation/control is essentially a clog on the freedom of trade and commerce conferred the status of a Fundamental Right and has to be by legislative mandate and/or is a statutory function. There is no challenge in this petition to the statutory provision in the PNGRB Act delegating such legislative/statutory function to the PNGRB, circumscribing it only with the condition of the same being done by Regulations. However what follows is, that the PNGRB, in laying down the transportation tariff and the manner of determination thereof, by Regulations, performs a legislative function. There is an inherent difference between the executive functions of the PNGRB and such legislative function of the PNGRB in framing the

Regulations. The Supreme Court in *State of U.P. Vs. Renusagar Power Co.* (1988) 4 SCC 59, *Shri Sitaram Sugar Co. Ltd. Vs. Union of India* (1990) 3 SCC 223, *T.N. Seshan, Chief Election Commissioner Vs. Union of India* (1995) 4 SCC 611 and *State of Tamil Nadu Vs. K. Sabanayagam* (1998) 1 SCC 318 has noticed the difference between legislative and administrative functions of bodies/authorities/office. Section 8 of the PNGRB Act dealing with transaction of business of the PNGRB, which comprises of, a Chairperson, a Member (Legal) who is qualified to be a Judge of the High Court or has been a member of the Indian Legal Service and of three other members, provides that if the Chairperson is unable to attend a meeting of the Board, the senior most member present shall preside at the meeting and all questions which come up before any meeting of the PNGRB shall be decided by a majority of the members present and voting. Thus it is well nigh possible that the executive functions of the PNGRB may be performed even in the absence of the Chairperson and Member (Legal). Similarly, Section 58 permits delegation of the powers of the PNGRB to any one or more members or officers. However the Regulations under Section 61, which are required to be by notification and which include the power under Section 61(2)(t) to lay down transportation tariff for common carriers or

contract carriers, are under Section 62 required to be laid before each House of Parliament while it is in session for a period of 30 days and if the Parliament makes any modification in the Regulations, the Regulations thereafter would have effect only in such modified form. We assume that the framing of the Regulations by the PNGRB in the temporary absence of the Chairperson and Member (Legal) for any reason whatsoever would await the presence of the Chairperson and Member (Legal) as ordinarily there would not be any hurry to frame the same. We thus conclude that merely because PNGRB itself is the delegatee of the legislature to lay down transportation tariff and the manner of determination thereof, though with the condition of doing the same by Regulations, would not entitle the PNGRB to further delegate the said function, even to itself, to be performed otherwise than by Regulations.

34. The reliance by the senior counsel for GMR Energy, GMR Vemagiri and Tata on para 55 of *PTC India Ltd.* (supra) is also misconceived. The Supreme Court in the said judgment was concerned with the Electricity Act, 2003 which besides delegating the power to the Central Electricity Regulatory Commission (CERC) constituted thereunder to make Regulations, *inter alia* for the terms and conditions for determination of

tariff, also vide Section 79 thereof, prescribing the functions of the said CERC, prescribed one of the functions as “to regulate the tariff”. It was in the said statutory context that the Supreme Court in para 55 relied upon by the senior counsel held that to regulate is an exercise which is different from making of Regulations. It was further clarified that making of Regulations under Section 178 (of the Electricity Act) is not a pre-condition to the CERC taking steps under Section 79 to regulate tariff though if there are Regulations then the measure under Section 79 has to be in conformity with such Regulations. The provisions of the PNGRB Act with which we are concerned are however materially different. The same, while prescribing the functions of the PNGRB in Section 11 thereof nowhere empower the PNGRB to regulate the transportation tariff without framing Regulations, as is the case under the Electricity Act, 2003. We are of the opinion that the judgment of the Supreme Court in *PTC India Ltd.* on which reliance has been placed by the senior counsel for GMR Energy, GMR Vemagiri and Tata is rather against the respondents. The Constitution Bench of the Supreme Court in the said judgment also has carved out a distinction between the various kinds of functions of Regulatory Bodies such as the CERC and the PNGRB and further held that it is only by subordinate

legislation i.e. by making Regulations that existing contracts (in that case Power Purchase Agreements) can be over-ridden and required to be aligned with the Regulations and which could not be done across the board by an Order of the CERC under Section 79 of the Electricity Act, 2003. Reference in this regard may also be made to *Bharat Sanchar Nigam Ltd. Vs. Telecom Regulatory Authority of India* (2014) 3 SCC 222 concerned with the Telecom Regulatory Authority of India Act, 1997 (TRAI Act) where also, the Telecom Regulatory Authority of India (TRAI) constituted thereunder, on a perusal of the provisions of the said Act (Sections 11 and 36) was held to have distinct functions of making Regulations and of fixing, regulating, laying down the terms and conditions of agreements by issuing Orders ad directions. The Supreme Court in the judgment, noticing Section 33 of the TRAI Act which is in *pari materia* to Section 58 (supra) of the PNGRB Act further held that the reason for making the power to make Regulations non-delegable is because the power to make Regulations is legislative as opposed to administrative.

35. Though the Supreme Court in *K.T. Plantations Pvt. Ltd. Vs. State of Karnataka* (2011) 9 SCC 1 has reiterated that a provision, as in Section 62 of the PNGRB Act, of laying the Regulations before the Parliament does not

make the Regulations if not laid before the Parliament, void and that such a requirement is directory and not mandatory but the Supreme Court in *D.S. Garewal Vs. State of Punjab* AIR 1959 SC 512, *Delhi Cloth & General Mills Co. Ltd. Vs. UOI* (1983) 4 SCC 166, *State of M.P. Vs. Mahalaxmi Fabric Mills Ltd.* (1995) Supp. (1) SCC 642 and *Quarry Owners' Association Vs. State of Bihar* (2000) 8 SCC 655 has also held that such requirement of laying before the Parliament is not an empty formality and serves the purpose of providing a control of the legislature over the delegated legislation.

36. In view of the aforesaid position, we have also wondered whether the Guidelines, even though not laid before the Parliament can be treated as Regulations, notwithstanding the nomenclature used, of guidelines. However we find the PNGRB to have while issuing the Guidelines expressly observed that the same are in exercise of powers under Section 11(a) of the PNGRB Act. When the PNGRB has itself consciously exercised the powers in framing the Guidelines as under Section 11(a) and not under Section 11(e)(ii), Section 22 and Section 61(2)(t) of the PNGRB Act, we are of the view that the same cannot be treated by us an exercise of power to frame the Regulations.

37. We accordingly hold that PNGRB was not entitled to delegate the function of laying down the transportation tariff and the manner of determination thereof, by Regulations, even to itself to be done otherwise than by Regulations and answer question 'C' in para 19 hereinabove accordingly.

38. Insofar as the argument of the counsels for the respondents on the basis of the Access Code Regulations and the condition imposed on the petitioner at the time of authorizing the petitioner to lay down the pipeline of abiding by all directions of the PNGRB is concerned, the Division Bench of this Court in *Indraprastha Gas Ltd.* (supra) has already held that if the PNGRB is not found to be empowered to do a particular thing, it cannot wrest such a power by imposing the same as a condition while exercising the other powers vested in it. Thus, the acceptance by the petitioner of the condition imposed by the PNGRB at the time of authorizing the petitioner to lay down the pipelines, to “comply with any other term or condition which may be notified by PNGRB in public interest from time to time” is of no avail. The Supreme Court, in the very recent judgment dated 25th August, 2014 in Writ Petition (Crl.) No. 120/2013 titled *Manohar Lal Sharma Vs. The Principal Secretary* (commonly known as the Coal Block Allocation

Scam) has also held that the principle of *contemporanea expositio* i.e. of contemporaneous construction placed by the administrative or executive officers charged with executing a statute being entitled to considerable weight, is not binding upon the Courts and may have to be disregarded if such interpretation by the contemporary authority is clearly wrong.

39. We accordingly hold that the PNGRB can exercise power, under Section 2(zn), of fixing the transportation rate; under Section 11(e)(ii), of regulating the transportation rate; and under Section 22, of laying down the transportation tariff and the manner of determining such tariff, only by Regulations. We further hold the provisions of the Model GTA Guidelines insofar as affecting the Ship-or-Pay Charges which the petitioner is entitled to collect from the shippers under the Agreements entered into with the shippers and insofar as varying the Force Majeure clause in the said Agreements to be having an impact on the transportation tariff and being in the nature of fixing the transportation rate and/or regulating the transportation rate and/or laying down the transportation tariff and the manner of determining such tariff. We accordingly hold the provisions of the Model GTA Guidelines, purporting to fix the transportation rate and/or regulating the transportation rate and/or to lay down the transportation tariff

and the manner of determination thereof, though issued by the PNGRB but otherwise than by way of Regulations, to be bad.

40. Insofar as the argument of the respondents, of the petitioner misusing its dominant position, is concerned, it is not as if there is no cure therefor in the statute. The PNGRB can by making Regulations in accordance with Sections 61-62 of the Act do what it has sought to do by framing the Model GTA Guidelines and which has now been held to be not permissible. Without the PNGRB doing so and in the absence of any Regulations qua transportation tariff and the manner of determination thereof, the PNGRB in exercise of its adjudicatory functions also cannot pass an order having the effect of regulating transportation tariff or the manner of determination thereof. In *Vijaya C. Gurshaney* (supra) relied upon by the counsel for the PNGRB, there was no challenge to the power of the DDA under the Delhi Development Act, 1957 to take the policy decision to lay down the guidelines and in the absence thereof the reliance on the observations in the judgment is of no avail.

41. Though as aforesaid a number of reliefs have been claimed in the petition but the arguments having been confined to the aforesaid, we do not deem it necessary to specifically deal therewith though find it apposite to

observe that the counsels have probably not argued the same as the same are consequential to what we have adjudicated.

42. The petition is allowed to the aforesaid extent. The complaints by the shippers against the petitioner before the PNGRB and passing of final orders wherein was stayed by the interim order dated 30th May, 2013 in this petition may now be disposed of by the PNGRB in terms of our findings hereinabove. The respondents having co-operated in the expeditious disposal of the matter, no order as to costs.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

SEPTEMBER 11, 2014

'bs'/gsr