

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

Date of decision: 1st June, 2012

+ **W.P.(C) No. 2034/2012 and CM Nos.4370/2012 & 5617/2012**

% **INDRAPRASTHA GAS LTD.** Petitioner

Through: Mr. Parag Tripathi, Sr. Advocate with Mr. Shiv Kumar Pandey, Mr. Tejas, Mr. Niraj Pathak, Mr. Buddy Ranganathan, Ms. Bahar Dhawan, Ms. Swati Sharma and Mr. Nitesh Jain, Advocates.

versus

PETROLEUM AND NATURAL GAS REGULATORY BOARD AND ANR. Respondent

Through: Mr. A.S. Chandhiok, ASG with Mr. I.S. Alag, Mr. J.S. Lamba, Mr. Rakesh Dewan and Mr. Rishabh Bhutani, Advocates for R-1
Mr. Sachin Datta, CGSC with Mr. Abhimanyu Kumar, Adv
Mr. B.M. Sehgal, Adv. for Dr. Jatin Thukral, Intervener

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The petition impugns,
 - i) the order dated 9th April, 2012 of the respondent no. 1 Petroleum and Natural Gas Regulatory Board (hereinafter called “Board”);
 - ii) the Petroleum and Natural Gas Regulatory Board (Determination of Network Tariff for City or Local Natural Gas Distribution Networks and Compression Charge for CNG) Regulations, 2008 (hereinafter called “Tariff Regulations”);
 - iii) Regulation 17(5) 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 (hereinafter called “Network Regulations”);
 - iv) Regulation 7 of the Petroleum and Natural Gas Regulatory

Board (Code of Practice for Quality of Service for City or Local Natural Gas Distribution Networks) Regulations, 2010 (hereinafter called “Quality Regulations”);

v) Scheme for Consumer Welfare Fund 2011; and,

vi) alternatively in the event of the Board being held to have power to fix network tariff and compression charges, seeks direction for re-fixing thereof by following principles of natural justice.

2. Notice of the petition was issued. Finding the petition to be entailing a pure question of law as to the power of the Board to fix the rates, as done by the impugned order dated 9th April, 2012, the learned ASG appearing for the respondents stated that no counter affidavit was required to be filed. Further, owing to the urgency expressed, the matter was immediately set down for final hearing. Liberty was also granted to the petitioner to avail the appellate remedy qua the quantum of the rates fixed by the Board. The counsels have been heard.

3. We may also notice that though the multifarious challenge to various provisions as aforesaid is made in the writ petition but the counsels, at the time of arguments, confined their submissions to the entitlement of the Board to fix the tariff, as done in the impugned order dated 9th April, 2012 and made their submissions qua the Act and the various Regulations in this context only. We are therefore proceeding to adjudicate the said aspect only.

4. The Board, vide the impugned order dated 9th April, 2012 issued in exercise of powers under Section 22 of the Petroleum and Natural Gas Regulatory Board Act, 2006 (PNGRB Act) and the Network Regulations has, a) determined the Network Tariff and Compression Charges for CNG in respect of Delhi City Gas Distribution (CGD) Network of the petitioner at ₹ 38.58 per MMBTU and ₹ 2.75 per KG respectively w.e.f. 1st April, 2008; b) directed the petitioner to recover the said Network Tariff and Compression Charges for CNG separately through an invoice, without any premium or discount on a non-discriminatory basis; c) directed the petitioner to appropriately reduce the selling price of CNG from the date of

issuance of this order; and, d) left the modalities and time frame for refund of the differential Network Tariff and the Compression Charges for CNG recovered by the petitioner w.e.f. 1st April, 2008 in excess from its consumers to be decided subsequently.

5. The plea/contention of the petitioner is -

- i) that it was established in the year 1998 to comply with the direction of the Supreme Court in *M.C. Mehta v. Union of India* [WP(C) No. 13029/1985] for introduction of an alternative fuel in the form of CNG to mitigate pollution levels in the City of Delhi;
- ii) that it is a Joint Venture Company of GAIL (India) Limited, Bharat Petroleum Corporation Ltd. and the Government of Delhi and has been authorized to supply, sell and distribute Compressed Natural Gas (CNG) for the Automobile Sector as well as Piped Natural Gas (PNG) to the domestic, commercial and industrial consumers in the cities of Delhi, Noida, Greater Noida, Ghaziabad;
- iii) towards the said end, the petitioner speedily expanded its network by arranging gas, laying down and building a network of inter-connected pipelines spread all over the city and set up of CNG Station etc., all at a huge cost;

- iv) that the petitioner was already operating the CGD Network under permission, allocation and authorization of the Central Government at the time of enactment of the PNGRB Act in the year 2006 and the said position was recognized by the PNGRB Act also;
- v) the Board constituted under the PNGRB Act, on 19th March, 2008 notified the Petroleum and Natural Gas Regulatory Board (Exclusivity for City or Local Natural Gas Distribution Network) Regulations, 2008 (hereinafter called “Exclusivity Regulations”) in exercise of its powers under Section 61 of the PNGRB Act;
- vi) that the Board vide its letter dated 9th January, 2009, while recognizing the authorization granted to the petitioner by the Central Government, granted Exclusivity to the CGD Network of the petitioner for the National Capital Territory of Delhi, subject to the condition that the petitioner shall submit Network Tariff and Compression Charges for CNG as per the Tariff Regulations for the approval of the Board within 30 days thereof;
- vii) that though it was the contention of the petitioner that the Board was not empowered to fix prices but the petitioner nevertheless submitted the Network Tariff to the Board;
- viii) WP(C) No. 9022/2009 was filed by the petitioner in this Court

challenging the action of the Board of initiating the process of granting authorization to others, by calling tenders for the city of Ghaziabad. The said writ petition was allowed by Division Bench of this Court vide judgment dated 21st January, 2010 reported as 170 (2010) DLT 80 holding that the Board did not have the power to grant authorization in the wake of non-notification of Section 16 of the PNGRB Act. The Board challenged the said judgment by filing SLP(C) 5408/2010 but during the pendency of the said SLP the respondent no.2 Union of India on 12th July, 2010 notified Section 16 w.e.f. 15th July, 2010;

- ix) that the Board on 1st September, 2010 in exercise of its powers under Section 61 of the PNGRB Act notified the Quality Regulations (supra) requiring the entities as the petitioner to, in the bills to be raised by them on the consumers *inter alia* state the Network Tariff and Compression Charges for CNG;
- x) that the Supreme Court vide order dated 12th May, 2011 in the SLP (supra) permitted the Board to deal with the applications for authorization on the conditions mentioned therein;
- xi) that upon the intent of the Board to fix tariff, that too from a retrospective date, becoming apparent to the petitioner, the petitioner objected thereto;

- xii) that the Board has no power to fix and regulate Network Tariff and Compression Charges.

Reliance is placed on :-

- a) *Ispat Industries Ltd. vs. Commissioner of Customs, Mumbai* (2006) 12 SCC 583 laying down that in the case of conflict between the Act and the Rules, the Act is to prevail;
- b) *N.C. Dhoundial v. Union of India* (2004) 2 SCC 579, *Naraindas Indukhya v. The State of Madhya Pradesh* (1974) 4 SCC 788, *Chhotobhai Jethabhai Patel and Co. v. The Industrial Court, Maharashtra Nagpur Bench, Nagpur* (1972) 2 SCC 46 and *P. Malaichami v. M. Andi Ambalam* 1973 2 SCC 170 all laying down that bodies created under a Statute derive their power from the Statute and have no unlimited jurisdiction.

6. Since the challenge in the petition is to the power of the Board to direct the petitioner to, while charging its consumers, disclose the Network Tariff and the Compression Charges and to also fix the said Network Tariff and Compression Charges, we deem it appropriate to, before noticing the arguments urged by the senior counsel for the petitioner, record as to how the learned ASG appearing for the respondents has shown the source of or

justified the said power.

7. The learned ASG has drawn our attention to:-
- i) Regulations 3 and 4 of the Exclusivity Regulations making the same applicable to an entity as the petitioner and explaining the rationale for allowing such Exclusivity;
 - ii) the letter dated 9th January, 2009 of the Board to the petitioner granting exclusivity to the petitioner *inter alia* on the term/condition that the petitioner shall submit the Network Tariff and Compression Charges for CNG as per the Quality Regulations for approval of the Board;
 - iii) on the basis of the above, it is contended that the petitioner having accepted the said term as a condition for obtaining exclusivity is bound by a contractual obligation with the Board and is now estopped from challenging the power of the Board;
 - iv) attention is also invited to the letter dated 11th February, 2009 of the petitioner to the Board accepting the said power of the

Board;

- v) attention is invited to letters dated 25th March, 2009 of the Board and 29th May, 2009 of the petitioner to justify contractual basis for the power of the Board to fix Network Tariff and Compression Charges. It is urged that the petitioner having dealt with the Board, so understanding the powers of the Board, cannot now be heard otherwise;
- vi) attention is invited to “Introduction” and “Statement of Objects and Reasons” of the PNGRB Act to urge that the same was enacted to protect the interest of the consumers;
- vii) it is similarly pointed out that Sections 2(i), (m), (w) of the PNGRB Act are all intended to ensure that the consumer is not exploited;
- viii) particular attention is invited to Section 2(zn) of the Act defining the ‘transportation rate’;
- ix) on the basis of Section 11(e) it is contended that the Board is empowered to regulate *inter alia* the transportation rates;
- x) the Rule making provision i.e. Section 61 is shown to be,

‘without prejudice to the generality of the powers’ and thus not exhaustive; particular attention is invited to Section 61(2) clauses (n), (t), (za) to show that Board is empowered to make regulations qua transportation tariff and any other matter which is required to be or may be specified by Regulations or in respect of which provision is to be made by Regulations;

- xi) it is contended that the writ petition nowhere shows as to how the Regulations made are inconsistent with the Act;
- xii) it is argued that if it were to be held that the Board cannot control tariff, no purpose would be served in fixing the transportation cost which the petitioner also admits the Board to be empowered to;
- xiii) it is argued that the Board is not fixing the retail price of CNG but is only fixing the transportation cost;
- xiv) Reliance is placed on:-
 - a) ***PTC India Ltd. v. Central Electricity Regulatory Commission*** (2010) 4 SCC 603 dealing with the powers of the Appellate Tribunal constituted under

the Electricity Act, 2003;

- b) ***Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupesh Kurmarsheth*** AIR 1984 SC 1543 to contend that in determining the constitutionality of the Regulations, the Court should only see whether the Regulations fall within the scope and ambit of the power conferred by the Statute on the delegatee, whether the Regulation is inconsistent with the provision of the parent Statute and whether the Regulation infringes any of the fundamental rights or other restrictions or limitation imposed by the Constitution;
- c) ***Shri Sitaram Sugar Company Limited v. Union of India*** (1990) 3 SCC 223 laying down that the action of a delegatee must reasonably relate to the purpose of the enabling legislation;
- d) ***Pratap Chandra Mehta v. State Bar Council of***

Madhya Pradesh (2011) 9 SCC 573 to contend that the powers of the delegatee have to be construed keeping in mind the objects sought to be achieved by the Statute and the power to frame Rules has to be given a wider rather than a restrictive scope so as to render the legislative object achievable; that the legislature provides a general Rule making power to carry out the purpose of the Act and when such a power is given, the Rules framed therein if satisfy the functionality of the object of the enactment are valid.

- xv) that the quantum of the Network Tariff and the Compression Charges fixed by the Board are not to be gone into these proceedings and, if the Board is found to be entitled to fix the same, are to be subject matter of appeal before the Appellate Authority already preferred by the appellant; and,
- xvi) that keeping in view the objective of the PNGRB Act, the Regulations permitting the Board to fix the Network Tariff

and the Compression Charges and the action of the Board so fixing the Network Tariff and the Compression Charges cannot be interfered with.

8. The crux of the argument of the senior counsel for the petitioner is that the Act, vide Section 22 thereof empowers the Board to only fix the transportation tariff; that the transportation rate, as per Section 2(zn) is the rate to be charged either by a common carrier or a contract carrier of gas from a person engaged in marketing of gas, for moving the gas. It is argued that the Act nowhere empowers/authorizes the Board to fix the price to be charged by a marketer of gas from its consumers. We therefore, without elaborating on the submissions in this regard, first intend to examine the provisions of the Act in this respect.

9. However before doing so, it is necessary to deal with the contention of the learned ASG that the impugned order dated 9th April, 2012 does not fix the retail price of gas and only fixes the Network Tariff inasmuch as if that were to be the position, the question would only be, whether the fixation of Network Tariff and Compression Charges to be charged by the

petitioner from its consumers, does not affect the total price to be charged by the petitioner. In this regard it may be noted that the impugned order dated 9th April, 2012 itself requires the petitioner to reflect such Network Tariff and Compression Charges fixed by the Board “through appropriate reduction in selling prices” and defers the decision on modalities and time frame for ‘refund’ of differential Network Tariff and Compression Charge for CNG for the period from 1st April, 2008 till the order dated 9th April, 2012. Had the order dated 9th April, 2012 impugned in this petition not been of fixation of retail price of gas to be charged by the petitioner from its consumers, mention of ‘reduction in sale price’ and of ‘refund by the petitioner of the Network Tariff and Compression Charge for CNG charged by the petitioner in excess of the rate so fixed by the Board’ would not have been made in the impugned order. The argument of the learned ASG that the Board by fixing the Network Tariff and the Compression Charges is not fixing the price to be charged by the petitioner from its consumers, thus cannot be accepted. The question for adjudication then is, whether the Act authorizes the Board to do so and whether the intent of the legislature was to confer a power of price fixation on the Board.

10. The Preamble to the PNGRB Act undoubtedly describes it as, to provide for the establishment of the Board to regulate *inter alia* ‘marketing and sale of natural gas so as to protect the interests of consumers’. Regulation of marketing and sale, would generally speaking, include regulation of price. This line of judgments and a discussion thereon can be found in *U.P. Cooperative Cane Unions Federations v. West U.P. Sugar Mills Association* (2004) 5 SCC 430, holding the power of regulation to be all-encompassing. We may notice that the ratio of the said judgment has already been referred to a larger Bench vide *West Uttar Pradesh Sugar Mills Association v. State of Uttar Pradesh* (2012) 2 SCC 773. Similarly, price fixation is also generally towards protection of interest of consumers. Thus, from a reading of the Preamble to the Act, it definitely follows that the Board constituted thereunder is empowered to ‘fix the price’. However such an objective, reflected in the Preamble to the statute is not enough and a provision for price fixation has to exist in the body of the statute also. As is obvious from the arguments of the learned ASG as noted above, there is no specific provision of the PNGRB Act empowering the Board to

control/regulate or fix the price at which gas is to be sold to the consumer and which power is being sought to be exercised by the Board. Section 11 of the PNGRB Act, while prescribing the functions which the Board is to perform, does not state, as it ought to have stated/prescribed, had the legislature intended the Board to perform the function of controlling/regulating/fixing the price of natural gas, to perform such function. What falls for determination is whether the power to control/regulate/determine price can be deduced from the functions as described in the following clauses of Section 11 of the Act and which alone can be said to have closest nexus if any to price regulation/fixation:-

“11. Functions of the Board.- The Board shall-

- (a). Protect the interest of consumers by fostering fair trade and competition amongst the entities;
- (e). regulate, by regulations, -
 - (i)
 - (ii) transportation rates for common carrier or contract carrier;
 - (iii)
- (f). in respect of notified petroleum, petroleum products and natural gas-
 - (i)
 - (ii) ensure display of information about the maximum retail prices fixed by the entity for consumers at retail outlets;
 - (iii) monitor prices and take corrective measures to prevent

- restrictive trade practice by the entities;
- (iv)
 - (v) provide, by regulations, and enforce, retail service obligations for retail outlets and marketing service obligations for entities;
 - (vi) monitor transportation rates and take corrective action to prevent restrictive trade practice by the entities;
 - (j) perform such other functions as may be entrusted to it by the Central Government to carry out the provisions of this Act.”

11. We are of the opinion that none of the aforesaid clauses can be construed as prescribing price control/regulation as a function of the Board. Clause (a) supra while prescribing protection of interest of consumers limits the same to, by fostering fair trade and competition amongst entities engaged in distributing, dealing, transporting, marketing gas. The function of the Board thereunder is of regulating the *inter se* relationship of entities under the Act and not to regulate/control the relationship between the entities under the Act and the consumers. Similarly, Clause (f) while prescribing function of monitoring prices limits the same to taking corrective measures to prevent restrictive trade practices by the entities. Thus only if the Board finds that the marketeers of gas in a particular area have formed a cartel or are indulging in any other restrictive trade practices, is the Board empowered to monitor prices. Such is not the

case of the Board in the present instance. The petitioner even though till date the exclusive marketeer of gas in Delhi, has not been accused of any restrictive trade practice and the power exercised also is not in the name of monitoring price. Another sub-clause of clause (f) of Section 11 confers function on the Board to ensure display of information about Maximum Retail Price. Again, had the intent of the legislature been to confer the power on the Board to fix the Maximum Retail Price, nothing prevented the legislature from providing so expressly. Instead, functions of enforcing retail service obligations and marketing service obligations only have been conferred by the legislature. The definition of retail service obligations and marketing service obligations in Sections 2(zk) and (w) also do not include obligation to sell at the prices fixed by the Board.

12. That brings us to the question as to whether prices can be fixed/regulated/controlled and if so, how. Prices are generally governed / regulated by market forces. Price fixation/regulation/control is essentially a clog on the freedom of trade and commerce conferred the status of a fundamental right. However wherever the circumstances so justify, the

same has been treated as a reasonable restriction. However such restriction on fundamental right has to be by legislative mandate only. The Supreme Court recently in *DLF Universal Ltd. v. Director, Town and Country Planning Department, Haryana* (2010) 14 SCC 1, finding no provision in the statute (Haryana Development and Regulation of Urban Areas Act, 1975) empowering the Director to fix the sale price, held directions fixing the sale price to be beyond the limits laid down by the empowering Act and suffering from lack of power and void. It was observed that an order which is not within the powers given by the empowering Act, has no legal legs to stand on and is a nullity. It was further held that a power of imposing restrictions on profit percentages, time limit on construction and handing over of such construction does not encompass within itself the right to exercise power in manner that inhibits terms of contract and freedom granted therein. Similarly, in *O.N.G.C. v. Association of Natural Gas Consuming Industries of Gujarat* AIR 1990 SC 1851 it was observed that price fixation is a legislative function. Even the seven Judge Bench of the Supreme Court in *Prag Ice & Oil Mills v. Union of India* (1978) 3 SCC 459 had observed that unless by the terms of a particular statute, price

fixation is made a quasi-judicial function, it is really legislative in character. The Supreme Court in *Transmission Corporation of Andhra Pradesh Limited v. Sai Renewable Power (P) Ltd.* (2011) 11 SCC 34 also opined that fixation of tariff is a statutory function, to be performed by a statutory authority in furtherance of the provisions of the relevant laws; finding the Electricity Act, 2003 to be requiring the appropriate Commission to determine the tariff, it was held to be empowered to do so. In contrast, the Board with which we are concerned in the present case, as aforesaid is not found to have been assigned the function of fixing the Network Tariff or the Compression Charges as it has purported to do. The Supreme Court in *U.P. Power Corp. Ltd. v. NTPC Ltd.* (2009) 6 SCC 235 has held that regulatory provisions are required to be applied having regard to the nature, textual context and situational context of each statute.

13. Coming back to the PNGRB Act, Section 12 thereof while conferring jurisdiction on the Board to entertain complaints and of resolution of disputes also does not mention complaints of sale beyond any retail price as may be fixed by the Board, but only mentions contravention of display of retail price at retail outlets. Similarly, Section 46 of the Act while prescribing punishment for unauthorized activities does not deal with punishment if any for sale beyond the retail price fixed by the Board.

Section 52 while prescribing the obligations of entities as the petitioner does not require them to sell gas at the prices fixed by the Board.

14. The aforesaid analysis of the PNGRB Act does not show the Board to have been conferred power to regulate the Maximum Retail Price of gas. In the absence of any provision to the said effect in the Act, the mention in the Preamble to the Act to regulation of marketing and sale of natural gas is to be necessarily read as without the power to fix the Maximum Retail Price. Price fixation being a restriction on fundamental right, such a power cannot be inferred by conjectures and has to be expressly conferred. As aforesaid no such power/function has been conferred on the Board and the learned ASG also during the arguments has struggled to dig out such a power in the Board by seeking to extrapolate different provisions of the Act.

15. The Supreme Court in *DLF Qutab Enclave Complex Educational Charitable Trust v. State of Haryana* (2003) 5 SCC 622 held that a regulatory Act must be construed having regard to the purpose it seeks to achieve and a statutory authority cannot ask for something which is not

contemplated under the statute. The statute in that case relating to regulation of user of land was construed to be not imposing any limitation prohibiting transfer of land not affecting its user. It would thus be seen that the powers of regulation under a statute were held to be not unlimited and a right of regulation was held to be confined to the language of the statute and not all pervasive. The basic rule of interpretation of statutes that the Court shall not go beyond the statute unless it is absolutely necessary so to do and that purposive construction would be resorted to only when literal interpretation leads to manifest injustice or absurdity, was applied. In our view the principle applied therein holds good in the facts of the present case also. Merely because the Board has been conferred with regulatory powers will not be interpreted to empower the Board to exercise powers which the statute has not conferred on it.

16. The House of Lords as far back as in *Rossi v. Edinburgh Corporation* [1905] A.C. 21 held that provisions in restraint of trade ought not to be interpreted as by implication extending the restrictions in restraint of trade further than the legislature has sanctioned. To the same effect is

the dicta of the Supreme Court in *Tata Power Company Limited v. Reliance Energy Limited* (2009) 16 SCC 659 where it was held that save and except for the exercise of regulatory power which is specifically recognized by the statute, it is not open to the regulatory body (Electricity Regulatory Commission in that case) to exercise a power which is not incorporated in the statute.

17. We are also of the view that in the absence of any provision to the said effect in the Act, such a power cannot be inferred from the rule making power or by referring to the omnibus rule making power. It is also worth mentioning that there is no indication whatsoever in the Act as to the factors which are to govern such price fixation.

18. As far as the reliance by the learned ASG on Section 61(2)(za) is concerned, we are of the view that in the absence of any such power in the Board under the Act, no such power can be conferred by the Board on itself under the guise of making regulations. The Supreme Court recently in *Academy of Nutrition Improvement v. Union of India* (2011) 8 SCC 274 reiterated that conferment of rule making power by an Act does not

enable the rule making authority to make a rule which travels beyond the scope of the enabling Act.

19. That brings us to transportation rate/transportation tariff which undoubtedly finds mention in the Act and to the question whether the Network Tariff and the Compression Charges fixed by the respondent are within the ambit of the said transportation rate. Section 2(zn) of the Act defines “transportation rate” as:-

“transportation rate”, in relation to common carrier or contract carrier or a city or local natural gas distribution network, means such rate for moving each unit of petroleum, petroleum products or natural gas as may be fixed by regulations.”

Section 22 titled “Transportation Tariff” is as under:-

“22. Transportation tariff.-(1) Subject to the provisions of this Act, the Board shall lay down, by regulations, the transportation tariffs for common carriers or contract carriers or city or local natural gas distribution network and the manner of determining such tariffs.

(2) For the purposes of sub-section (1), the Board shall be guided by the following, namely:-

(a) the factors which may encourage competition, efficiency, economic use of the resources, good performance and optimum investments;

- (b) safeguard the consumer interest and at the same time recovery of cost of transportation in a reasonable manner;
- (c) the principles rewarding efficiency in performance;
- (d) the connected infrastructure such as compressors, pumps, metering units, storage and the like connected to the common carriers or contract carriers;
- (e) bench-marking against a reference tariff calculated based on cost of service, internal rate of return, net present value or alternate mode of transport;
- (f) policy of the Central Government applicable to common carrier, contract carrier and city or local distribution natural gas network.”

20. The contention of the senior counsel for the petitioner is that the said transportation rate/transportation tariff is the rate/tariff which the entity which has an inter-connected network of gas pipelines and associated equipment used for transporting natural gas from a bulk supply high pressure transmission main to the medium pressure distribution grid and subsequently to the service pipes supplying natural gas to domestic, industrial or commercial premises and CNG stations is entitled to charge from the marketeers of gas. It is urged that the Act contemplates an entity engaged only in laying down and maintaining such network alone without

being a marketer of gas and which entity has been described as a contract carrier. It is further urged that the Act also contemplates a marketer of gas which has laid down its own network of gas pipelines and the associated equipment as the petitioner has done and empowers the Board to compel such an entity, as the petitioner to, in its own distribution network carry/move the gas of other marketers also. The senior counsel for the petitioner contends that though the petitioner at present is the only marketer of gas with exclusivity rights, in future upon other marketers coming in the fray, can be compelled by the Board to in its own network, also carry/move the gas of such other marketers. It is contended that the transportation rate/transportation tariff referred to in the Act is the rate/tariff which such common carrier or a marketer with own distribution network is to charge from other marketers of gas. The argument is that the transportation rate/transportation tariff mentioned in the Act is the rate/tariff charged by one entity under the Act from another and not the rate/tariff which the marketer of gas under the Act is to charge from the consumers.

21. As noticed above, while Section 2(zn) uses the expression “transportation rate”, Section 22 uses the expression “transportation tariff”. It was as such enquired from the senior counsel for the petitioner whether there is any difference between ‘rate’ and ‘tariff’. The senior counsel for the petitioner has answered the said query by inviting attention to ***Transmission Corporation of Andhra Pradesh Ltd.*** (supra) which describes tariff as a table or a book or a catalogue of rates. It is further contended that there is no difference between the two. We may however notice that ***PTC India Ltd.*** (supra) also defines tariff as including within its ambit fixation of rates.

22. In so far as the contention of the learned ASG of the petitioner, irrespective of the PNGRB Act, being contractually bound to be governed by the rates/tariff prescribed by the Board is concerned, the senior counsel for the petitioner has referred us to ***Shree Vindhya Paper Mills Ltd. v. Union of India*** AIR 1983 Bombay 270 where it was observed that “law is not determined by conduct of the parties or by their view of it”. We even otherwise are of the opinion that if the Board is not found to be empowered

to regulate the Maximum Retail Price of gas under the statute by which it has been created, it cannot wrest such a power by imposing the same as a condition while exercising the other powers vested in it. The Board, under Section 15 of the PNGRB Act is empowered to register entities desirous *inter alia* of marketing natural gas. If the Board is not empowered to regulate/control price, the Board cannot, while registering entities, impose a condition that such entities would be bound by the maximum retail price fixed by the Board. Such a condition if any imposed by the Board would be void in as much as the Board, being a creature of statute, cannot perform any act beyond those which it has been authorized to perform. The petitioner by conduct could not have conferred upon the Board a jurisdiction which it does not derive under the PNGRB Act. It was held in ***S. Sethuraman v. R. Venkataraman*** (2007) 6 SCC 382 that if jurisdiction cannot be conferred by consent, it cannot clothe the authority to exercise the same in an illegal manner. Similarly in ***A.C. Jose v. Sivan Pillai*** (1984) 2 SCC 656 it was held that agreement or participation not permissible or authorized by law cannot estop challenge thereto. Mention may also be made of ***Kalidas Dhanjibhai v. State of Bombay*** AIR 1955 SC 62 where

application for registration under a statute was held to be not coming in the way of subsequent challenge to the need/requirement for such registration. The Supreme Court in *Lohia Machines Ltd. v. Union of India* (1985) 2 SCC 197 also held that acquiescence in an earlier exercise of a rule making power which was beyond the jurisdiction of the rule making authority cannot make a similar exercise at a subsequent date valid.

23. The word “transport” and the expression “transportation rate/transportation tariff” connote the cost of movement from one place to another. The goods which are moved generally are not of the transporter. If the intent of the legislature had been to empower the Board to fix the Maximum Retail Price of gas and further if the legislature had thought that cost of transportation was to be one of the factors to be taken into consideration while fixing the said retail price, the legislature would not have stopped at providing for fixation of such transportation rate only. The provision for fixation, only of transportation rate, clearly connotes that the transportation rate is the rate to be charged by the transporter for the goods of the others. In the present case, the transportation is to be of the gas

belonging to another entity by the common carrier or by the marketeer also having own distribution network. We are therefore inclined to accept the contention of the senior counsel for the petitioner that the transportation rate provided for in the Act is the rate to be charged by one entity under the Act from another for transporting/carrying/moving gas of other. The same can by no stretch of imagination have relevance to Maximum Retail Price of gas, though the transportation cost so fixed by the Board may have a bearing on the case of a price to be charged by a marketeer of gas not having its own distribution network but utilizing the distribution network of another entity under the Act. This position is fortified from Section 21(2).

24. We may at this stage notice that the Section 2(x) of the Act does define the 'Maximum Retail Price' as the "maximum price fixed by an entity at which the natural gas may be sold to the retail consumers" and includes in the same all taxes, cess and levies, local or otherwise and freight or commission payable to the dealers. The same is also indicative of the maximum retail price being fixed by the entities under the Act themselves and not by the Board. We had during the hearing enquired as to

whether any of the other provisions of the Act uses the expression 'Maximum Retail Price' as has been defined in Section 2(x). We are told that the only reference thereto is in Section 11 (supra) where the entities are required to display the maximum retail price. The Apex Court in ***Dr. Indramani Pyarelal Gupta v. W.R. Natu*** AIR 1963 SC 274 held that one of the tests to determine whether a statutory body is vested with a particular power is to see whether exercise of such power is contra-indicated by any specific provision of the enactment bringing such statutory body into existence. Judged by this test, Section 2(x) providing for the Maximum Retail Price to be fixed by the entity as the petitioner itself is contra-indicative of the Board though regulatory in function, having such a power to fix the Maximum Retail Price.

25. In the context of price fixation, the Supreme Court in ***Ashoka Smokeless Coal India (P) Ltd. v. Union of India*** (2007) 2 SCC 640 held the Central Government in that case to be forbidden from issuing any direction which will have an impact over the price (of coal in that case) when there was no control over price.

26. We find a Single Judge of the Kerala High Court in *Johny Thomas v. Union of India* MANU/KE/0683/2008 also to have concluded that the PNGRB Act does not deal with petroleum and petroleum products as an essential commodity and to have been not intended to regulate the trade and commerce of an essential commodity.

27. We thus conclude that the PNGRB Act does not confer any power on the Board to fix/regulate price of gas as has been done vide the impugned order dated 9th April, 2012. Having held so, we do not deem it necessary to deal with the other Regulations impugned in the writ petition and suffice it is to state that any provision therein having the effect of empowering the Board to fix the price or the Network Tariff or Compression Charges for CNG, as long as not Transportation Rate, is beyond the competence of the Board and *ultra vires* the PNGRB Act and of no avail.

28. As far as the reliance by the learned ASG on *PTC India Ltd.* is concerned, the same is found to be of no application since in relation to electricity with which that judgment was concerned, there was always a

Tariff Policy and further since the Electricity Act, 2003 was also found to be conferring a power on the Commission to determine tariff.

29. Before parting with the matter, we may record that the senior counsel for the petitioner has also cited other judgments on impermissibility of retrospectivity in price fixation and on non compliance of principle of natural justice but in the light of above, need is not felt to burden this judgment with the same.

30. We thus allow this writ petition to the extent of holding that the Petroleum and Natural Gas Regulatory Board is not empowered to fix or regulate the maximum retail price at which gas is to be sold by entities as the petitioner, to the consumers. We further hold that the Board is also not empowered to fix any component of Network Tariff or Compression Charge for an entity such as the petitioner having its own distribution network. The provisions of the Regulations (supra) in so far as construed by the Board to be so empowering it are held to be bad/illegal. Accordingly, the order dated 9th April, 2012 to the extent so fixing the maximum retail price or requiring the petitioner to disclose the Network

Tariff and the Compression Charges to its consumers is struck down/quashed. Rule is made absolute. We may also record that though we had not granted any interim stay of the order dated 9th April, 2012 which came into force immediately but the matter having been taken up immediately for hearing, the intent was that no coercive/penal steps shall be taken against the petitioner for non-compliance thereof.

The respondent having co-operated in expeditious disposal of the matter, no order as to costs.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

JUNE 1, 2012
M/PP

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