

GAIL (INDIA) LTD.

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v.

PETROLEUM AND NATURAL GAS REGULATORY BOARD &
ORS.

(Civil Appeal No. 11450 OF 2014)

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JANUARY 13, 2016

[KURIAN JOSEPH AND R.F. NARIMAN, JJ.]

Petroleum and Natural Gas Regulatory Board Act, 2006 – ss. 28, 11(a) rw s. 12(1)(b)(v) – Restrictive Trade Practice– Petroleum and Natural Gas Regulatory Board (Guiding Principles for Declaring or Authorising Natural Gas Pipeline as Common Carrier or Contract Carrier) Regulations, 2009 – Petroleum and Natural Gas Regulatory Board (Affiliate Code of Conduct for Entities Engaged in Marketing of Natural Gas and Laying, Building, Operating or Expanding Natural Gas Pipeline) Regulations, 2008 – Denial of access to common carrier capacity on reasonable endeavor basis to the two pipelines laid by the appellant to second respondent – Whether discriminatory and amounts to Restrictive Trade Practices – The Board as also the Appellate Authority held the said practice as discriminatory and amounts to Restrictive Trade Practice – On appeal, held: Issue as regards the applicability of the Petroleum and Natural Gas Regulatory Board (Affiliate Code of Conduct for Entities Engaged in Marketing of Natural Gas and Laying, Building, Operating or Expanding Natural Gas Pipeline) Regulations, 2008 to the complainant-second respondent not considered either by the Board or by the Appellate Authority – Unless the said issue is addressed, the complaint filed by the second respondent before the Board should not have been disposed of. – Said issue framed and matter remanded back to the Board – Order passed by the Appellate Authority as also by the Board set aside – Petroleum and Natural Gas Regulatory Board (Authorising Entities to Lay, Build, Operate or Expand Natural Gas Pipeline) Regulations, 2008.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 11450 of 2014.

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A From the Judgment and Order dated 28.11.2014 of the Appellate Tribunal for Electricity New Delhi in Appeal 52 of 2014.

Mukul Rohtagi, A.G., Tushar Mehta, ASG, Yoginder Handoo, Rajat Nair, Darpan Sachdeva for the Appellant.

B Parag P. Tripathi, Piyush Joshi, Uttara Babbar, Sumiti Yadava, Saurav Agrawal, Munawwar Naseem, Astha Gaur, Pradeep Kumar Bakshi for the Respondents.

The Judgment of the Court was delivered by

C **KURIAN, J.** 1. The main issue raised in this appeal is whether the denial of access to common carrier capacity on reasonable endeavor basis to the two pipelines laid by the appellant to the second respondent, is discriminatory and amounting to Restrictive Trade Practices or not. In the nature of the order we are required to pass in this case, it is unnecessary to go in detail to the factual matrix.

D 2. The issue arises under the Petroleum and Natural Gas Regulatory Board (Authorising entities to lay, build, operate or expand natural gas pipeline) Regulations, 2008 and Petroleum and Natural Gas Regulatory Board (Guiding Principles for Declaring or Authorising Natural Gas Pipeline as Common Carrier or Contract Carrier) Regulations, 2009.

E 3. In terms of the Regulations, the appellant published the available common carrier capacity for the prospective contracting by any third party.

F 4. On 19.11.2012, the appellant published an Expression of Interest for booking capacity by interested parties mentioning therein that the common carrier capacity thus available is on Ship or Pay basis.

5. Respondent No. 2, on 04.05.2013, expressed its desire to avail the common carrier capacity on reasonable endeavour basis.

G 6. Failing to resolve the disputes between ship or pay and reasonable endeavour basis, Respondent No.2 filed a complaint before the Petroleum and Natural Gas Regulatory Board (in short, "the Board") on 21.09.2013.

7. The Board, after elaborate discussions, allowed the complaint. We shall extract the relevant portion as under :-

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52. *The respondent's explanation does not deserve any acceptability or credibility at all because the common carrier capacity has to be non-discriminatory reserved on 'first-cum-first-serve' basis without making any specific classification for reservation of common carrier capacity.* A

53. *The practice adopted by the respondent on the one hand reveals discrimination towards the customer like complainant and on the other hand, results in additional burden for the shippers who are not the regular and long standing customers of the respondent and such practices also discourage fair competition in the market.* B

54. *In view of above, it would not be appropriate for us to direct the respondent for booking common carrier capacity on reasonable endeavour basis but we hold that the practice being adopted by the respondent, while booking common carrier capacity, is not only discriminatory, it also amounts to restrictive trade practice and must follow the consequence under Section 28 in the light of the provision of Section 11 (a) read with Section 12(1)(b)(v) of the Petroleum & Natural Gas Regulatory Board Act.* C

55. *On giving careful consideration to all the facts and circumstances, we hereby direct the respondent to immediately cease its restrictive trade practice of preventing the shippers like complainant, the access of common carrier capacity in its common carrier pipeline and also impose civil penalty of Rs. 1.00 lac under Section 28 of the PNGRB Act, 2006, to be deposited within a month from today.* D

8. Aggrieved, the appellant took up the matter before the Appellate Tribunal for Electricity (in short, "Appellate Authority"), leading to the impugned order dated 28.11.2014, by which the Appellate Authority dismissed the appeal in the following terms :-

"On giving careful consideration to the facts and circumstances of the Appeal, including the pleadings and submissions made by the parties, we are of the opinion that it has been established that the Appellant, in the instant case, while booking common carrier capacity in its pipeline, has acted in a discriminatory manner leading to restrictive trade E

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A *practices and as such, the Appellant is liable to pay the penalty of Rs. 1 lakh to the Board. Thus, the Impugned Order is upheld. Consequently, the Appeal is hereby dismissed”*

9. Feeling aggrieved by the impugned order passed by the Appellate Authority, the appellant has preferred this appeal before us.

B 10. Though the parties have taken elaborate contentions both before the Board as well as before the Appellate Authority, having extensively heard Mr. Tushar Mehta, learned Additional Solicitor General appearing for the appellant and Mr. Parag Tripathi, learned senior counsel appearing for the second respondent, we find that the following crucial
C aspect has not been considered either by the Board or by the Appellate Authority. The main arguments of the learned counsel for the respondents rests on the application of the Petroleum and Natural Gas Regulatory Board (Affiliate Code of Conduct for Entities Engaged in Marketing of Natural Gas and Laying, Building, Operating or Expanding Natural Gas Pipeline) Regulations, 2008 and without addressing this issue, the dispute
D as raised in the complaint cannot be resolved.

11. In the facts and circumstances of the case, we are of the view that unless the issue, which is formulated below, is addressed, the complaint filed by the second respondent before the Board should not have been disposed of. Therefore, we propose to frame the following
E issue and send the matter back to the Board :-

Issue - To what extent, the Petroleum and Natural Gas Regulatory Board (Affiliate Code of Conduct for Entities Engaged in Marketing of Natural Gas and Laying, Building, Operating or Expanding Natural Gas Pipeline) Regulations, 2008 are applicable to the complainant.

F 12. While addressing this issue, the interplay between the scheme as per the Act and the regulations will also be addressed.

13. We find that the pleadings by both the parties have not been satisfactory before the original authority. Therefore, as requested by the learned senior counsel appearing for both the sides, we permit both
G sides to file additional pleadings before the Board. The complainant may file its additional pleadings within two weeks from today and the appellant will file its reply within two weeks thereafter. Based on the additional pleadings, we make it clear, it will be open to the Board to raise additional issues, if required.

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14. Having regard to the fact that the original complaint was filed in the year 2013, we direct the Board to dispose of the complaint within six months from today. We also grant liberty to the complainant, if so required, to make an application before the Board for an appropriate interim order after completion of the pleadings and in which case, the Board may dispose of the application within three months.

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15. In that view of the matter, we set aside the impugned order passed by the Appellate Authority dated 28.11.2014 in Appeal No. 52 of 2014 as also the original order passed by the Board dated 26.12.2013 in Case No. 68 of 2013.

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16. We make it clear that we have not expressed any opinion on the merits of the case and it will be open to both the parties to raise all available contentions before the Board at any stage.

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17. With the above observations and directions, the Civil Appeal is disposed of with no order as to costs.

Nidhi Jain

Appeal disposed of. D