REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No(s). 2021
(ARISING OUT OF SLP (C) No(s). 28192-28193 OF 2018)

ADANI GAS LIMITED ...APPELLANT(S)

VERSUS

UNION OF INDIA & ORS. ...RESPONDENT(S)

WITH

CIVIL APPEAL NO. 2021
(ARISING OUT OF SLP (C) NO. 30061 OF 2018)

AND

CIVIL APPEAL NO. 2021
(ARISING OUT OF SLP (C) NO. 30062 OF 2018)

JUDGMENT

S. RAVINDRA BHAT, J.

1. Special leave granted. These appeals were heard with the consent of counsel appearing on behalf of the parties. The appeals are directed against a judgment of the Gujarat High Court[1] rejecting certain writ petitions.

2. In those proceedings, the main appellant (hereafter called "Adani") challenged the validity of Regulation 18 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 (hereafter called the "CGD Regulations") as violative of Articles 14 and 19(1)(g) of the Constitution of India, and *ultra vires* Section 16 of the Petroleum and Natural Gas Regulatory Board Act, 2006 (hereafter

[1]Dated 28.09.2018.

called the "PNGRB Act" or "the Act"). Adani had also challenged the grant of authorization to the third respondent (hereafter called "Gujarat Gas") for laying and maintaining a gas distribution network. Gujarat Gas had succeeded in securing the authorization in an auction held by the Petroleum and Natural Gas Regulatory Board (hereafter called "PNGRB" or "the Board").

Background

3. The PNGRB Act came into effect on 1.10.2007, and mandated authorization by the Board for the laying, building, operating or expanding any city or local natural gas distribution network (collectively, "CGD activities" and such a network, "CGD network"). On 30.10.2007, the Board issued a press note directing entities engaged in CGD activities with or without authorization of the Central Government, to submit relevant details. After receiving the petitioner's details, the Board informed it that recognition and acceptance could be only of a specific and formal authorization by the Central Government, in accordance with Section 17 of the Act. Accordingly, Adani's activities were restrained and a direction was given to obtain authorization from the Central Government. The Board eventually granted Adani provisional clearance to carry out certain capital works in the Ahmedabad area, including the disputed areas of Sanand, Bavla, and Dholka (hereafter called "disputed areas"). Adani also submitted an indemnity in favour of the Board.

4. Section 16, relating to authorization, came into effect on 12.07.2010. On 04.02.2013, the Board granted provisional authorization to Adani's CGD network in Ahmedabad city and Dascroi area, excluding 18 CNG stations of Hindustan Petroleum Corporation Limited (hereafter called "HPCL"), subject to certain conditions. The disputed areas were excluded from this provisional authorization. Under protest, Adani accepted the grant of authorization on 09.12.2013, despite certain areas being excluded. On 1.10.2015, the Board invited bids for development of CGD networks in those disputed areas in Ahmedabad. Adani submitted its application-cum-bid documents in respect of these areas.

5. Feeling aggrieved by the exclusion of these areas from the authorization granted to it, Adani approached the High Court, preferring a petition under Article 226 of the Constitution, seeking several reliefs. The principal relief claimed was the quashing of the grant of authorization to Gujarat Gas, questioning the exclusion of the disputed areas by the earlier authorization dated 28.11.2013, and challenging the *vires* of Regulation 18 framed by the Board under the PNGRB Act. Adani also contended that by virtue of Section 16 of the PNGRB Act, it was entitled to be treated as an entity with "deemed authorization".

6. The PNGRB and Gujarat Gas, who were arrayed as respondents before the High Court, contended that Adani's petition was liable to be dismissed on the ground of delays and laches, and availability of alternate remedies. They also contended that Adani was disentitled to claim the reliefs it sought due to its conduct. On merits, PNGRB contended that its letter dated 31.03.2008 to Adani sought necessary details. At that stage, Adani did not challenge the validity of Regulation 18 and on the contrary, sought authorization under that provision by a letter dated 09.07.2008 without protest. It was contended that although Section 16 of the PNGRB Act was brought into force in 2010, at that time too, Adani did not challenge the validity of the impugned regulation. Furthermore, Adani applied for authorization under Section 17(2) of the PNGRB Act and Regulation 18 without any protest and participated in the hearings fixed by PNGRB. At that stage too, no objection was raised with regard to its entitlement as a "deemed authorized" entity, and Adani furnished the required particulars to PNGRB. The respondents pointed out that on 04.02.2013, PNGRB issued a provisional authorization letter on certain terms and conditions in which the disputed areas were excluded. At that stage too, Regulation 18 was not challenged; Adani, on the other hand accepted the terms and conditions on 28.10.2013. The petition was therefore opposed on the grounds of estoppel, applicability of the principle of approbate-reprobate, as well as delay and on merits.

7. The High Court, after hearing the parties, by its judgment held that Adani had applied for and was granted authorization with respect to Khurja area in Uttar

Pradesh in 2012. That authorization was issued under Regulation 18. Adani accepted that authorization and never protested against it; it also accepted the terms and conditions of the letter issued by the PNGRB for Ahmedabad, which excluded the disputed areas. Thereafter, the performance bank guarantee was also submitted by the Adani, and ultimately PNGRB issued the final authorization for Ahmedabad city and Dascroi area, excluding the disputed areas. The Court noticed that the bid for the disputed area was issued on 01.10.2015 and Adani participated in the bidding process, rather than challenging it. The petition was filed only after it was unsuccessful in the bid. The High Court found that the challenge to Regulation 18 of the CGD Regulations therefore, was only when it suited Adani's convenience.

8. The impugned judgment then noted that this court, in its judgment reported as *In re Special Reference No. 1 of 2001*[2](hereafter called "Special Reference"), had ruled that in view of Entry 53, List I of the Seventh Schedule, the Parliament had exclusive legislative competence, and the Central Government, exclusive executive competence on the subject of natural gas, and that State Governments did not have any authority to enact such a legislation or to grant any authorization in respect of the subject of natural gas. The High Court held that:

> *"The Parliament has, therefore, made provision with regard to 'deemed authorization' under Section 16 of the PNGRB Act subject to the provisions of Chapter IV which includes Section 17 of the PNGRB Act. If the provision contained in Section 17 of the PNGRB Act is seen, it provides for distinction between the entities authorized by the Central Government and those not so authorized. Further, the entities authorized by the Central Government have to furnish the particulars of their activities before the appointed day to the respondent Board, whereas, the other entities have to apply for authorization under Section 17(2) of the PNGRB Act and Regulation 18 of Regulations of 2008. Thus, the Parliament, while enacting Section 17(2) of the PNGRB Act, had given a chance to such entities to apply for authorization to respondent Board in respect of the areas in which they were active before the appointed day. At this stage, it is also required to be noted that the petitioner No.1 commenced the work of CGD network in Ahmedabad District on the basis of the interim policy of the Government of Gujarat. The said policy itself provides that as and when the Gas Act or any other relevant regulation is brought into force, the petitioner No.1 will*

[2](2004) 4 SCC 489.

have to meet with the requirements of the Regulation. Further, the NOC granted by the Government of Gujarat is also subject to similar condition. In fact, the Presidential Reference was with regard to the Gujarat Gas Act and ultimately the Hon'ble Supreme Court, in the case of Association of Natural Gas &Ors. (supra), struck down the constitutional validity of Gujarat Gas Act and held that with respect to natural gas, only the Central Government has legislative competence. Thus, from the date of coming into force of PNGRB Act i.e., on 01.10.2007, only the Central Government is having legislative and executive competence and therefore Parliament introduced 'deemed authorization' in Section 16 of the PNGRB Act. Therefore, when the Parliament introduced the concept of 'deemed authorization' in Section 16 of the PNGRB Act, it could only be with respect to entities operating under an executive order/authorization from the Central Government. If section 16 of PNGRB Act is interpreted to mean "deemed authorization" even to entities operating without such executive order/authorization, such interpretation would run contrary to the Presidential Reference answered by the Hon'ble Supreme Court. As observed hereinabove, Section 16 of the PNGRB Act is subject to the provisions of Chapter IV which includes Section 17.

12.1. If we consider the provisions contained in Sections 11, 18, 19 and 61 of the PNGRB Act, it is clear that the respondent Board has been empowered under the Act to either invite applications and or decide applications moved to it from interested parties to lay, build, operate or expand such pipelines or city or local gas distribution network and the said applications have to be decided in transparent and objective manner as provided in the regulations. The function of the respondent Board is defined under Section 11(i) of the PNGRB Act. Further, Section 61 of the PNGRB Act empowers the respondent Board to frame the regulations which are consistent with the PNGRB Act and the Rules made thereunder to carry out the provisions of the PNGRB Act. The regulations of 2008 were therefore framed. Regulation 18(2) empowers the respondent Board to take into consideration various criteria while considering the application for grant of authorization to such entities and one of them is in respect of the actual physical progress made and the financial commitment specifying a physical progress at least twenty five percent and a financial commitment of at least twenty five percent of the capital expenditure identified for the CGD project as per the DFR submitted immediately before the appointed day, may be considered as adequate. If any entity which is already carrying out work before the appointed day, without the authorization of the Central Government, it becomes incumbent upon the respondent Board to see that the quantity of the work and financial commitment is sufficient and therefore the condition as specified in Regulation 18(2)(d) cannot be said to be ultra vires to the provisions of PNGRB Act. In fact the impugned regulation is in furtherance of the objects of the PNGRB Act.

12.2. Thus, from the combined reading of Sections 16 and 17 of the PNGRB Act and Regulation 18 of the Regulations of 2008, it would be clear that other entities can also claim authorization from the respondent Board provided they meet the test of Regulation 18 of the Regulations of 2008. In fact, the aforesaid provisions provide a fair opportunity to unauthorized/other entities also to claim authorization with respect to work already carried out before the appointed day provided the work was completed to a reasonable extent."

In view of this reasoning, the High Court dismissed Adani's writ petition.

Relevant Provisions of the PNGRB Act and Regulations

9. The PNGRB Act, with the exception of Section 16, came into force on 1.10.2007 ("appointed day"). Section 16 was, however, brought into force subsequently, on 12.07.2010. The enactment set up the PNGRB to regulate refining, processing, storage, transport, marketing, distribution and sale of petroleum, petroleum products and natural gas in all parts of the country, and to promote competitive markets. Section 1 (4) of the Act declares that it applies to *"refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas excluding production of crude oil and natural gas."* Section 2 (d) defines "authorized entity" as follows:

> *"(d) "authorised entity" means an entity—*
> *(A) registered by the Board under section 15—*
> *(i) to market any notified petroleum, petroleum products or natural gas, or*
> *(ii) to establish and operate liquefied natural gas terminals, or*
> *(B) authorised by the Board under section 16—*
> *(i) to lay, build, operate or expand a common carrier or contract carrier, or*
> *(ii) to lay, build, operate or expand a city or local natural gas distribution network;"*

Section 2(i) of the Act defines a *'city or local natural gas distribution network'* as:

> *"(i)an interconnected network of gas pipelines and the 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 situated in a specified geographical area."*

Section 2 (l) defines compressed natural gas as follows:

> *"(l) "compressed natural gas or CNG" means natural gas used as fuel for vehicles, typically compressed to the pressure ranging from 200 to 250 bars in the gaseous state."*

Section 2 (za) defines "natural gas" as follows:

> *"(za) "natural gas" means gas obtained from bore-holes and consisting primarily of hydrocarbons and includes—*

(i) gas in liquid state, namely, liquefied natural gas and regasified liquefied natural gas,
(ii) compressed natural gas,
(iii) gas imported through transnational pipelines, including CNG or liquefied natural gas,

(iv) gas recovered from gas hydrates as natural gas

(v) methane obtained from coal seams, namely, coal bed methane, but does not include helium occurring in association with such hydrocarbons;"

10. Section 16 of the PNGRB Act requires authorization by the Board for any entity that wishes to lay, build, operate or expand any city or local natural gas distribution network. Section 17 deals with authorization, and Section 18 deals with publicity of applications. The provisions read as follows:

"16. Authorisation. *– No entity shall –*
(a) lay, build, operate or expand any pipeline as a common carrier or contract carrier;
(b) lay, build, operate or expand any city or local natural gas distribution network, without obtaining authorization under this Act:
Provided that an entity, -
(i) laying, building, operating or expanding any pipeline as common carrier or contract carrier' or
(ii) laying, building, operating or expanding any city or local natural gas distribution network,
immediately before the appointed day shall be deemed to have such authorisation subject to the provisions of this Chapter, but any change in the purpose or usage shall require separate authorization granted by the Board.

17. Application for authorisation.

(1) An entity which is laying, building, operating or expanding, or which proposes to lay, build, operate or expand, a pipeline as a common carrier or contract carrier shall apply in writing to the Board for obtaining an authorisation under this Act:

Provided that an entity laying, building, operating or expanding any pipeline as common carrier or contract carrier authorised by the Central Government at any time before the appointed day shall furnish the particulars of such activities to the Board within six months from the appointed day.

(2) An entity which is laying, building, operating or expanding, or which proposes to lay, build, operate or expand, a city or local natural gas distribution network shall apply in writing for obtaining an authorisation under this Act:

Provided that an entity laying, building, operating or expanding any city or local natural gas distribution network authorised by the Central Government at any

time before the appointed day shall furnish the particulars of such activities to the Board within six months from the appointed day.

(3) Every application under sub-section (1) or sub-section (2) shall be made in such form and in such manner and shall be accompanied with such fee as the Board may, by regulations, specify.

(4) Subject to the provisions of this Act and consistent with the norms and policy guidelines laid down by the Central Government, the Board may either reject or accept an application made to it, subject to such amendments or conditions, if any, as it may think fit.

(5) In the case of refusal or conditional acceptance of an application, the Board shall record in writing the grounds for such rejection or conditional acceptance, as the case may be.

***18. Publicity of applications.**—When an application for registration for marketing notified petroleum, petroleum products and natural gas, or for establishing and operating a liquefied natural gas terminal, or for establishing storage facilities for petroleum, petroleum products or natural gas exceeding such capacity as may be specified by regulations, is accepted whether absolutely or subject to conditions or limitations, the Board shall, as soon as may be, cause such acceptance to be known to the public in such form and manner as may be provided by regulations."*

11. Section 17(2) obliges entities to apply to the PNGRB for authorization, and its proviso says that such entities which were authorized by the Central Government at any time *before the appointed day*, shall furnish the particulars of such activities to the Board within six months from the appointed day. Section 19 provides for the grant of authorizations, and reads as follows:

*"**19. Grant of authorization.***
(1) When, either on the basis of an application for authorisation for laying, building, operating or expanding a common carrier or contract carrier or for laying, building, operating or expanding a city or local natural gas distribution network is received or on suo motu basis, the Board forms an opinion that it is necessary or expedient to lay, build, operate or expand a common carrier or contract carrier between two specified points, or to lay, build, operate or expand a city or local natural gas distribution network in a specified geographic area, the Board may give wide publicity of its intention to do so and may invite applications from interested parties to lay, build, operate or expand such pipelines or city or local natural gas distribution network.
(2) The Board may select an entity in an objective and transparent manner as specified by regulations for such activities."

12. The CGD Regulations apply to any entity which is laying, building, operating or expanding, or which proposes to lay, build, operate or expand a CGD network. Regulation 2(c) defines an 'authorized area' as:

"(c) "authorised area" means the specified geographical area for a city or local natural gas distribution network (hereinafter referred to as CGD network) authorized under these regulations for laying, building, operating or expanding the CGD network which may comprise of the following categories, either individually or in any combination thereof, depending upon the criteria of economic viability and contiguity as stated in Schedule A, namely:-
(i) geographic area, in its entirety or in part thereof, within a municipal corporation or municipality, any other urban area notified by the Central or the State Government, village, block, tehsil, sub-division or district or any combination thereof; and
(ii) any other area contiguous to the geographical area mentioned in sub-clause (i);"

Regulation 2(g) defines 'development of a CGD network':

"(g) "development of a CGD network" means laying, building, operating or expanding a city or local natural gas distribution network;"

Regulation 2(2) provides that:

"(2) Words and expressions used and not defined in these regulations, but defined in the Act or in the rules or regulations made thereunder, shall have the meanings respectively assigned to them in the Act."

13. Regulation 18 of the CGD Regulations pertains to entities not authorized by the Central Government, and provides as follows:

"18. Entity not authorized by the Central Government for laying, building, operating or expanding CGD network before the appointed day.

(1) An entity laying, building, operating or expanding CGD network at any time before the appointed day but not duly authorized to do so by the Central Government shall apply immediately for obtaining an authorization in the form as at Schedule I.

(2) The Board may take into consideration the following criteria while considering the application for grant of authorization, namely: -

(a) the entity meets the minimum eligibility criteria as specified in clauses (a) to (e) and (i) of sub regulation (6) of regulation 5 before the appointed date and is possessing all necessary statutory clearances, permissions, no objection certificates from the Central and State Governments and other statutory authorities;

(b) an entity which is not registered under the Companies Act, 1956 at the time of submitting the application for grant of authorization shall undertake to become a company registered under the Companies Act, 1956:

Provided that the Board may exempt an entity to register under the Companies Act, 1956 on such conditions as it may deem appropriate;

(c) a satisfactory assessment of the actual physical progress made and the financial commitment thereof till immediately before the appointed day in comparison with the entity's DFR appraised by the financial institution funding the project. In case the project has not been funded by any financial institution, the Board may appraise the DFR. The DFR of the entity should clearly indicate the specified geographical area of the project and also specify the coverage proposed for CNG and PNG. In case upon scrutiny of the DFR by the board by taking into account the geographical area, customer segments, infrastructure requirements, etc. proposed by the entity, the DFR is found to be sub-optimal and unacceptable, the Board may not consider the case of the entity for issuing the authorization;

(d) in respect of the actual physical progress made and the financial commitment thereof referred to in clause (c), a physical progress of at least twenty five percent and a financial commitment of at least twenty five percent of the capital expenditure identified for the CGD project as per the DFR immediately before the appointed day may be considered as adequate;

(e) the entity should have arranged, by way of acquisition or lease, land for CGS and procured the necessary equipment for erecting the CGS before the appointed day;

(f) the Board reserves the right to get the actual physical progress and the financial commitment certified and depending upon the progress achieved, the Board may consider authorizing the entity for the authorized area –

i) as per the geographical area in its DFR;
ii)as per the geographical area actually covered under implementation till the appointed day; or
ii) the geographical area as specified by the Board;

(g) in relation to laying, building, operating or expanding the CGD network, it is for the entity to satisfy the Board on the adequacy of its ability to meet the applicable technical standards, specifications and safety standards as specified in the relevant regulations for technical standards and specifications, including safety standards and the quality-of-service standards as specified in regulation 15;

(h) assessment of the financial position of the entity in timely and adequately meeting the financial commitments in developing the CGD network project as appraised by a financial institution and an examination of the audited books of accounts of the entity;

(i) firm arrangement for supply of natural gas to meet the demand in the authorized area to be covered by the CGD network;

(j) any other criteria considered as relevant by the Board based on the examination of the application.

(3) The evaluation of the application in terms of the clauses (a) to (j) shall be done in totality considering the composite nature and the inter-linkages of the criteria.

(4) The Board, after examining the application in terms of the criteria under sub-regulation (2) and also taking into account the requirements in other regulations, may form a prima-facie view as to whether the case should be considered for authorization.

(5) In case of prima-facie consideration, the Board shall issue a public notice in one national and one vernacular daily newspaper (including web-hosting) giving brief details of the project and seek comments and objections, if any, within thirty days from any person on the proposal.

(6) The Board, after examining the comments and objections, if any, under sub-regulation (5), may either consider or reject the case for grant of authorization for the CGD network.

(7) In case it is decided to grant authorization, the same shall be in the form at Schedule D.

(8) In case of rejection of the application, the Board shall pass a speaking order after giving a reasonable opportunity to the concerned party to explain its case and proceed to select an appropriate entity for the project in terms of Regulation 6.

(9) In case the entity is selected for grant of authorization for CGD network-

(a) the network tariff and the compression charge for CNG shall be determined under 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;

(b) the Board may consider grant of exclusivity on such terms and conditions as specified in the Petroleum and Natural Gas Regulatory Board (Exclusivity for City or Local Natural Gas Distribution Networks) Regulations, 2008;

(c) the entity shall abide by the technical standards, specifications including safety standards as specified under relevant regulations for technical standards and specifications, including safety standards;

(d) the provisions under regulations 9, 13, 14, 15 and 16 shall apply to the entity."

Contentions of the appellants

14. Mr Harish Salve, learned senior counsel contended that the impugned judgement erroneously interpreted Section 16 of the PNGRB Act and its proviso. Referring to the sequence of events, it was highlighted that the initial proposal for setting-up of the gas pipeline was by the invitation of the Gujarat Government. Adani made the proposal on 20.08.2001. The State Government framed its policy with effect from 18.07.2002, and Adani applied under that policy. It was after considering commercial and technical feasibility that the Gujarat Government issued the no objection certificate (hereafter called "NOC") dated 27.04.2003. Soon thereafter, Adani took steps to develop the three areas in question.

15. Mr. Salve submitted that the issue as to whether the States have the legislative competence and executive authority in respect of natural gas became the subject matter of a reference under Article 143. By its opinion in *Special Reference* (supra), this Court answered the reference and held that it was only the Parliament which could, having regard to Entry 53 of List I of the Seventh Schedule to the Constitution, legislate in respect of natural gas and petroleum products, and the Central Government alone could frame suitable policies. It was to give effect to this opinion that the PNGRB Act was enacted. The Act was brought into force on 01.10.2007. Mr. Salve drew the attention of the Court to a Press Note dated 31.10.2007 seeking applications from interested parties. He then submitted that on 31.03.2008, having regard to the fact that Adani had received state authorization in the past, the PNGRB asked it to apply under Section 17(2) which it did on 26.02.2008.

16. It was argued that though the provisions of the PNGRB Act were brought into force, the Central Government advisedly did not bring into force Section 16 of the Act. This led to a proceeding before the Delhi High Court[3], which directed the provision to be brought into force. It was as a consequence of these proceedings that the Central Government ultimately notified Section 16. Mr Salve urged that the

[3] *Voice of India v. Union of India* W.P.(C) 8415/2009, decided on 20.01.2010.

proviso to Section 16 of the PNGRB Act was enacted with the intent to deem authorization, and by that, save and permit the functioning of networks and facilities of *all entities* who were functioning in the sector, and not only entities authorized by the Central Government. He urged that a narrow interpretation of the proviso, confining benefit of "deemed authorization" to entities that were permitted to operate *before the enactment* of PNGRB, and who were granted authorization by the Central Government, would be reading something new into the statute that does not exist. It was argued that the proviso to Section 16 of the PNGRB Act was plain and unambiguous and referred to entities which were involved in various activities listed in it before the appointed day and not only entities authorized by the Central Government.

17. It was submitted that Section 17 of the PNGRB Act did not distinguish between entities authorized by the Central Government and others, and merely required entities which did not have central authorization to apply in writing for authorization in terms spelt out by the regulations framed by the PNGRB. The procedural requirement for entities authorized by the Central Government was (as per Section 17 (2) of the PNGRB Act), to intimate relevant details. Therefore Section 16 of the PNGRB Act did not create an artificial distinction between entities authorized by the Central Government and other entities. It was submitted that Parliament was well aware of the debate which took place before the coming into force of the PNGRB Act, especially the fact that several States had authorized entities to construct and lay pipelines and networks, which had come up in the meanwhile. It was urged in this context that the Preamble to the PNGRB Act and the proviso to Section 16 referred to "*entities"* and not "*entities authorized by Central Government*". The proviso to Section16 emphasized on the physical activity of laying, building, operating or expanding any city or local natural gas distribution network *and not* the factum as to whether authorization for such activity was previously granted by the Central Government or not. It was urged that the lone exception carved out in the proviso to Section 16 was that a separate authorization was required for change in the

purpose or usage. Unless there was a change in the purpose or usage, an entity laying, building, operating or expanding any city or local natural gas distribution network before the appointed day (i.e., irrespective of prior authorization by Central Government) shall be deemed to have the authorization under Section16.

18. Learned counsel submitted that in terms of Section 17(2) of the PNGRB Act, all entities had to apply in writing for authorization in such form and manner as specified in regulation made under Section17(3). In terms of Section 17(4), consideration of applications (made under Section 17(2)) was subject to the provisions of the PNGRB Act, which would include Section 16. Thus, all entities, regardless of past authorization by the Central Government, who were carrying out CGD activities immediately before the appointed day were deemed to have authorization *qua* the entire area. It was urged that in the absence of any norms and policy guidelines by the Central Government, the reference made to *"norms and policy guidelines laid down by the Central Government*" in Section 17(4) was rendered insignificant. Adani also disputed the contention that Section16 granted deemed authorisation only to entities authorised by the Central Government. It was urged that accepting that argument would involve reading something new into a statutory provision which was otherwise plain and unambiguous. Learned counsel cited *Pallavi Resources Ltd. vs. Protos Engineering Company Pvt. Ltd.*[4]

19. The appellants disputed that the provisions of the Petroleum Act, 1934 read with the Petroleum Rules framed under it were applicable, and certain authorizations and approvals were necessary before the enactment of the PNGRB Act. It was asserted that those provisions only required approval on the design and route of the pipeline from the Chief Controller of Explosives. It was urged that the authorities under the Petroleum Rules had no powers to authorize or prohibit a particular entity from transporting petroleum through pipelines as long as the appropriate design/route was adopted.

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[4](2010) 5 SCC 196.

20. Learned senior counsel further contended that PNGRB's justification for Regulation 18was without foundation. Mr Salve placed reliance upon the opinion rendered by this Court in *Association of Natural Gas & Ors v Union of India*[5]which stated that the States lacked legislative competence to enact laws on the subject of natural gas, and therefore, under the PNGRB Act, entities authorized by the Central Government stood on a different footing as compared to their entities. It was urged that Section 16 of the PNGRB Act read with Section 17 covered only entities authorized by the Central Government to seek a different kind of clearance. The PNGRB Act was enacted two years after the decision rendered by this Court in *Special Reference* (supra). When it enacted the PNGRB Act, Parliament did not differentiate between entities authorized by the Central Government and other entities, but in fact covered all entities carrying out activities which were the subject matter of the Act before the appointed day under Section16 of the PNGRB Act, subject to the provisions of Chapter IV of the Act.

21. Learned counsel cited *Adani Gas Ltd. vs. Union of India*[6], and stressed that this recognized the applicability of the provision of "deemed authorization" under Section 16 of the PNGRB Act, even in respect of an entity not previously authorized by the Central Government. It was pointed out that Adani, in the present case, had started work from 21.4.2003 in Ahmedabad District in terms of the NOC issued by the State Government. The appellant would therefore be deemed to possess authorization in terms of Section 16.

22. It was next argued that Section 17(4) empowered the Board to accept or reject the application, subject to the provisions of the Act and consistent with the norms and policy guidelines laid down by the Central Government. The PNGRB evaluated applications in terms of Regulation 18(2), on behalf of deemed authorized entities under Section 16 of the PNGRB Act. Regulation 18(2) prescribed eligibility criteria and/or statutory obligations for entities which were deemed to be authorised under

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[5](2004) 4 SCC 489.
[6](2019) 3 SCC 641.

Section 16 of the Act. Regulation 18(2)(1) conferred omnibus power to the PNGRB to evolve any other criteria deemed relevant by it. This empowered the Board to conjure up criteria, defeating the parliamentary intent in Section 16.

23. It was urged that the regulation framing power under Section 61(1) was a general power to carry out the provisions of the Act. Reliance was placed on three decisions of this court, viz. *Global Energy Ltd v. Central Electricity Regulatory Commission*[7], *Petroleum & Natural Gas Regulatory Board v. Indraprastha Gas Limited & Ors*[8] and *Kunj Behari Lal Butail v. State of Himachal Pradesh*[9], where it was held that the rule making power for carrying out the provisions of the Act was a general delegation. It was urged that the power could not be exercised so as to bring into existence substantive rights, obligations, or disabilities not contemplated by the provisions of the Act. It was therefore, urged that Section 61(2)(h) and (n) did not empower the Board to indicate eligibility criteria for entities authorised by the State Government.

24. Counsel contended that Section 17(3) of the PNGRB Act empowered the Board only to specify the form and manner in which an application may be made by entities under Section 17(1) and Section 17(2) of the Act. Thus, the PNGRB could not have prescribed substantive obligations upon entities by creating the aforesaid artificial distinction, contrary to the provisions of Section 16 of the Act. Learned counsel urged that this court in its judgment in *Adani Gas* (supra) held that in cases of entities which were deemed to be authorised under Section 16, the Board was empowered only to see if certain safeguards would suffice. It was further held that Regulation 18 was not mandatory. It was urged that to the extent that Regulation 18 provided for reduction of the area (of operation of any existing entity) it was contrary to Section 16, as the area for which an entity was deemed to be authorized could not

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[7](2009) 15 SCC 570.
[8](2015) 9 SCC 209.
[9](2000) 3 SCC 40.

be bifurcated. Regulation 18 could not whittle down the ambit of the principal provision in Section 16.

25. It was submitted that the authorization order dated 28.11.2013, excluding the disputed areas was a non-speaking order, and violative of the principles of natural justice; it was also contrary to the provisions of Section 17(5) of the PNGRB Act requiring reasons to be set out in such order. Such a non-speaking order was also in breach of Regulation 18(8). Counsel submitted that the reasons for the exclusion were given for the first time in PNGRB's affidavit dated 17.11.2016 which was impermissible as no order could be supported by subsequent affidavits. Learned senior counsel relied on *Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, Delhi & Ors*[10] in this regard. It was further stated that PNGRB, in its affidavit, placed reliance upon a report dated 18.2.2011 to say that Adani did not have a presence in the said areas as on the date of inspection. That report was not provided at the time of the order, i.e., 28.11.2013 and was for the first time provided on 6.6.2017. Thus, it was contended that the order is violative of principles of natural justice.

26. Adani was granted an NOC by the State Government for the entire Ahmedabad District, including the disputed areas under the policy of the State Government. Such area could not have been curtailed by relying on a power under the CGD Regulations. Further, that the said areas were put up for auction on 1.10.2015 with a far larger area, clearly showed that the disputed areas were not economically viable on a standalone basis, and the basis for exclusion of those areas from Adani's authorized area was unfounded.

27. Learned senior counsel submitted that the report dated 18.2.2011 was factually incorrect, as it stated that as on the date of inspection, Adani had not undertaken any activity in the said areas, when in fact it had an operational network as on the date of inspection catering to various customers. Adani had augmented its network in the

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[10](1978) 1 SCC 405.

said areas of Ahmedabad by undertaking urgent capital works pursuant to PNGRB's permission dated 11.6.2009. The details of Adani's investments in the disputed areas of Ahmedabad prior to the date of that report also reflect that it had a presence in those areas. None of those particulars were considered by the High Court.

28. It was argued that the impugned authorization was inconsistent with Regulation 18. Under that regulation, to evaluate actual physical progress and financial commitment, presence as on the appointed day is to be seen in the entire Ahmedabad District, and not apart of it by curtailing the ambit of Section16. It was submitted that the authorization order dated 28.11.2013 omitted to say how Adani did not fulfil the criteria under Regulation 18. On the contrary, the minutes of the meeting of 27.8.2010 reveal that Adani's application fulfilled the grant of authorization under Regulation 18 in respect of the geographical area, which covered Ahmedabad city and contiguous areas and Dascroi. It was urged that Adani also fulfilled the criteria of 25% physical progress in terms of Regulation 18, for the entire Ahmedabad District. PNGRB overlooked that as well as the fact that initiation of development work for any CGD network, including in the Ahmedabad District, always started from one point i.e., in linear progression, generally, where a city gas station was first established for inlet gas, which then extended to the whole of the area. Even under the current PNGRB norms, an authorized entity was given at least 8 years to develop charge areas. Therefore, PNGRB wrongfully carved areas out of the Ahmedabad District and tested each such area in terms of Regulation 18, which was not permissible.

29. It was argued that Adani, in accepting a restricted authorization, or in participating in the tender process later in 2015 did not acquiesce or waive its rights. It protested immediately against the exclusion of the disputed areas. Provisions of the PNGRB Act came into force on 1.10.2007, with the exception of Section 16 (which came into force on 12.7.2010). In the interregnum, entities like Adani were constrained to apply under Regulation 18. In respect of Khurja in Uttar Pradesh,

PNGRB accepted Adani's application under Regulation 18.There was no cause of action to challenge Regulation18 in respect of the authorization granted in Khurja.

30. It was pointed out that in the case of Ahmedabad, Adani's initial Detailed Feasibility report (hereafter called "DFR") inadvertently failed to specify the said areas and Dascroi but the mistake was soon rectified, and those areas were made part of the amended DFR. The PNGRB, in its meeting held on 12.8.2010 also recognized the inclusion of the said areas in the DFR. Ultimately, PNGRB included Dascroi within the scope of authorization, but excluded the disputed areas. Adani had immediately protested against such exclusion and had never given up its protest. It was however, constrained to participate in the auction not only to protect its investments already made in the disputed areas, but also because it was desirous of developing CGD networks in the other areas of Ahmedabad.

31. Learned counsel urged that acquiescence to certain facts or waiver was an intentional relinquishment of a known right. The correct interpretation of Section 16 and Section 17 of the PNGRB Act was debated and unsettled. Consequently, it is incorrect to rely upon the doctrine of acquiescence or waiver to deny relief to Adani. Learned counsel relied on *Moti Lal Padampat Sugar Mills v. State of U.P.*[11]Learned counsel further submitted that mere delay did not amount to waiver and that there was no estoppel against provisions of a statute. The so-called delay, waiver, or acquiescence on Adani's part would not have any bearing on the maintainability of the writ petition in relation to the reliefs sought.

32. Mr. Dhruv Mehta, learned senior counsel argued in addition to Mr. Salve that an overall reading of provisions of the Act - especially Sections 16 and 17 - would show that Parliament made no classification as far as entities were concerned. The classification was in respect of authorization granted by the Central Government. It was submitted that all applications under Section 17 had to be decided in a uniform manner while applying the same yardstick. The learned counsel relied upon Section

[11](1979) 2 SCC 409, paras 6-7.

17(4), which empowered the Board to either accept or reject the application, consistent with the provisions of the Act and consistent with norms, and policy guidelines prescribed by the Central Government. It was thus argued that every application or intimation received by the PNGRB had to be treated in the same manner, regardless of Central Government authorization. Consequently, the deeming authorization clause in Section 16 had to be given primacy.

33. Learned counsel relied upon Section 61(2) (e), (h) and (n). It was argued that the PNGRB's power to frame Regulations under Section 61 was general. As contrasted with this, it was inherent in the nature of PNGRB's function that it had to function through regulations, many aspects in terms of Section11. Learned senior counsel relied on *Adani Gas* (supra) to urge that Regulation 18 was not mandatory and that the PNGRB could decide to apply any one or the set of criteria specified in that provision. It was urged that in the absence of any norm or existing statutory guidance in the form of specific provisions in the Act, the PNGRB could not have framed Regulation 18 to arm itself with extreme power to pick and choose any standard at its whim. Learned senior counsel emphasized that if the Board were to so wish, it could apply some of the standards spelt out in Regulation 18 in case of one entity and only one or none in the case of another entity, while examining applications under Section 17. It was urged therefore that Regulation 18 had discriminatory potential and could not be sustained. Learned senior counsel relied on the decision of this Court in *Petroleum and Natural Gas Regulatory Board v Indraprastha Gas*[12] and urged that there was no statutory guidance to the PNGRB, in regard to regulation framing, with respect to evaluation of applications under Section 17.

34. Dr. A.M. Singhvi, learned senior counsel appearing for an intervenor, Haryana Gas adopted the arguments made on behalf of Adani, with respect to the interpretation of provisions of the PNGRB Act. It was submitted that there were no

[12]2015 (9) SCC 209.

legal impediments before the coming into force of the PNGRB Act, preventing any entity from starting the business of laying, maintenance and operation of a gas pipeline or network. Given this legal position, Parliament's intent while enacting the "deemed authorization" provision under the proviso to Section 16 was to save networks that had been set up, or were under construction. Doing otherwise, and holding that all entities who did not obtain Central Government authorization could not operate after the enactment of the PNGRB, meant that such networks, put up at great expense, which constituted national assets, would have gone waste. It was further submitted that the requirement of Section 17(2) had to be considered in the light of the PNGRB's power under Section 17(4), which had to necessarily be exercised in the light of the "deemed authorization" provision enacted by Section 16.

Contentions of respondents

35. The learned Attorney General for India contended that before the opinion of the Supreme Court of India in *Special Reference (supra)*, State Governments proceeded on the basis that the distribution of natural gas for consumption in cities would fall under Entry 25 of List II, and that their executive power enabled grant of authorizations or licenses to lay pipelines and undertake distribution of natural gas in cities. However, once this Court rendered its opinion on 25.03.2004, the position in law was clarified by the Court holding that Parliament alone was competent to legislate in regard to natural gas, by reason of Entry 53 of List I. States were bereft of legislative competence as well as executive power to issue authorizations or licenses for setting up natural gas distribution networks.

36. Once the Constitutional demarcation of legislative powers was clearly enunciated by this court, the result was that all licenses or authorizations granted by States for operating natural gas distribution networks were rendered null and void, and had no legal effect whatsoever. It was argued that it was this background in which the PNGRB Act was enacted. Section 11 set out the functions of the Board, which included the power to authorize entities to lay, build, operate or expand city or

local natural gas distribution networks. Although Section 16 was not brought in force on 01.10.2007, Section 17 which was in effect on that date, empowered PNGRB to authorize CGD activities. Section 17 also mandated that an application for authorization *"shall"* be made in writing to the Board and that the Board may allow or reject any application.

37. It was urged that the scheme devised by Section 17(2) was that a written application was to be made for authorization under the Act. As Section 11 empowered the Board to grant authorization, applications had to be made to PNGRB. The proviso expressly dealt with the laying and operating of city or local natural gas distribution networks that had been authorized by the Central Government *before the PNGRB Act came into force*. The Central Government alone was competent under Article 73 of the Constitution to issue such licenses or authorizations. They were valid in the eye of law, in view of the opinion of this Court in *Special Reference* (supra). Entities with the Central Government's authorization, only had to furnish particulars of their activities to the PNGRB within six months from the date when the Act came into force, and, were entitled to operate natural gas distribution networks in terms of those authorizations. However, Sections 17(3), (4) and (5) dealt with cases where, under Sections 17(1) or (2), applications were made directly to the PNGRB for grant of authorization to lay, build, operate or expand a pipeline or a network. These applicants could fall into two categories. The first were entities laying or operating natural gas networks immediately before the appointed date without any authorization by the Central Government, but on the basis of authorizations given by State Governments which had no validity whatsoever. The second category was for those new entrants who sought authorizations for laying, building, operating or expanding gas pipelines or networks. The PNGRB was entitled to consider applications from both these categories of applicants, and either accept them or reject them by applying, *inter alia*, the norms and policy guidelines prescribed by the Central Government.

38. It was highlighted that Section 16, which came into force on 15.07.2010 dealt with two categories. One, a new entrant which proposed to carry out CGD activities, which had to obtain authorization from the PNGRB. If there was more than one applicant for the same city or local area, a transparent process (i.e., competitive bidding) was to be resorted to under the Act and the Regulations. There was a second category, i.e., entities, who had been carrying out CGD activities prior to the appointed date in a legally valid manner, i.e., under authorization by the Central Government and not by the State Government. The Attorney General also pointed out that the proviso to Section 16 clearly stated that entities who were laying or operating natural gas distribution networks immediately before the appointed day shall be deemed to have such authorization "subject to the provisions of this Chapter". This meant subject to the provisions of Section 17 too. Therefore, "deemed authorization" under the proviso to Section 16 would apply only to entities which had the authorization of the Central Government prior to the appointed date.

39. It was urged that the interpretation adopted by this Court in *Adani Gas* (supra), i.e., that deemed authorizations covered entities authorized by the state government, and that the requirements of Regulation 18 were directory, was erroneous. It was submitted that the Bench in *Adani Gas (supra)*did not take into account the binding, five judge bench opinion in *Special Reference* (supra), by reason of which it was clear that the legislative competence to regulate all aspects relating to petroleum and petroleum products (including natural gas) was that of Parliament, and the executive power to frame policies, that of the Central Government.

40. Mr. Paras Kuhad, learned senior counsel appearing for the second respondent PNGRB, argued that at all times since 1974, by virtue of the combined effect of the Petroleum Act, 1934,(hereafter called "the Act of 1934"), the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962 (hereafter called "the Act of 1962"), the Petroleum Rules, 1976 (hereafter called "Rules of 1976"), and the Petroleum Rules, 2002 (hereafter called "Rules of 2002"), enacted by Parliament and framed under those laws (by the Central Government) pursuant to Entry 53 List I, in

relation to laying of pipelines for transportation of petroleum (with natural gas being a part of petroleum -as held in para 40 of *Special Reference*), a regulatory regime with the Central Government as the regulator had existed. Thus, pipelines for transportation of petroleum and natural gas could be laid only upon the satisfaction of the Central Government to the effect that it was necessary to lay such a pipeline between two specified points (by virtue of Sections 3 and 6 of the Act of 1962), after taking into account various factors like approval of the route, design, construction and working of the pipeline, by the Chief Controller of the Central Government. The satisfaction was based on a comprehensive Project Report, (by reason of Rule 89 of Rules of 1976 and the Rules of 2002), subsequent to issuance of an authorization by Central Government, and affirmation by the State Government, pursuant to issuance of an order by the Central Government in favour of the State Government or Corporation, directing the vesting in the latter of the right of user in land for laying pipelines (Section 7(1) read with Section 6(4) of Act of 1962).

41. It was submitted that taking note of these facts, Section 17(1) and (2) of the PNGRB Act made it obligatory for all "under-construction" pipelines or networks to obtain an authorization under the Act, except for the pipelines or networks already authorized by the Central Government. Section 48 of the PNGRB Act criminalized the construction or operation of pipelines without obtaining authorization.

42. It was urged on behalf of PNGRB that Section 16 of the PNGRB Act was to be interpreted in the light of Sections 17 and 48 and thus, Section 16 did not clothe every "under-construction" pipeline, legal or illegal, with the imprimatur of "deemed authorization". The mandatory applicability of the regulatory regimen of Section17 was reiterated by Section 16, by stating that deemed authorizations shall be subject to the provisions *"of this Chapter"*. Upon Section 16 becoming operative, entities with under-construction pipelines which had applied for authorization under Section 17, but whose work was under suspension, owing to Section 48, became entitled to restart construction activities at their own risk and cost, pending a final decision on their application for authorization. The fiction created by Section 16 was for this

limited purpose. It was submitted that illegal pipelines laid in contravention of the Act of 1934 were not intended to be granted deemed authorization. Secondly, in any case, such deemed authorization could have no bearing on the requirement of *'obtaining authorization under this Act'*. The proviso to Section 16 stated in unambiguous terms that its operation was *"subject to the provisions of this Chapter"*. The final regimen, uniformly applicable, was that created by the *"provisions of the Act"* i.e., the PNGRB Act. Thus, every entity laying a pipeline, other than an entity authorized by the Central Government had to obtain an authorization under the Act of 2006 in terms of Section17(4), with the attributes of such regimen provided under the PNGRB Act and Regulations which were:

(a) Competitive selection of an entity in accordance with Regulations (Section 19);

(b) Discovery of transportation tariff and commitment to build pipeline/network infrastructure through a competitive bidding process (Regulation 7 of Authorization Regulations of 2008);

(c) Applicability of open access regimen to all pipelines/networks after the expiry of the period of exclusivity/monopoly granted to them (Section 21 read with Section 20 (1) & (4));

(d) Subjection of all pipelines/networks to stringent qualifying standards, including that of safety and pre & post-commissioning conditions/standards/obligations. (CGD Authorization Regulations of 2008).

43. It was urged that the grant of authorization for Ahmedabad city and denial of authorization for disputed areas, i.e., Sanand, Bavla and Dholka were in the same order dated 28.11.2013. Adani had the choice to accept or reject it. Having unequivocally accepted and acted upon the grant of authorization and exclusivity for Ahmedabad City and Dascroi, and denial of the authorization for Sanand, Bavla and Dholka, it could not, while enjoying the fruits of the order for Ahmedabad City, question another part of the same order to the extent it limited the authorization to the said area. This Court has repeatedly held that a person taking advantage under an

instrument, which both grants a benefit and imposes a burden, cannot take the former without complying with the latter. Reliance was placed on *Shyam Telelink Ltd. v. Union of India*[13].It was submitted that Adani acquiesced to the terms and conditions of the bidding process by participating in it without any demur and was now stopped from challenging the same. Reliance was also placed on *M/s Tafcon Projects [I] (P) Ltd. vs Union of India & Ors*[14].

44. It was further highlighted that Adani accepted authorizations awarded to it by following the procedure which it now challenged, without asserting its "deemed authorization" status at any stage, with Khurja geographical area[15] being an example. Now however, Adani has challenged the validity of Regulation 18 when its application for authorization was rejected in respect of Lucknow GA, Udaipur GA, Jaipur GA and in the present case. It was submitted that Adani was estopped by its conduct from raising a challenge to Regulation 18.

45. It was contended that pipeline construction only on the strength of NOCs issued by the States, was not recognized by Parliament as worthy of being saved. The CGD Regulations sought to save, after scrutiny, such of these pipelines as were viable, optimal, safe, capable of implementation, and actually under construction. It was contended that Regulation 18 of the 2008 Regulations, obliged every "under construction" pipeline (except Central Government authorized pipelines), to compete in the selection process and succeed therein, based on its competitive tariff bid and competitive bid for construction of infrastructure. It was emphasized that the power to accept or reject an application for authorization (Section 17(4), the power to prescribe the process of selection (Section 19(2) and the power to grant authorization for laying pipelines/networks (Section 20(3)), is a discretionary power of the Board. Its exercise is subject to the legislative objectives stated in Section 20(5), of avoiding "infructuous investment" and of "securing distribution of natural gas across the

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[13](2010) 10 SCC 138.
[14]2004 (13) SCC 788.
[15]Authorization granted on 4.12.2012.

country". The PNGRB submitted that Regulation 18 of the Regulations of 2008 primarily sought to evaluate the following:

(a) Managerial, technical and financial competence of the applicant entity to implement the Project (Regulation 18(2)(a));

(b) Viability of the Project, in the context of its route/geographical area, customer segments (industrial, commercial, domestic, transport etc.) and infrastructure requirements (steel inch-km pipelines, CNG Stations, PNG connections etc.) and the pipelines/networks design and construction, being inconformity with the applicable technical and safety standards (Regulation 18(2)(e) & (g));

(c) The pipelines/networks, actually under construction, those in the process of being laid and built, the commencement of construction - demonstrated by the availability of land, clearances and permissions, erection equipment, financial capacity (net-worth), minimal financial commitment (25%) etc. (Regulation 18(2)(d) & (e)).

46. In terms of Section 19(1), the applicable schedule and regulatory standards, the Board determined the geographical area to be authorized. Regulation 18 of the 2008 Regulations provided for evaluation of the existence of these factors, which alone could demonstrate that it was not a proposed pipeline/network, but a pipeline/network that was actually being laid or built and was viable, optimal and safe in terms of the objectives of the PNGRB Act.

47. Mr. P.S. Narasimha, appearing for Gujarat Gas, reiterated the submissions made by the Attorney General. It was submitted that the doctrine of approbate and reprobate applied to prevent Adani from complaining of arbitrariness.

48. It was urged that the proviso to Section16 of the PNGRB Act did not validate NOCs or authorisations issued by the State Government; it only provided a framework whereby entities that were carrying out CGD activities immediately prior to the appointed date were permitted a chance to obtain authorisation under the PNGRB Act. It was Section17 that proceeded to categorise entities as those with a

Central Government authorisation and without it. Learned counsel urged that Sections 16, 17, and 19 of the PNGRB Act read with Regulation18 of the CGD Regulations provided the framework by which an authorisation under the Act could be obtained by an entity which was laying CGD networks without a Central Government authorisation before the appointed date. Section 16 of the PNGRB Act did not grant or vest authorisation, but was *"subject to the provisions of this Chapter"* and thereby subject to provisions requiring the obtaining of authorisation under the Chapter. The process of obtaining authorisation was governed by Section 17 and 19 read with Regulation 18. Adani's argument that Section 16 of the PNGRB Act preserved the entire "project" which the entity had intended to implement (and hence it claimed "deemed" authorisation for the entire Ahmedabad District) was outside the scope of the specific language of the proviso to Section 16, which applied only to an entity "*laying, building, operating or expanding*" a CGD network "*immediately before the appointed day shall be deemed to have such authorisation subject to the provisions of this Chapter*". It did not refer to any *"intention"* of the entity. Therefore, the scope of the deeming provision was limited to the specific work of laying, building, operating or expanding a CGD network immediately before the appointed day; it was not as expansive as to cover "intended" works. It was pointed out that the PNGRB's Site Inspection Report dated 18.02.2011 stated that the work at site had not been carried out at the disputed areas.

49. Mr. Narasimha refuted Adani's interpretation of the proviso to Section 16 and submitted that the deeming fiction it enacted was meant to save only central government authorized entities. He urged that having regard to the express terms of Section 16, which was subjected to other provisions (including Section 17), the only feasible interpretation would be that it covered those entities that had been granted authorization by the central government, which had exclusive jurisdiction to do so. It was submitted that a deeming fiction had to be limited, and could not be extended beyond the purpose for which it was enacted; he placed reliance on *K.S.*

Dharmadatam v. Central Government & Ors[16]*; N.K. Sharma v. Abhimanyu*[17] and *State of Maharashtra v Lalji Rajshi Shah & Ors*[18].

50. Mr. Gaurav Agarwal, Advocate, appearing on behalf of an intervenor, M/s Green Gas Ltd., contended that historically, for 22 areas, entities had been authorized by the Central Government. All such entities were Central PSU promoted entities, in which Gas Authority of India Ltd. (hereafter called "GAIL") was a stakeholder since GAIL was handling the administered pricing mechanism (hereafter called "APM") natural gas under the directions of the concerned Union Petroleum and Natural Gas Ministry. Likewise, other Central Government owned Oil Marketing Companies (Indian Oil Corporation Ltd., Bharat Petroleum Corporation Ltd., and HPCL) were also stakeholders and provided the established distribution network (e.g., retail stations, pipelines, etc.) along with technical knowledge and experience of handling such products. All the aforesaid entities had APM gas allocation from the Central Government. All such entities had to be accorded necessary local permissions as well as were deemed authorized entities under the PNGRB Act.

51. In some areas of Gujarat, a State PSU (M/s Gujarat Gas Limited) was historically (i.e., much before the *Special Reference*) operating under permissions from the State Government and the Central Government. The entity had Central Government ratification for those areas. It applied for grant of authorization to PNGRB under Section 17(2) and was granted such authorization. It was urged that after the decision in *Special Reference* (supra) on 25.03.2004 and in the teeth of the said decision, other state governments framed policies in regard to natural gas distribution and issued local permissions to private entities of their choice, in the face of the Central Government having already authorized PSU-promoted entities to undertake distribution of natural gas. So, on one hand, there were PSU-promoted Central Government authorized entities with gas allocation awaiting local permissions

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[16]1979 (4) SCC 294.
[17]2005 (13) SCC 213.
[18]2000 (2) SCC 699.

from State Government to implement the CGD project. On the other hand, the State Government did not grant local permissions to such entities and instead permitted private entities of their choice to setup the CGD infrastructure, albeit without any gas allocation.

52. Learned counsel referred to an affidavit by the Central Government filed in I.A. No.270/2008 in the larger batch matter in *M.C. Mehta v. Union of India*[19], seeking clarification and declaration that all such State Government NOCs/permissions were unconstitutional in view of *Special Reference* (supra). That application (I.A. No.270/2008) was disposed of by the court's order dated 07.04.2017, in the following terms:

> *"The primary prayer made in this application is for a declaration that the Central Government is exclusively empowered to formulate and implement policy with regard to all matters pertaining to Natural Gas, including transmission and supply of Natural Gas, City Gas Distribution, etc.*
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> *Learned Solicitor General says that in view of the decision of this Court in Presidential Reference in Special Reference No.1 of 2001 reported in (2004) 4 SCC 489 as well as the provisions of the Petroleum and Natural Gas Regulatory Board Act, 2006, no further orders are required to be passed in this application and the application is accordingly disposed of in terms of the decision of this Court as well as the Act."*

53. Mr. Agarwal contested as erroneous, the submission of Adani that the "deemed authorization" provision in Section 16 was conceived in larger public interest, to save all existing entities who were operating. It was urged that an entity selected by the State Government, without following any due process and without any authority under law, could not be saved merely because of the investments made or the lapse of time as it was plainly contrary to public policy. All private entities which were selected by the State Governments were so selected without following any due process and most, if not all were given NOC or gas allocation by the Central Government. If such entities were conferred "deemed authorization" status, then it would be tantamount to legalizing an illegal action.

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[19]WP(C) 13029/1985.

Points for consideration

54. The following points arise for consideration by this Court:

(i) The scope of the "deemed authorisation" clause under the proviso to Section 16 of the PNGRB Act;

(ii) Validity of Regulation 18; and

(iii) Whether the exclusion of the disputed areas from the authorisation granted to Adani was justified.

Analysis & Conclusions

Re: Point No. 1: The scope of the "deemed authorization" clause under the proviso to Section 16 of the PNGRB Act

55. The PNGRB Act came in the wake of declaration of law by the opinion of this Court[20] under Article 143 of the Constitution of India. This Court held that Entry 53, List I of the Seventh Schedule shall regulate the development of oil fields and mineral oil resources, petroleum and petroleum products, other liquids, and substances declared by Parliament by law to be "dangerously inflammable", and that this entry exclusively enabled Parliament alone, to the exclusion of state legislatures to enact laws in relation to natural gas. The Special Reference became necessary due to the states asserting that by Entry 25 of List II[21], state legislatures had exclusive domain over the subject of natural gas. The Presidential reference was also made with respect to the competence of the Gujarat state legislature to enact a law regulating transmission, supply and distribution of gas[22].This Court, in its opinion, noted that several laws relating to petroleum and petroleum products had been enacted both before and after the Constitution came into force[23]. This Court, after examining the

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[20]*Special Reference No.1/2001*.
[21]Relating to 'gas and gas works'.
[22]Gujarat Gas (Regulation, Transmission, Supply and Distribution Act, 2001
[23]Notably the Petroleum Act, 1934; the Mines Act, 1952; Mines and Minerals (Development) Act, 1957; Oil Fields (Regulation and Development) Act, 1948; Petroleum and Minerals Pipelines

previous decisions with respect to interpretation of legislative entries in the context of rival claims to exclusive power, proceeded to consider what was meant by the expression "petroleum and petroleum products" and "mineral oil resources" in Entry 53 of List I. After examining various technical encyclopaedias and reference books this Court held:

> *"38. All the materials produced before us would only show that the natural gas is a petroleum product. It is also important to note that in various legislations covering the field of petroleum and petroleum products, either the word 'petroleum' or 'petroleum products' has been defined in an inclusive way, so as to include natural gas. In Encyclopaedia Britannica, 15th Edn. Vol. 19, page 589 (1990), it is stated that "liquid and gaseous hydrocarbons are so intimately associated in nature that it has become customary to shorten the expression 'petroleum and natural gas' to 'petroleum' when referring to both." The word petroleum literally means 'rock oil'. It originated from the Latin term petra-oleum. (petra-means rock or stone and oleum-means oil). Thus, Natural Gas could very well be comprehended within the expression 'petroleum' or 'petroleum product'."*
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> *"44. Under Entry 53 of List I, Parliament has got power to make legislation for regulation and development of oil fields, mineral oil resources, petroleum, petroleum products, other liquids and substances declared by Parliament by law to be dangerously inflammable. Natural gas product extracted from oil wells is predominantly comprising of methane. Production of natural gas is not independent of the production of other petroleum products; though from some wells the natural gas alone would emanate, other products may emanate from subterranean chambers of earth. But all oil fields are explored for their potential hydrocarbon. therefore, the regulation of oil fields and mineral oil resources necessarily encompasses the regulation as well as development of natural gas. For free and smooth flow of trade, commerce and industry throughout the length and breadth of the country, natural gas and other petroleum products play a vital role.*
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> *45. In Re: Cauvery Water Dispute Tribunal MANU/SC/0097/1992: AIR1992SC522, the right to flowing water of rivers was described as a right 'publici juris', i.e., a right of public. So also the people of the entire country has a stake in the natural gas and its benefit has to be shared by the whole country. There should be just and reasonable use of natural gas for national development. If one State alone is allowed to extract and use natural gas, then other States will be deprived of its equitable share. This position goes on to fortify the stand adopted by the Union and will be a pointer to the conclusion that "natural gas' is included in Entry 53 of List I. Thus, the legislative history and the definition of*

(Acquisition of Right of User in Land) Act, 1962; Oil and Natural Gas Development Act, 1974; Petroleum and Natural Gas Rules, 1959.

'petroleum', 'petroleum products' and 'mineral oil resources' contained in various legislations and books and the national interest involved in the equitable distribution of natural gas amongst the States - all these factors lead to the inescapable conclusion that "natural gas" in raw and liquefied form is petroleum product and part of mineral oil resource, which needs to be regulated by the Union.

46. Natural gas being a petroleum product, we are of the view that under Entry 53 List I, Union Govt. alone has got legislative competence. Going by the definition of gas as given in Section 2(g) of the Gujarat Act wherein "gas" has been defined as "a matter of gaseous state which predominantly consists of methane", it would certainly include natural gas also. We are of the view that under Entry 25 List II of the Seventh Schedule, the State would be competent to pass a legislation only in respect of gas and gas-works and having regard to collocation of words 'gas and gas works', this Entry would mean any work or industry relating to manufactured gas which is often used for industrial, medical or other similar purposes. Entry 25 of List II, as suggested for the States, will have to be read as a whole. The expressions therein cannot be compartmentally interpreted. The word 'gas' in the Entry will take colour from other words 'gasworks'. In Ballantine's Law Dictionary, 3rd edition, 1969 'Gas Works' is defined as "a plant for the manufacture of artificial gas". Similarly in Webster's New 20th Century dictionary, it is defined as "an establishment in which gas for heating and lighting is manufactured". In the www.freedictionary.com 'gas works' is explained as "a manufactory of gas, with all the machinery and appurtenances; a place where gas is generated." The meaning of the term 'gas works' is well understood in the sense that the place where the gas is manufactured. So it is difficult to accept the proposition that 'gas' in Entry 25 of List II includes Natural Gas, which is fundamentally different from manufactured gas in gas works. therefore, Entry 25 of List II could only cover manufactured gas and does not cover Natural Gas within its ambit. This will negative the argument of States that only they have exclusive powers to make laws dealing with Natural Gas and Liquefied Natural Gas. Entry 25 of List II only covers manufactured gas. This is the clear intention of framers of the Constitution. This reading will no way make that entry a 'useless lumber' as feared by the States, because Natural Gas was never intended to be covered by that entry. It is also difficult to accept the argument of States that all 'gas' could be categorized as dangerously inflammable and thus arriving at the conclusion that Natural Gas is also covered in State List because this differentiation is based not on the characteristics of gas, but on the manner of its origin. Entry 25 of List II covers the gas manufactured and used in gas works. In view of this specific Entry 53, for any petroleum and petroleum products, the State Legislature has no legislative competence to pass any legislation in respect of natural gas. To that extent, the provisions-contained in the Gujarat Act are lacking legislative competence."

56. The Court categorically held that States had no legislative competence to enact laws on the subject of natural gas and liquefied natural gas. It also held that the Gujarat enactment of 2001, insofar as it related to natural gas or liquefied natural gas was without legislative competence and that the act was *ultra vires* the Constitution.

The opinion of the Court was rendered on 25.03.2004. As a result, all activities relating to natural gas that relied upon authorizations by the States became exposed to the vice of illegality. Having regard to the opinion of this Court and the previous policies of the Central Government, Parliament thought it fit to enact the PNGRB Act. Significantly, this Act does not deal with any aspect relating to extraction of petroleum or liquefied natural gas. It deals with what may be termed as "downstream activities "such as refining, processing, storage, transportation, distribution, marketing and sale of petroleum and petroleum products and natural gas. The main aim of the Act is to regulate all these activities in a comprehensive and wide-ranging manner. When parliament enacted the PNGRB Act, it was aware that several entities were in the process of setting up various kinds of networks which the law governed (i.e., transmission, storage, distribution, marketing etc.). Parliament, therefore, devised a uniform standard by which entities that were laying networks or were in the process of setting up such activities had to be considered. The statutory device adopted was through Sections 16 and 17. By virtue of the power conferred by Section1(3) upon the Central Government, all provisions of the PNGRB Act except Section 16 were brought into force on 01.10.2007. The intention of not bringing into force Section 16 appears to have been to allow some breathing time to entities which were in the process of laying, building and operating any pipeline, to first apply to the PNGRB. If Section 16 were to be brought into force at once, all activities which had started before the enactment of the PNGRB Act would necessarily have been rendered illegal and would have had to cease. The delayed enforcement of this provision meant that existing entities could do what was required of them in terms of other provisions of the Act and seek necessary authorisation.

57. The non-implementation or absence of enforcement of Section 16 led to a public interest litigation before the Delhi High Court[24]. The High Court declared that by virtue of absence of notification of Section 16, the PNGRB lacked the power to

[24] *Voice of India v. Union of India* W.P.(C) 8415/2009, decided on 20.01.2010.

grant authorisation to entities which had applied to it for laying, building, operating or expanding city or local natural gas networks. The judgement was carried in appeal by special leave[25] in which notice was issued. In the meanwhile, pending decision on the Special Leave Petition, the Central Government brought into force Section 16 of the Act by notification dated 12.07.2010 with effect from 15.07.2010.

58. If one considers the background of the enactment, it is evident that the Parliament wished to decisively declare that only entities authorised in accordance with the provisions of the Act by the PNGRB could function. Section 16 by itself does not classify or make any distinction between entities who are permitted or authorised by the Central Government or any other authority. However, by the proviso, it distinguishes two categories of entities, i.e., (i) those laying, building, operating or expanding any pipeline as common carriers or contract carriers and (ii) any city or local natural gas distribution network. The deeming fiction, as it were, in respect of such two classes of entities, by which Adani and other intervenors in its support urge to be unqualified, is created by the expression that such entities *"immediately before the appointed date shall be deemed to have such authorization"*. However, this deeming provision is expressly made subject to the provisions of this Chapter. The chapter in question is Chapter IV.

59. Parliament enacted the PNGRB Act to regulate refining, processing, storage, transportation, distribution, marketing, and sale of petroleum, petroleum products, and natural gas excluding the production of crude oil and natural gas. The objectives of the enactment are *inter alia*, setting up of the Board, regulation of refining, storage, processing, transportation, distribution, marketing, and sale of petroleum, petroleum products, and natural gas except for the production of crude oil and natural gas. An important objective is the protection of consumer's interests in certain activities related to petroleum, its products, and natural gas and ensuring a sufficient

[25]SLP 5408/2010

and continuous supply of petroleum, its products, and natural gas all around the country. The other important objective is promotion of competitive business.

60. The PNGRB's functions are (under Section 11):

(a) registration of entities to market notified petroleum and its products that are subject to contract by Central government, and natural gas;

(b) registration of entities establishing and operating LPG terminals;

(c) registration to entities to set up storage facilities petroleum, its products, and natural gas, if it exceeds the capacity provided by regulations;

(d) Authorization of entities to lay, build, operate, or expand:

1. A common or contract carrier.
2. City or local natural gas distribution network.

(e) Declaring pipelines to be common or contract carriers.

There are other functions too, including regulating access to common or contract carriers to ensure fair trade and competition among the entities, specifying the pipe-line access code regulating transportation rates for common or contract carriers and regulating access to city or local natural gas distribution networks to ensure fair trade and competition among the competitors according to the pipeline access codes.

61. Chapter V of the Act deals with the settlement of disputes. A bench consisting of a member (legal) and one or more member(s) as nominated by the Chairperson of the PNGRB is empowered to settle disputes under the PNGRB Act. Section 24 empowers the Bench to exercise its power as a Civil Court on matters such as refining, processing, storage, transport, distribution, marketing and sale of petroleum, petroleum products, and natural gas, quality of service and security of supply to the consumers by the entities, and disputes arising under Sections 15 and 19. Under Section 25, complaints can be filed by any person before the Board to refer to the dispute between entities or any matter of the entities or any other matter relating to the provisions of the Act. The complaint must be filed within sixty days from the date

of any contravention, act, or conduct that took place. The complaint shall be accompanied by fees as provided under the regulation. Section 26 empowers the PNGRB to appoint an officer having qualifications and experience, as an Investigating Officer to investigate in the matters as specified by the regulations. If any person contravenes any directions of the PNGRB, it is empowered to impose a civil penalty on that person and the order passed by the Board can be deemed to be a decree. Section 27 of the PNGRB Act deals with certain factors that the Board takes into account while deciding any dispute. These factors are (a) amount of inappropriate gain and unfair advantage obtained because of a default; (b) amount of loss suffered by an entity because of a default, and (c) the repetitive nature of the default.

62. Adani and the intervenors supporting it argue that the deeming fiction (in Section 16) should be given full effect. To say so, they point out that the deeming fiction should be taken to extend to all entities who were laying, building, or expanding any pipeline, regardless of whether such entities received Central Government authorization or not. In the absence of any distinction, the fullest effect should be given to Parliament's intent, to ensure that work that had commenced on laying or building, etc. of pipelines, was to be preserved as that was beneficial to the national economy. It is also urged that the expression *"subject to the provisions of this chapter"* should be harmoniously construed, which means that entities that apply under Section 17 (1) or 17 (2) for authorization should not be denied it without reasonable cause, given that the PNGRB is bound to respect and give effect to the mandate of the deemed authorization clause, which is applicable to all.

63. The appellants relied upon the judgment in *Adani Gas* (supra). The controversy in that case was that Adani had applied and obtained NOC with regard to gas distribution network for Udaipur and Jaipur. Adani had, after coming into force of the PNGRB Act, applied for authorization under Section 17 on 28.08.2008. The PNGRB which was seized of the applications asked Adani to appear before it on 04.08.2010 (after Section 16 was brought into force on 12.07.2010). The Board

required Adani to show-cause as to why its applications should not be rejected. After issuing notice, the State Government on 18.05.2011 withdrew the NOC granted and forfeited the commitment fee given by Adani. Later the PNGRB rejected the application seeking authorization for Udaipur and Jaipur. Both these actions i.e., withdrawal of NOC and the rejection of the application under Section 17 were challenged along with a challenge to the vires of Regulation 18. This Court in *Adani Gas Ltd.* (supra) considered the scope of the PNGRB Act and observed as follows:

> *"15. Section 16 of the 2006 Act, which came into force on 12-7-2010, relates to "authorisation". It puts an embargo on laying, building, operating or expanding in city or local natural gas distribution network without obtaining authorisation under the Act. Proviso (ii) of the said Section 16 provides for" deemed authorisation" in case an entity had been 1aying, building, operating or expanding any city or local gas distribution network, immediately before the appointed date, which shall be deemed to have such authorisation. In the present case, the appointed date is 1-10-2007 when the 2006Act was brought into force, except the provision contained in Section 16 of the 2006 Act, which came into force on 12-7-2010.*
> *16. The 2008 Regulations were framed before Section 16 of the 2006 Act came into force. Regulation 18 of the 2008 Regulations provides that an entity, not authorised by the Central Government for laying. building, operating or expanding CGD network before the appointed date, shall apply or obtaining an authorisation in the form as in Schedule I and the Board may take into consideration the criteria for considering the application for grant of authorisation in terms specified in clauses (a) to (j) of Regulation 18(2)."*

64. Then, noticing Regulation 18 and the various requirements spelt out by it which the PNGRB Act took into account, the judgment further held as follows:

> *"18. It is noteworthy that the language used in Regulation 18(2) is that "the Board may take into consideration... ". As such, the language in which the Regulation has been couched does not make the consideration in the said clauses, including clause (d), to be mandatory, but no doubt the same would be relevant considerations. On a careful perusal of the order passed by Board, we find that the application of the appellant has been rejected for reasons mentioned in para 5 of the impugned order dated 19-5-2011, which are extracted hereunder:*
>
> *"5.The committee found that you do not satisfy the conditions laid down under Regulation 18(1) of the Petroleum and Natural Gas Regulatory Board (Authorising Entities to Lay, build, Operate or Expand City or Local Natural Gas Distribution Networks)Regulations,2008onaccount of the following:*
>
> *(a) Physical and financial progress achieved by M/s Adani Gas Ltd. before the appointed day in the GA of Jaipur does not satisfy the proviso*

18(2)(d) of Regulation 18(1) of the Petroleum and Natural Gas Regulatory Board (Authorising Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008;

(b) Even after clear instructions of PNGRB vide Press Note dated 30-10-2007 to stop all incremental activities M/s Adani Energy Ltd. had continued with laying of MDPE pipeline and thus violating the directions of the Board."

19. From the above, it is clear that the application of the appellant has been rejected primarily on the ground of non-compliance with clause (d) of Regulation 18(2) of the 2008 Regulations. It was incumbent on the Board to take into consideration various factors as specified in clauses(a)to (j)of Regulation 18(2) of the 2008 Regulations, and the same has to be considered in the backdrop of the fact that the press note was issued on 30-10-2007 to stop all incremental activities and as such it was necessary to consider whether the appellant could have been faulted for non-compliance with clause (d) of Regulation 18(2), and whether it was a mandatory requirement or merely one of the factors to be considered along with all the other factors. Other relevant aspects as contained in the other clauses have not been adverted to by the Board while deciding the application of the appellant, which were also equally significant. It was necessary to consider whether the appellant is compliant with various other factors as provided in clauses (a) to (j) of Regulation 18(2) of the2008 Regulations. The non-compliance, if any, with clause (d) ought to have been considered in the light of the press note dated 30-10-2007 which required stopping of all incremental activities.

20.The peculiar factual position is that the 2006 Act had been notified on 3-4-2006 but came into force on 1-10-2007 and the NOC was issued on 27-3-2006, after the Government of Rajasthan had invited open bids on19-11-2005 for laying of city gas distribution network in the cities of Udaipur and Jaipur, in which the appellant had been selected. Besides depositing the sum of Rs 2 crores immediately towards commitment fee, the appellant had thereafter incurred mammoth expenditure alter it was successful in the bids, which aspect has not been considered by the Board while deciding the application of the appellant. In our considered view, the same should not have normally been overlooked. Besides the same, in the factual circumstances of the present case, the provision of "deemed authorisation contained in proviso (ii) to Section 16 had also been enforced on 12-7-2010 and it was necessary for the Board to have considered whether it was a case where only certain safeguards were required to be observed in view of the "deemed authorisation".

65. An overall reading of the judgment (*Adani Gas Ltd.*) discloses that this Court was not cognizant of the background in which Parliament had enacted the PNGRB Act. This Court did not consider the exclusive legislative competence that Parliament possessed, and as a corollary, executive authority that the Central Government exercised by virtue of Entry 53 List I of the Seventh Schedule of the Constitution.

More crucially, the decisive and unanimous opinion of this Court rendered in *Special Reference (supra)* was not considered or even adverted to. In light of the above circumstances this Court should now consider the correctness of the approach and view recorded in the previous review i.e., *Adani Gas Ltd* (supra).

66. Parliament did not enact the PNGRB Act on a blank slate, as it were. In the Presidential Reference *[Special Reference (supra)]* under Article 143 elicited the Court's opinion in the background of assertions by some States that they had the legislative competence to deal with natural gas. This Court's unanimous judgment was categorical, in that it upheld the primacy of Parliament under Entry 53 List I of the Seventh Schedule of the Constitution of India. Importantly, this Court also recollected enactments (including the pre-constitution Petroleum Act of 1934) that dealt with petroleum, natural gas, mineral oils etc. and sought to regulate various facets and aspects thereof and related products and their regulations. Given this background, the Parliament felt the compelling need to enact a comprehensive legislation that would regulate salient aspects of all activities pertaining to petroleum products and mineral oils. The PNGRB Act was thus enacted. As noticed earlier, it regulates all activities after extraction of petroleum, natural gas and other petroleum products starting with refining and going right up to distribution to the ultimate consumer. When Parliament enacted the Act, it was confronted with a factual situation where several entities had begun various activities towards laying pipelines and setting up networks in relation to natural gas. If one read the proviso to Section 16 in isolation, the inference undoubtedly would be that every entity which had started laying and building pipelines and networks was the recipient of the deemed authorization clause- or in the words of Adani, that provision sought to retrospectively regularize activities by all entities. However, such a plain and facial construction is unacceptable given that in the same provision (i.e., proviso to Section 16) the deemed authorization is immediately followed by phrase *"subject to provisions of this chapter"*.

67. At this stage, it would be necessary to notice the scope of a proviso. Proviso ordinarily carves out a field of operation, but does not travel beyond the main enacted provision. Therefore, the golden rule of interpretation is to read the whole section, inclusive of the proviso, in such a manner that they mutually throw light on each other and result in a harmonious construction. This was held in *Dwarka Prasad* v. *Dwarka Das Saraf*[26]:

> *"18. We may mention in fairness to counsel that the following, among other decisions, were cited at the Bar bearing on the uses of provisos in statutes: Commissioner Income Tax v. Indo-Mercantile Bank Ltd. [1959 Supp (2) SCR 256]; Ram Narain Sons Ltd. v. Commissioner Sales Tax (1955) 2 SCR 483]; Thompson v. Dibdin [1912 AC 533]; R. v. Dibdin [1910 P 57 (CA)] and Tahsildar Singh v. State of U.P. [1959 Supp (2) SCR 875. The law is trite. A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. 'Words are dependent on the principal enacting words to which they are tacked as a proviso. They cannot be read as divorced from their context' (Thompson v. Dibdin [1912 AC 533]. If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction."*

68. Later, in *S. Sundaram Pillai & Ors. v. V. Pattabiraman & Ors.*,[27]this Court held as follows:

> *"27. (...) The well-established rule of interpretation of a proviso is that a proviso may have three separate functions. Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment.*
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> *28. Craies in his book 'Statute Law' (7th Edn.) while explaining the purpose and import of a proviso state at page 218 thus:*

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[26](1976) 1 SCC 128.

[27](1985) 1 SCC 591.

"The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it...The natural presumption is that, but for the proviso, the enacting part of the section would have included the subject- matter of the proviso."

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30. Sarathi in 'Interpretation of Statutes' at pages 294-295 has collected the following principles in regard to a proviso: -

"(a) When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso.

(b) A proviso must be construed with reference to the preceding parts of the clause to which it is appended.

(c) Where the proviso is directly repugnant to a section, the proviso shall stand and be held a repeal of the section as the proviso speaks the later intention of the makers.

(d) Where the section is doubtful, a proviso may be used as a guide to its interpretation; but when it is clear, a proviso cannot imply the existence of words of which there is no trace in the section.

(e) The proviso is subordinate to the main section.

(f) A proviso does not enlarge an enactment except for compelling reasons.

(g) Sometimes an unnecessary proviso is inserted by way of abundant caution.

(h) A construction placed upon a proviso which brings it into general harmony with the terms of section should prevail.

(i) When a proviso is repugnant to the enacting part, the proviso will not prevail over the absolute terms of a later Act directed to be read as supplemental to the earlier one.

(j) A proviso may sometimes contain a substantive provision."

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33. The above case was approved by this court in CIT v. Indo Mercantile Bank Ltd[28]., where Kapur, J. held that the proper function of a proviso was merely to qualify the generality of the main enactment by providing an exception and taking out, as it were, from the main enactment a portion which, but for the proviso, would fall within the main enactment. In Shah Bhojraj Kuverji Oil Mills & Ginning Factory v. Subhash Chandra Yograj Sinha[29]Hidayatullah, J, indicated the parameters of a proviso thus:

"As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule."

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[28][1959] 2 Supp. SCR 256.
[29][1962] 2 SCR 159.

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> *"37. In short, generally speaking, a proviso is intended to limit the enacted provision so as to except something which would have otherwise been within it or in some measure to modify the enacting clause. Sometimes a proviso may be embedded in the main provision and becomes an integral part of it so as to amount to a substantive provision itself."*

69. The Central Government did not immediately bring into force Section 16 of the PNGRB Act, as its imperative and negative terms (*"no entity shall"* lay build, operate a city or local gas network)would have led to a virtual standstill of all network laying or constructing activity. Instead, it notified all provisions, except Section 16, as to grant time to the newly established Board to consider and examine the feasibility of applications for authorization, based on which entities were then laying and constructing networks, the soundness of their scheme in technical and economic terms, etc. Adani and intervenors supporting it, have urged that this Court should give full scope to the proviso, and the fiction of a deemed authorization, since Parliament's intent was to clearly authorize all entities, subject to certain modalities, because not doing so would result in waste of precious national resources.

70. This Court recollects that while interpreting a proviso, not only should the main provision be kept in mind, but the purpose for enacting the proviso should not be lost sight of. In *N.K. Sharma* (supra)this Court rejected an argument that under the Haryana Co-operative Societies Act, 1984, a Managing Director could not be prosecuted without sanction, as he was a deemed public servant. The Court held that Section 123, which created the legal fiction of treating some employees as public servants, was restricted in its application to those engaged in recovery of loans or those appointed as liquidator or arbitrator. It was held that:

> *"Section 117 of the said Act enumerates offences. Section 118 limits taking of cognizance of offences which come within the purview of the said Act, as would be evident from sub-section (1) thereof, and not under the provisions of the Penal Code or any other statute. The said provision, therefore, has no application. In terms of Section 123, only an employee who is engaged in the recovery of loans or a person who has been appointed as a liquidator or an arbitrator only shall be treated as a public servant. By reason of the said provision, a legal fiction has been created. A legal fiction, as is well known, is created for a specific purpose and, thus, applicability thereof cannot be extended for a purpose other than those for which it has been created. As the Managing Director of Haryana State*

Cooperative Land Development Bank Ltd., the appellant was not engaged in the recovery of loans or appointed as a liquidator or an arbitrator and in that view of the matter, the limited purpose for which the legal fiction has been created would have no application in the instant case.

71. In *Principles of Statutory Interpretation*, 14th Edn. G.P. Singh, the author describes the scope of a proviso:

> *"In interpreting a provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created [State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory, AIR 1953 SC 333; State of Bombay v. Pandurang Vinayak, AIR 1953 SC 244] , and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. [East End Dwellings Co. Ltd. v. Finsbury Borough Council, (1951) 2 All ER 587 (HL); CIT v. S. Teja Singh, AIR 1959 SC 352] But in so construing the fiction it is not to be extended beyond the purpose for which it is created [Bengal Immunity Co. Ltd. v. State of Bihar, AIR 1955 SC 661; CIT v. Amarchand N. Shroff, AIR 1963 SC 1448] , or beyond the language of the section by which it is created. [CIT v. Shakuntala, AIR 1966 SC 719; Mancheri Puthusseri Ahmed v. Kuthiravattam Estate Receiver, (1996) 6 SCC 185] It cannot also be extended by importing another fiction. [CIT v. Moon Mills Ltd., AIR 1966 SC 870] The principles stated above are 'well-settled'. [State of W.B. v. Sadan K. Bormal, (2004) 6 SCC 59] A legal fiction may also be interpreted narrowly to make the statute workable. [Nandkishore Ganesh Joshi v. Commr., Municipal Corpn. of Kalyan and Dombivali, (2004) 11 SCC 417]"*

72. The distinction between Central Government authorized entities and others does not appear in Section 16; however, it clearly does in Section 17, where different *regimes* and standards of scrutiny are prescribed for the PNGRB in considering applications. This statutory classification is important because it harks back to the genesis of the PNGRB Act, i.e., Parliament's intention to enact a comprehensive law to regulate important aspects of the petroleum and natural gas sector of the economy, in the wake of a decisive opinion of this Court that it is the Parliament alone that always had the competence to legislate in the field, and the Central Government, to frame policies. The statutory distinction, which is a classification no less, between Central Government approved entities and others, therefore, is manifest in Section 17, which occurs *after* Section 16.

73. The opening words of Section 16 are cast in negative terms ("*no entity shall*"). In a series of judgments, this Court has ruled that negative words are prohibitory. As held in *M. Pentiah v. Muddala Veeramallappa & Ors*[30],

> *"Negative imperative words are clearly prohibitory and are ordinarily used as a legislative device to make a statute imperative."*

74. In *Superintendent and Legal Remembrancer of Legal Affairs to Govt. of West Bengal vs. Abani Maity*[31], this Court observed as follows:

> *"Exposition ex visceribus actus is a long-recognised rule of construction. Words in a statute often take their meaning from the context of the statute as a whole. They are therefore, not to be construed in isolation. For instance, the use of the word 'may' would normally indicate that the provision was not mandatory. But in the context of a particular statute, this word may connote a legislative imperative, particularly when its construction in a permissive sense would relegate it to the unenviable position, as it were, 'of an ineffectual angel beating its wings in a luminous void in vain'. 'If the choice is between two interpretations', said Viscount Simon, L.C. In Nokes vs. Doncaster Amalgamated Collieries, Ltd. (AC at p. 1022):*
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> > *'The narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.'"*

75. The enacting part of Section 16 thus prohibits anyone or any entity from starting or carrying on any activity covered by the PNGRB Act and requires authorisation from it. The proviso then is meant to operate in an extremely restricted manner, i.e., to deal with entities *inter alia* that were engaged in laying, building, operating etc., *inter alia*, gas pipelines "*at the time when the Act came into force*". The proviso, unlike the main part of Section 16, was not intended to grant authorisation to entities which had not started any activity thus far. Such entities had to now apply for authorisation. In any case, by the combined operation of Sections 16 and 17, the proviso to Section 16 is not unqualified - the "deemed authorisation" clause is subject to other provisions of Chapter IV. Section 17 is one such provision under Chapter IV. As noticed previously, this provision brings home clearly that only

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[30](1961) 2 SCR 295.
[31](1979) 4 SCC 85.

Central Government authorised entities were deemed to have been authorised. The omission of any reference to authorisation in Section 16 is significant because the qualifier for application of the proviso is that it was subject to other provisions of the chapter. The scheme of Section 17 intrinsically classifies the two, i.e. Central Government authorised entities, and others. The underlying basis for this statutory classification is that only entities which had been cleared or authorised by the Central Government prior to the coming into force of the Act were deemed to have authorization under the Act, and therefore, had to furnish certain details. As with regard to the others, i.e., entities not authorised by the Central Government, fresh applications were necessary [Section 17(1) and Section 17(2)] which were to be assessed by the Board on a case-by-case basis and in accordance with uniform standards.

76. The other reason for holding that the deeming fiction of authorization in the proviso to Section 16 does not apply to all entities, is that the clause is *"subject to other provisions of this chapter"*. This means that not all entities can be termed as "deemed authorized" entities. In *K.R.C.S. Balakrishna Chetty v. State of Madras*[32] this Court explained the use of the term *"subject to"* in the following manner:

> *"The use of the words "subject to" has reference to effectuating the intention of the law and the correct meaning, in our opinion, is "conditional upon".*

77. In *Ashok Leyland Ltd. v. State of Tamil Nadu*[33] this Court held that *"subject to"* is an expression of subordination:

> *"93. Furthermore, the expression 'subject to' must be given effect to.*
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> *94. In Black's Law Dictionary, Fifth Edition at page 1278 the expression "Subject to" has been defined as under:*
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> *"Liable, subordinate, subservient, inferior, obedient to; governed or affected by; provided that; provided, answerable for. Homan v. Employers Reinsurance Corporation, 345 Mo. 650, 136 S.W. 2d 289, 302"*

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[32]1961 (2) SCR 736.
[33](2004) 3 SCC 1.

78. Therefore, if one reads the proviso to Section 16 with the proviso to Sections 17(1) and Section 17(2) the former (i.e., proviso to Section 16) only states that entities that had been previously authorized by the Central Government could claim deemed authorization. The *rationale* for this is that the provisos to Section 17(1) and 17(2) merely require such entities (as were authorized by the Central Government prior to coming into force of PNGRB Act) to *intimate certain details* to the PNGRB - but do not require any fresh authorization. This distinction i.e., between authorization and intimation is crucial because it states that entities which received Central Government authorization before the commencement of the Act, and which had started to lay, build or operate CGD networks were deemed to be authorized under the PNGRB Act. This is the only logical and reasonable construction, given this Court's declaration in *Special Reference* (supra), that States did not have the competence to enact any laws or frame policies in respect of natural gas. It was the Parliament alone that could do so. The Court also declared *ultra vires* the Gujarat enactment, in light of this reasoning. Parliament was conscious that authorizations for CGD networks were being granted by the Central Government, and it sought to save only these authorizations, which had the support of the Constitution. Authorizations granted by state governments were not legal and did not have the support of the Constitution, and such authorizations were to be obtained afresh, under the regime put in place by the PNGRB Act.

79. The appellant's reliance on Section 17(4), to urge that the PNGRB has limited options and can either reject an application seeking authorization or allow it, and that there is no statutory indication apart from the deemed authorization under the proviso to Section 16, is without basis. In the overall scheme of the PNGRB Act, what appears clearly is that:

(1) After coming into force of the PNGRB Act, all activities covered by it (refining, processing, storage, transportation, distribution, marketing and sale of petroleum products and natural gas) can be carried out only with the authorization of the PNGRB, in accordance with provisions of the Act;

(2) The PNGRB's functions are delineated in Section 11 which include granting authorization to entities to lay, build, operate or expand common carriers, contract carriers or local natural gas distribution network;

(3) The PNGRB's functions also include the control through regulation, access to city or local natural gas distribution network to ensure fair trade and competition amongst entities;

(4) The PNGRB has adjudicatory powers under Section 12 and 24;

(5) The PNGRB has regulation making powers under Sections 11 and 61;

(6) Pursuant to its regulatory powers, and regulation making powers, PNGRB in fact has framed several regulations[34], *including* the CGD Regulations of 2008;

(7) Sections 16 and 17 are of crucial importance because they manifest Parliament's intention of meting out uniform treatment, in regard to entities that were in the process of laying, building, operating or expanding any city or local natural gas distribution network or any pipeline as a common carrier or contract carrier; and

(8) Section 17 (4) itself alludes to the policies of the Central Government, which are to apply and guide the PNGRB, while considering applications under Section 17 (2).

80. As discussed earlier, petroleum was always within the exclusive domain of the Parliament and Central Government. The enactment of the Petroleum Act, 1934 (pre-Constitutional law) and more importantly, the Petroleum and Natural Gas Rules, 1959 (hereafter called "the 1959 Rules") shows that Union primacy always existed in this field. The 1959 Rules, by Rule 3(i) defined *"natural gas"* as gas obtained from

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[34]*Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations, 2008; Petroleum and Natural Gas Regulatory Board (Procedure for Development of Technical Standards and Specifications including Safety Standards) Regulations, 2009; Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand Petroleum and Petroleum Products Pipelines) Regulations, 2010; Petroleum and Natural Gas Regulatory Board (Procedure for Development of Technical Standards and Specifications including Safety Standards) Regulations, 2009; Petroleum and Natural Gas Regulatory Board (Gas Exchange)Regulations, 2020*

bore-holes and consisting primarily of hydrocarbons. Importantly, *"petroleum"* in Rule 3(k) is defined as *"naturally occurring hydrocarbons in a free State whether in the form of natural gas or in a liquid viscous or solid form."* By Rule 4, all prospecting or mining except under a license or a lease was prohibited. The Petroleum Rules, 2002in Part V brought in a regime (Rules 87-101) for regulation and transportation of petroleum, again defined broadly to include natural gas. Rule 89 is cast in negative terms and expressly prohibits pipelines without prior approval:

> *"89. Approval of the design and route of the pipeline-No pipeline shall be laid without the prior written approval of the Chief Controller of the route of the pipeline, and of the design, construction and working thereof."*

81. Rule 90 provides certain technical specifications with respect to design of the pipeline as well as location; Rule 91 states that pipelines are to be laid in the most favourable route, avoiding obstructions and areas which have no unusual external conditions. Other criterion such as hydrostatic testing, protection against corrosion, laying pipelines underground, shutting down of pipelines, checking of gauges, provisions for alterations, additions, repairs and maintenance, and the power of inspection and examination as well as obligation to report accidents are provided for.

82. The *Policy for Development of Natural Gas Pipeline and City or Local Natural Gas Distribution Network, 2006* was framed by the Central Government. In para 1.3, the policy's objective is to promote public and private sector investment in natural gas pipelines and city or local natural gas distribution networks to facilitate open access to all entities to the pipeline network on a non-discriminatory network, promotion of competition amongst entities to prevent abuse of dominant position and to secure consumer interest in terms of gas availability and reasonable tariff for natural gas pipeline and city or local natural gas distribution networks. Para 6.1 states that any entity wanting to build, operate or expand common or contract carrier gas pipelines has to undertake that if it has business interest in related areas of gas marketing or city or local gas distribution network or has a related entity (a parent company, group company, JV, subsidiary etc.), it would ensure an arm's length relationship between pipeline activity and those activities. Such entities were obliged

to follow an Affiliate Code of Conduct, and the PNGRB had the right to enquire about managerial structure/ownership patterns and accounts of the authorized entity and its related entities to ensure that such relationship is at arm's length. Para 6.2envisions that authorized entities will have transportation of natural gas as their sole business activity and not have any business interests in gas marketing or city or local gas distribution networks. Para 6.3 aims at ensuring that pipeline ownership would not provide any competitive advantage to any gas seller and abuse of market power in establishing an efficient gas grid with open access on a non-discriminatory basis. By reason of para 7.1, gas grid connectivity

> *"[I]s with a view to harmonizing the operations and providing interconnectivity to different gas pipelines. For the development of the gas sector in India, including the establishment of Gas Grid with open market access for all players on a non-discriminatory basis, a comprehensive set of technical requirements and safety standards as well as a code for gas grid connectivity, to be developed by the Board, is necessary to ensure operational compatibility. Adherence to such standards and codes will be an integral condition of Authorization for gas pipelines as well as city or local natural gas distribution networks. The Board may refuse access to the gas grid on technical considerations."*

In para 9, the Central Government or PNGRB, in consultation with the Oil Industry Safety Directorate (hereafter called "OISD"), has to

> *"[R]eview the existing rules & standards, their applicability and develop a comprehensive set of technical & HSE standards in respect of natural gas transmission & distribution pipelines and city or local natural gas distribution network. These standards shall cover technical & HSE parameters in design, laying, operation & maintenance of natural gas pipelines and city or local natural gas distribution networks including associated facilities & equipment considering, inter alia gas grid connectivity issues. The Board shall lay down the standards as per Section 11 (i) of the Act to ensure seamless development of natural gas pipeline & distribution infrastructure in the country."*

83. All these- the objectives and the provisions of the PNGRB Act and the Policy of 2006 - afford sufficient guidance to the Board, along with the regulations framed by it, for deciding which applicant entities can be granted authorization, and if so, to what extent of their respective projects. The decision by the PNGRB under Section 17(4) therefore, to decide upon any authorization application is not based on its

consideration of the subjective factors relating to each application, but on an overall analysis of all the above relevant factors.

84. Adani's contention as indeed that of the interveners with respect to orders of this Court (especially made in the public interest litigation, in *M.C. Mehta*) or authorizations granted by the State cannot be read as overriding or in any manner undermining the provisions of the PNGRB Act in terms of the opinion of this Court, in *In re. Special Reference 2001* as well as the decision in *Association of Natural Gas &Ors.* (supra). Parliament had exclusive competence to enact laws and the Union had the corresponding sole executive powers to frame policies in relation to petroleum and petroleum products. As noticed in the previous part of the judgment, though the Petroleum Act, 1934 continued as a "law in force", was used several times by framing specific rules in relation to various aspects, containing a legal *regime* for regulation of laying of gas pipelines, etc. for which Central authorities always exercised exclusive control prior to the enactment of the PNGRB Act. The Act creates a modern-day regulation intended to create All-India guidelines and policies for due implementation, ensuring that market dominance in the field is not abused and fairness in dealings of various entities takes place. PNGRB Act was intended to have primacy in regard to grant of authorizations on the subject over which it exercises jurisdiction. To facilitate due exercise of its jurisdiction, same role or space has been accorded to the States – which is indicated again in clear terms under the Central Government's policy of 2006. The role of the states in granting no objection is limited taking into account local factors - no more no less. In these circumstances, any contention on behalf of Adani or the intervenors to the effect that no objection had been granted to them by a State authority or orders of Court had permitted any entity to either function or continue to function does not *per se* amount to an authorization in terms of the PNGRB Act. It does not also follow that authorization of the Central Government can be assumed. Such entities had to secure authorization, under the PNGRB Act, in respect of any area, after coming into force of the Act.

85. Having regard to all these, this Court is of the opinion that the previous ruling in *Adani Gas* (supra) did not correctly interpret the law. It did not discuss whether the "deemed authorisation" (in the proviso to Section 16) was qualified or unqualified. The previous ruling in *Adani Gas*(supra)also did not notice the important condition that the deemed authorization clause applied *subject to* other provisions of Chapter IV, including Section 17; and lastly it overlooked the decisive ruling of a five-judge bench in *Special Reference*(supra). Accordingly, the interpretation of Section 16 and the deemed authorization clause in its proviso, in *Adani Gas* is held to be incorrect. The judgment in *Adani Gas* is therefore overruled. For the same reasons, the submissions of the appellants as well as the supporting interveners are rejected.

Re Point No. 2: Validity of Regulation 18

86. As discussed in the previous section of this judgment, by virtue of Sections 16 and 17, only those entities that were carrying out CGD activities, which had been authorized prior to the appointed day, are deemed to be authorized under the PNGRB Act. Section 19 provides that the Board may grant authorization either on the basis of an application for authorization, or on a *suo motu* basis, where the Board finds it necessary or expedient to lay, build, operate or expand a city or local natural gas distribution network in a specified geographic area.

87. In respect of entities that seek to set up such operations after the Act came into effect, Regulation 4 provides as follows:

> *"**4. Initiation of proposal through expression of interest route or suo-motu by Board.***
>
> *(1) An entity desirous of laying, building, operating or expanding a CGD network shall submit an expression of interest to the Board in the form of an application at Schedule B alongwith an application fee as specified under the Petroleum and Natural Gas Regulatory Board (Levy of Fee and Other Charges) Regulations, 2007.*
>
> *(2) The Board may suo-motu invite bids from entities interested in laying, building, operating or expanding a CGD network for any specified geographical area.*

88. Therefore, such entities are required to either submit an expression of interest, followed by acceptance of the proposal and invitation of bids by the Board (under

Regulation 5(5)), or bid for authorization when such bids are invited *suo-motu* by the Board (under Regulation 6). Entities that satisfy all the requisite conditions shall be granted authorization, under Regulation 10.

89. Regulation 17 provides for the further monitoring and regulation of entities that have prior authorization by the Central Government, which are deemed to be authorized under the PNGRB Act. The regulation imposes requirements to comply with all terms and conditions of the authorization, and relevant technical standards and specifications, etc. The Board may grant exclusivity to such entities; the Board also fixes transportation tariffs. Regulation 18 pertains to entities that were carrying out CGD activities prior to the coming into effect of the PNGRB Act, but were not authorized by the Central Government. Such entities do not enjoy "deemed authorization" under the Act; they are required to apply for fresh authorization under the provisions of Regulation 18.

90. The PNGRB Act and Regulations, thus create three categories of entities for the different ways in which authorization can be obtained: (1) Entities authorized by the Central Government prior to the appointed day, are deemed to be authorized, and are merely required to submit certain information in the relevant forms; (2) Entities that were carrying out CGD activities, but were not authorized by the Central Government, are required to apply for fresh authorization under Regulation 18; (3) Entities that seek to set up CGD activities after the appointed day, i.e., all entities seeking to set up operations afresh, after the PNGRB Act came into effect, would be required to either submit an expression of interest, followed by participation in the bidding process, or participate in the *suo-motu* invitation of bids by the PNGRB.

91. Regulation 18 is part of the CGD Regulations framed under Section 61 of the PNGRB Act. This regulation, on a plain reading, applies to entities not authorised by the Central Government for laying, building, operating or expanding pipelines beyond the appointed date. Regulation 18(1) requires such entities (who did not possess Central Government authorisation as on the appointed date) to apply immediately for obtaining authorisation in the format prescribed in Schedule I to the

CGD Regulations. Regulation 18(2) then prescribes that the PNGRB *"may"* take into consideration the criteria or conditions spelt out in clauses (a) to (j). Regulation 18(2)(a) speaks of the minimum eligibility criteria specified in Regulation 5(6)(a) to (e) and (i); Regulation 18(2)(b) states that entities which were not registered as companies at the time of coming into force of the Regulations were to undertake to become companies; Regulation 18(2)(c) states that a satisfactory assessment of the actual physical progress made and the financial commitment in respect of it immediately before the appointed date in comparison with the entities DFR appraised by the financial institutions funding the project may be taken into consideration by the PNGRB for grant of authorization. If the project is not funded, the Board could appraise the DFR which had to clearly indicate the specific geographical area of the project and also specify the coverage for CNG and PNG. Regulation 18(2)(d) prescribes that the actual physical progress and the financial demand referred to in clause (c) would mean at least 25% of the capital expenditure identified for the CGD Project in terms of DFR immediately before the appointed date. Apart from these, the entity should have arranged by way of acquisition or lease, lands for the next project (Clause (e)). The PNGRB reserves the right to have the actual physical progress certified and, having regard to the progress achieved, authorise the entity only for the authorised area as per the (i) geographical area in its DFR; or (ii) geographical area actually covered under implementation till the appointed day; or (iii) any area as specified by the Board(Clause (f)). The Board has to be satisfied of the adequacy of the entities 'capacities to meet the applicable technical standard and safety standards specified in the regulations or the technical standards, including the quality of safety standards. Clause (g) also refers to Clause 15. Regulation 18(3) is important because it obliges overall evaluation and is in the following terms:

> *"Regulation 18 (3) - the evaluation of the application in terms of the Clauses (a) to (j) shall be done in totality considering the composite nature and inter-linkages of the criteria."*

92. Apart from sub-regulation (3), it is also noteworthy that Regulation 18 applies only to one category, i.e., entities which were not authorised by the Central Government prior to coming into force of the PNGRB Act. These were a limited number of entities, a vanishing *species*, so to say, as they were not expected to continue without authorization. There is some logic in interpreting Regulation 18 in the light of the proviso to Section 16 and the main parts of Section 17. Before the coming into force of the PNGRB Act, the existing norms for grant of approval or authorisation evolved by the Central Government were found in the Petroleum Act, Petroleum Rules as well as the existing policies, i.e. the policy of 2002 and the later policy of 2006. Keeping this in mind, Regulation 18 was meant to cater to an extremely limited class of applicants and the intention of framing this regulation was to apply it to those entities whose projects existed and whose projects were unknown to the central government. The ruling in *Special Reference* (supra) was only a declaration of what always was the correct legal position, i.e., that Parliament had exclusive legislative competence to enact laws in relation to petroleum, mineral oil and oil and natural gas and that the Central Government had exclusive control over the subject matter. The infraction of this constitutional position by the States, some of which had granted authorizations, would mean that such entities which had been authorised by the State but not the Central Government, in all likelihood would not have conformed to the overall policy of the Central Government with respect to *inter alia* laying, operating, and building of natural gas pipelines and city or local natural gas distribution networks.

93. Regulation 18 was meant to provide a uniform standard whereby such State authorised entities' projects could be evaluated and granted authorization, if need be. Apart from technical and safety standards which the regulation necessitated, final standards were prescribed; common yardstick of 25% of actual physical progress with corresponding financial commitment was, therefore, insisted upon.

94. The PNGRB has been granted the flexibility of either approving the entire project or curtailing it or approving that part of the project which is actually

performed. In the opinion of this Court, this discretion is essential inasmuch as the PNGRB had to consider the overall position of not only the area or areas in question, but the feasibility of the concerned network and its integration with the state and national network. Regulation 18 is to be seen, therefore, as a special feature to deal with the applications made by entities not authorised by the Central Government. With the coming into force of Section 16 and the conclusion of evaluation of all those existing entities, there would be little or no scope for applying Regulation 18. This is also evident from Regulation 17 which reads as follows:

> ***"17. Entity authorized by the Central Government for laying, building, operating or expanding CGD network before the appointed day.***
> *(1) The entity shall submit relevant information along with supporting documents in the form as in Schedule H within a period of one hundred and eighty days from the appointed day.*
>
> *(2) The entity shall abide by the terms and conditions of the authorization by the Central Government including obligations, if any, imposed by the Central Government.*
>
> *(3) The entity shall abide by the relevant regulations for technical standards and specifications, including safety standards and the quality of service standards****.*
>
> *(4) The Board may consider grant of exclusivity on such terms and conditions as per the provisions in the Petroleum and Natural Gas Regulatory Board (Exclusivity for City or Local Natural Gas Distribution Networks) Regulations, 2008.*
>
> *(5) The transportation tariff shall be as determined by the Board as per regulation under section 22 of the Petroleum and Natural Gas Regulatory Board Act, 2006.*
>
> *(6) The activities of the entity may be subject to such other regulations as may be applicable as per the provisions of the Act."*

95. The ruling cited, i.e., *Adani Gas*(supra)in support of the submission noticed in the previous part of the judgement stated that Regulation 18(2) is not couched in mandatory terms and it held that:

> *"…but no doubt the same would be relevant considerations having regard to the express terms of regulation 18(3) which clearly spelt out that PNGRB has to take into consideration an application and test whether all criteria are satisfied having*

> *regard to their inter-linkages. There can be no room for doubt that these conditions were meant to be mandatory."*

In view of the above scheme of the regulations, this Court would first consider whether the phrase *"may take into consideration"* in Regulation 18 (2), before setting out the various criteria, is compulsive or only by way of guidance. In *Adani Gas (supra)*, this Court held that the term was not mandatory, and that the PNGRB had to nevertheless be generally guided by the various criteria in clauses (a) to (j).

96. As noticed earlier, the PNGRB Act is intended to regulate all activities post extraction – i.e., refining, processing, storage, transport, distribution, marketing and sale. Power, when conferred, has to be construed in the overall context of the parent statute, and the specific powers conferred on the regulatory agency. Section 11 and Section 61 of the PNGRB Act confer regulation making powers on the Board. It is in the exercise of this power that Regulation 18 was framed, for the application of uniform criteria to consider applications for authorization, made by entities which *did not have Central Government authorization* on the appointed date. It is in this context that one has to consider the interpretation of the phrase *"may take into consideration"*.

97. In *Sri Sitaram Sugar Company Limited v. Union of India*[35], this Court had to consider and interpret the expression *"having regard to"* in the statute, which conferred power upon the government to determine the price of sugar. This Court observed as follows:

> *"29. (....) Be that as it may, the expression "having regard to" must be understood in the context in which it is used in the statute. See Union of India v. Kamlabhai Harjiwandas Parekh [(1968) 1 SCR 463, 471]. These words do not mean that the government cannot, after taking into account the matters mentioned in clauses (a) to (d), consider any other matter which may be relevant. The expression is not "having regard only to" but "having regard to". These words are not a fetter; they are not words of limitation, but of general guidance to make an estimate. The government must, of course, address itself to the questions to which it must have regard, and, having done so, it is for the government to determine what it is empowered to determine with reference to what it reasonably considers to be relevant for the purpose. The Judicial Committee*

[35](1990) 3 SCC 223.

in CIT v. Williamson Diamonds Ltd. [LR 1958 AC 41, 49 : (1957) 3 WLR 663] observed with reference to the expression "having regard to": (AC p. 49)

> *"The form of words used no doubt lends itself to the suggestion that regard should be paid only to the two matters mentioned, but it appears to their Lordships that it is impossible to arrive at a conclusion as to reasonableness by considering the two matters mentioned isolated from other relevant factors. Moreover, the statute does not say "having regard only" to losses previously incurred by the company and to the smallness of the profits made. No answer, which can be said to be in any measure adequate, can be given to the question of "unreasonableness" by considering these two matters alone."*

See CIT v. Gungadhar Banerjee and Co. (P) Ltd. [(1965) 3 SCR 439, 444-45 : AIR 1965 SC 1977 : 57 ITR 176] See also Saraswati Industrial Syndicate Ltd. v. Union of India [(1974) 2 SCC 630, 633 : (1975) 1 SCR 956, 959]. In State of Karnataka v. Ranganatha Reddy [(1977) 4 SCC 471, 488 : (1978) 1 SCR 641, 657-58] this Court stated: (SCC p. 488, para 23 : SCR pp. 657-58)

"The content and purport of the expressions "having regard to" and "shall have regard to" have been the subject matter of consideration in various decisions of the courts in England as also in this country. We may refer only to a few. In Illingworth v. Walmsley [(1900) 2 QB 142 : 16 TLR 281] it was held by the Court of Appeal, to quote a few words from the judgment of Romer C.J. at page 144:

> *"All that clause 2 means is that the tribunal assessing the compensation is to bear in mind and have regard to the average weekly wages earned before and after the accident respectively. Bearing that in mind, a limit is placed on the amount of compensation that may be awarded ...."*

****

"29. (...) It is worthwhile to quote a few words from the judgment of Fletcher Moulton, L.J. at page 458. Under the phrase 'Regard may be had to' the facts which the courts may thus take cognizance of are to be 'a guide, and not a fetter'. This Court speaking through one of us (Beg, J., as he then was), has expressed the same opinion in the case of Saraswati Industrial Syndicate Ltd. v. Union of India [(1965) 3 SCR 439, 444-45 : AIR 1965 SC 1977 : 57 ITR 176]. Says the learned Judge at page 959 (SCC p. 633, para 3):'The expression "having regard to" only obliges the government to consider as relevant data material to which it must have regard'."

In State of U.P. v. Renusagar Power Co. [(1988) 4 SCC 59: AIR 1988 SC 1737] , one of us (Mukharji, J., as he then was) observed:

> *"The expression "having regard to" only obliges the government to consider as relevant data material to which it must have regard...".*

In O'May v. City of London Real Property Co. Ltd. [(1982) 1 All ER 660, 665 : (1982) 2 WLR 407 (HL)] , Lord Hailsham stated:

> *"A certain amount of discussion took place in argument as to the meaning of 'having regard to' in Section 35. Despite the fact that the*

> *phrase has only just been used by the draftsman of Section 34 in an almost mandatory sense, I do not in any way suggest that the court is intended or should in any way attempt to bind the parties to the terms of the current tenancy in any permanent form....".*

> *30. The words "having regard to" in the sub-section are the legislative instruction for the general guidance of the government in determining the price of sugar. They are not strictly mandatory, but in essence directory. The reasonableness of the order made by the government in exercise of its power under sub-section (3-C) will, of course, be tested by asking the question whether or not the matters mentioned in clauses (a) to (d) have been generally considered by the government in making its estimate of the price, but the court will not strictly scrutinise the extent to which those matters or any other matters have been taken into account. There is sufficient compliance with the sub-section, if the government has addressed its mind to the factors mentioned in clauses (a) to (d), amongst other factors which the government may reasonably consider to be relevant, and has come to a conclusion, which any reasonable person, placed in the position of the government, would have come to. (...)"*

98. In the present case, having regard to the contextual setting of Regulation 18, the expression *"may take into consideration"* cannot be placed in the straightjacket of either a mandate or a directory rule. There are numerous decisions which hold that "may" could mean "shall" and vice versa; much depends upon the context and object of the provision as well as its statutory setting. As discussed by this Court in *Shri Sitaram Sugar Company* (supra) the phrase *"having regard to"* followed by enumeration of criteria, is the legislature's or rule maker's indicator of how discretion is to be exercised. Likewise, the terms *"may consider"* or *"may take into consideration"* or even the enumeration of criteria prefaced by the phrase *"it shall be lawful to consider"* are methods by which the law or rule maker would like the authority to exercise discretion, taking into consideration certain criteria while discharging its duties.

99. In the present case, Regulation 18(3) specifically states that *"evaluation of the application in terms of the Clauses (a) to (j) shall be done in totality considering the composite nature and inter-linkages of the criteria."* This, coupled with the listing of *"any other criteria considered as relevant by the Board based on the examination of the application."*(Regulation 18 (2) (j)), in the opinion of this Court, brings more precision to the task of evaluation of applications (preferred by entities which did not

possess Central authorization when the Act came into force) by the PNGRB. If one keeps in mind the fact that all enumerated criteria deal with distinct matters, some of them technical, and others with financial capability of the applicant entity, the PNGRB is duty bound to further consider how and to what extent the applicant's project- ongoing, or at a nascent stage - had progressed. This is because *"laying, building, operating or expanding",* covers all stages i.e., from conceptualization and initial work, to advanced execution of a project, with deployment of optimal men, material and resources. Therefore, one criterion prescribed is the 25% threshold for execution of ongoing work, as well as expending such percentage of finance. The flexibility given to the PNGRB at the stage of evaluation is evident from Regulation 18(2)(f)(iii) which empowers it to specify the geographical area for which authorization is to be given to an entity, irrespective of the area specified in the DFR, or even the actual area *"covered under implementation till the appointed day".* All these mean that the PNGRB is to be guided by the composite of factors enumerated in Regulation 18(2) while evaluating applications for authorization; how important one factor is, and the appropriate weightage to be given to it, depends, as required by Regulation 18(3) on the *"totality"* of all facts *"considering the composite nature and inter-linkages of the criteria."* It is therefore, held that all clauses of Regulation 18(2) have to be considered, and wherever necessary, "*any other relevant criteria"* (Reg. 18 (2) (j)) which means factors relevant for the purposes of the Act, having regard to its objects and purposes. The PNGRB also has to consider the composite nature and *inter-linkages* of the criteria.

100. In regard to the validity of Regulation 18(2), the appellant's argument is that the regulation is *ultra vires,* because there is no substantive provision giving guidance, leaving the power to reject applications at the whims of the PNGRB, which can pick and choose any or some criterion and ignore the rest. As far as the latter aspect goes, this Court has held above, that all criteria have to be considered, having regard to their inter-linkages. Therefore, the question of picking and choosing one criterion, and ignoring others does not arise. Much would depend on the individual

facts of the case, the weight given to one or a set of criteria. This *per se* does not render the power (under Regulation 18 (2)) arbitrary. In the particular facts of any case, it is open to an aggrieved applicant to show *the exercise of power* is arbitrary, and seek judicial review. As held by this Court in *Collector of Customs v Nathella Sampathu Chetty*[36]:

> *"The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements."*

101. The challenge to the regulation on the ground of arbitrariness, and violation of Article 14, therefore, fails.

Point No. 2 Whether Regulation 18 is ultra vires the PNGRB Act

102. The next question is with respect to whether Regulation 18 is *ultra vires* the PNGRB Act. In *State of Tamil Nadu & Anr. v P. Krishnamurthy & Ors.*[37]this Court recollected the following principles while adjudging the validity of subordinate legislation, including regulations*:*

> *"15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognized that a subordinate legislation can be challenged under any of the following grounds:*
>
> *(a) Lack of legislative competence to make the subordinate legislation.*
>
> *(b) Violation of fundamental rights guaranteed under the Constitution of India.*
>
> *(c) Violation of any provision of the Constitution of India.*

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[36](1962) 3 SCR 786.
[37](2006) 4 SCC 517.

(d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules)

16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non- conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity."

103. This Court, in *PTC India Ltd. v. Central Electricity Regulatory Commission*[38], characterised regulation making as legislative:

"49. On the above analysis of various sections of the 2003 Act, we find that the decision-making and regulation-making functions are both assigned to CERC. Law comes into existence not only through legislation but also by regulation and litigation. Laws from all three sources are binding. According to Professor Wade, "between legislative and administrative functions we have regulatory functions". A statutory instrument, such as a rule or regulation, emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also a part of administrative process resembling a judicial decision by a court of law. (See Shri Sitaram Sugar Co. Ltd. v. Union of India [(1990) 3 SCC 223])

104. In *State of U.P v Renusagar Power Co.*[39] this Court held that

"If the exercise of power is in the nature of subordinate legislation, the exercise must conform to the provisions of the statute."

In *Global Energy Ltd. v. Central Electricity Regulatory Commission*[40], a rule disqualifying a company or entity from applying for a license under the Electricity Act, 2003, was impugned as *ultra vires.* The rule, setting out disqualifications *inter*

[38](2010) 4 SCC 603.
[39](1988) 4 SCC 59.
[40](2009) 15 SCC 570.

alia, precluded an entity whose partners, promoters, directors or associates were *"involved in any legal proceedings, and in the opinion of the Commission grant of licence in the circumstances, may adversely affect the interest of the electricity sector of the consumers";* or *"is not considered a fit and proper person for the grant of licence for any other reason to be recorded in writing"* from the applying. The phrase *"not considered fit"* was amplified in the explanation to include *"(i) financial integrity of the applicant; (ii) his competence; (iii) his reputation and character; and (iv) his efficiency and honesty."* This Court proceeded to analyse the challenge to the rule, and observed as follows:

> *"38. When a disqualification is provided, it is to operate at the threshold in respect of the players in the field of trading in electricity. When, however, a regulatory statute is sought to be enforced, the power of the authority to impose restrictions and conditions must be construed having regard to the purpose and object it seeks to achieve. Dealing in any manner with generation, distribution and supply and trading in electrical energy is vital for the economy of the country. The private players who are permitted or who are granted licence in this behalf may have to satisfy the conditions imposed. No doubt, such conditions must be reasonable. Concededly, the doctrine of proportionality may have to be invoked.*
>
> *39. The superior courts would ensure that the subordinate legislation has been framed within the four corners of the Act and is otherwise valid. The issue therefore which arises for our consideration is as to whether the delegation having been made for the purpose of carrying out the object, could the limitation be imposed for ascertaining as to whether the applicant is fit and proper person and disregarding his creditworthiness. There cannot be any doubt whatsoever that a statute cannot be vague and unreasonable.*
>
> ******** ********* ******
>
> *41. The question, which, however, falls for our consideration is as to whether the purported legislative policy is valid or not. Such a question did not arise for consideration in Clariant [(2004) 8 SCC 524].*
>
> ******** ********* ******
>
> *43. A legislative policy providing for qualification or disqualification of a person for obtaining a trading licence should not be vague or uncertain. Parameters must be laid down therefor for determining the financial integrity, reputation, character, efficiency and honesty of the applicant. An Explanation appended to clause (f) of Regulation 6-A points out various aspects that may be considered while determining the said criteria. However, what should be the criteria in regard to financial integrity, character, reputation, etc. have not been defined. How and in what manner the said criteria are required to be ascertained have not been laid down, the criteria are subjective ones.*
>
> ******** ********* ******

> *44. A disqualifying statute, in our opinion, must be definite and not uncertain; it should not be ambiguous or vague. Requisite guidelines in respect thereof should be laid down under the statute itself. It is well settled that essential legislative function cannot be delegated.*
>
> ******** ********* ******
>
> *47. The factors enumerated in the Explanation appended to clause (f) of Regulation 6-A are unlimited. For determining the question as to whether the applicant is a fit and proper person, a large number of factors may be taken into consideration. It for all intent and purport would be more than the technical requirement, capital adequacy requirement and creditworthiness for being an "electricity trader" as envisaged under Section 52 of the Act. An applicant usually would be a new applicant. It is possible that there had been no dealings by and between the applicant and the licensor. Each one of the criteria laid down in the Explanation refers to creditworthiness.*
>
> ******** ********* ******
>
> *51. Regulation 6-A in effect confers powers/discretion on matters of licensing even in public hearing. Such relevant factors which provide for the criteria laid down in Regulation 6-A could be brought on record. Section 15, however, empowers the Commission to specify the form and manner of the application and the fees that is required to be attached. The parliamentary object must be read in the context of the Preamble."*

105. Sections 11 and 61 of the PNGRB Act contain regulation making powers. Under Section 11(c)(ii) the Board has power to authorize entities to *"lay, build, operate or expand city or local natural gas distribution networks".* By Section 11(e)(iii) PNGRB is empowered to frame regulations to *"access to city or local natural gas distribution network so as to ensure fair trade and competition amongst entities as per pipeline access code".* By Section 11(f)(iv) it is enjoined to ensure *"equitable distribution of petroleum and petroleum products".* Section 11(i) empowers the Board to:

> *"(i) lay down, by regulations, the technical standards and specifications including safety standards in activities relating to petroleum, petroleum products and natural gas, including the construction and operation of pipeline and infrastructure projects related to downstream petroleum and natural gas sector."*

All these regulatory powers, coupled with the general power under Section 61(1) to frame regulations are, in the opinion of this court, sufficiently wide to clothe PNGRB with the power to frame Regulation 18. Furthermore, Regulation 18 is to be considered as applicable to a specific class of entities- by their nature, dwindling in numbers, i.e., entities which had not secured Central Government authorization or

approval before the PNGRB Act came into force. The regulation is meant to guide the Board to deal with applications of such categories of entities, which fall under proviso to Section 16 read with Section 17 (2), *and apply uniform standards.* These considerations further the objectives of the whole of PNGRB Act as well as enable the PNGRB to objectively perform its task, while deciding applications, exercising its powers under Section 17 (4).

106. In *Petroleum & Natural Gas Regulatory Board v. Indraprastha Gas Ltd.*[41] the issue involved was whether the PNGRB was empowered to fix or regulate the maximum retail price at which gas could be sold by entities such as Indraprastha Gas Ltd., to the consumers and further if the Board was empowered to fix any component of network tariff or compression charge for an entity having its own distribution network. This Court noticed the difference between city and local gas distribution networks. This Court considered the combined impact of Section 20 (declaring, laying, building, etc., of common carrier or contract carrier and city or local natural gas distribution network); Section 21(the right of first use by entities laying, building, operating or expanding a pipeline for transportation of petroleum and petroleum products or local natural gas distribution networks) and Section 22 (the Board's power to fix transportation tariff). This Court noted that Section 22 i.e., the power to fix tariff is "*subject to*" other provisions of the Act, including Section 11. Having regard to the specific provisions of Sections 22 and 11, it was then held that the Board lacks the power to fix tariffs, regulating maximum retail price at which gas could be sold to ultimate consumers. In that context, this Court, noticing the general regulation making power of the Board, under Section 61, held that

> *"53. In the case at hand, the Board has not been conferred such a power as per Section 11 of the Act. That is the legislative intent. Section 61 enables the Board to frame Regulations to carry out the purposes of the Act and certain specific aspects have been mentioned therein. Section 61 has to be read in the context of the statutory scheme. The regulatory provisions, needless to say, are to be read and applied keeping in view the nature and textual context of the enactment as that is the source of power. On a scanning of the entire Act and applying various*

[41](2015) 9 SCC 209.

> *principles, we find that the Act does not confer any such power on the Board and the expression "subject to" used in Section 22 makes it a conditional one. It has to yield to other provisions of the Act. The power to fix the tariff has not been given to the Board. In view of that the Board cannot frame a Regulation which will cover the area pertaining to determination of network tariff for city or local gas distribution network and compression charge for CNG. As the entire Regulation centres around the said subject, the said Regulation deserves to be declared ultra vires, and we do so."*

107. This Court is of the opinion that the above decision is of no assistance; on the contrary the observations with regard to the term "*subject to provisions of this Act*" in Section 22 - which are *in pari materia* with proviso to Section 16, reinforce the conclusions recorded previously. The power to fix tariffs, was held to extend only to *inter se* relationship between parties, to foster competition and fairness, and did not extend to regulating relationship between the entities and the end consumers. The observations with respect to Section 61 not authorizing the Board to make regulations relating to the tariff at which gas could be sold to customers, was made having regard to the specific manner in which tariffs were dealt with under Section 22, and the general objectives, of the enactment, i.e., to frame common standards to regulate the sector, promote competition and fairness. In the present case, the proviso to Section 16 is subject to other provisions, notably Section 17. The power to consider and make appropriate orders on applications for authorizations, are dependent upon the policies of the Central Government, in addition to the objectives of the Act.

108. In the present case, this Court notices no express provision of the kind which the Court in *Petroleum and Natural Gas Regulatory Board* (supra) had to deal with. Section 22 had to be construed restrictively, as not conferring the power to fix tariffs for products, delivered to the ultimate consumers, having regard to the objectives of the Act. On the other hand, Regulation 18 is essential for giving effect to the scheme of the Act, particularly Sections 16 and 17.

109. It is a well-established principle that the rule or regulation making authority cannot travel beyond the scope of the enabling parent Act. (*State of Karnataka* v. *H.*

Ganesh Kamath[42] ; *St. Johns Teachers Training Institute* v. *NCTE*[43]; *Tata Power Co. Ltd.* v. *Reliance Energy Ltd.*[44]). In the decision reported as *Indramani Pyarelal Gupta* v. *W.R. Natu* [45] this Court observed that the proper test applicable would be to consider whether the rule or subordinate legislation is "incompatible" with the purpose for which the body was created or the particular power is contra-indicated by a specific provision:

> *"[T]he proper rule of interpretation would be that unless the nature of the power is such as to be incompatible with the purpose for which the body is created, or unless the particular power is contra-indicated by any specific provision of the enactment bringing the body into existence, any power which would further the provisions of the Act could be legally conferred on it."*

110. In the present case, the purpose and objective for framing Regulation 18, is compatible to the overall objectives of the PNGRB Act. The various factors mentioned in it, provide an objective basis for the Board to consider the proper method of granting authorization, under Section 17 (2); in their absence, the PNGRB would have experienced difficulty in dealing with every application for authorization, on a case-by-case basis. More importantly the content of Regulation 18 is not contraindicated by any specific provision of the Act.

111. It is recognized, in certain decisions, by this Court, that regulations and rules framed in exercise of statutory empowerment, by expert statutory bodies, and regulatory authorities, should be interpreted deferentially, with the foreknowledge that such bodies know their task and are best equipped for it. In *Keshavlal Khemchand & Sons (P) Ltd. v. Union of India*[46] the validity of an amendment, in 2004 to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, defining, by Section 2 (o) "non-performing assets" was challenged, on the ground of excessive delegation, as it left the matter of defining

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[42]1983 (2) SCC 402.
[43]2003 (3) SCC 321.
[44](2009) 16 SCC 659.
[45]1963 (1) SCR 721.
[46](2015) 4 SCC 770.

what could be such non-performing assets, to the discretion of the Reserve Bank of India (hereafter called "RBI").After noting that the modern financial system is complex and requires

> *"[C]onstant monitoring on daily basis sometime even on minute to minute basis. In lieu of the importance and complexities, the Reserve Bank, the prime regulator of the Indian economy and banking system, has been issuing guidelines and directions from time to time not only to the banks but to various other financial institutions which are amenable to its jurisdiction."*

This Court upheld the amendment, as empowering an expert body, which is experienced and knowledgeable in the sector, to issue appropriate guidelines, and notifications.[47]In *Bharat Sanchar Nigam Ltd v Telecom Regulatory Authority of India*[48] this Court, dealing with the powers and functions of the Telecom Regulatory Authority of India (hereafter called "TRAI") observed as follows:

> *"The TRAI Act speaks of many players like the licensors and users, who do not come within the ambit of the term "service provider". If TRAI has to discharge its functions qua the licensors or users, then it will have to use powers under provisions other than Sections 12(4) and 13. Therefore, in exercise of power under Section 36(1), TRAI can make regulations which may empower it to issue directions of general character applicable to service providers and others and it cannot be said that by making regulations under Section 36(1) TRAI has encroached upon the field occupied by Sections 12(4) and 13 of the TRAI Act.*
>
> *100. In view of the above discussion and the propositions laid down in the judgments referred to in the preceding paragraphs, we hold that the power vested in TRAI under Section 36(1) to make regulations is wide and pervasive. The exercise of this power is only subject to the provisions of the TRAI Act and the rules framed under Section 35 thereof. There is no other limitation on the exercise of power by TRAI under Section 36(1). It is not controlled or limited by Section 36(2) or Sections 11, 12 and 13."*

A like approach is visible in the recent ruling in *Prakash Gupta v Securities and Exchange Board of India*[49]where it was observed, in relation to the Securities Exchange Board of India (hereafter called "SEBI") that:

> *"SEBI, as the regulator, is entrusted with diverse roles and functions including the power to regulate the securities' market, make regulations and to enforce the*

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[47]A similar approach was adopted by the Court in *Transmission Corporation of Andhra Pradesh Limited Vs. Rain Calcining Limited and Ors*. 2019 SCC OnLine SC 1537.
[48] 2014 (3) SCC 222.
[49] 2021 SCC OnLine SC 485.

> *provisions of the Act. Its functions have been recognized in a panoply of statutory provisions. Independent of initiating a prosecution, SEBI has been entrusted with wide ranging powers and functions including the power to investigate, to issue directions and levy penalties and make cease and desist orders. While the statute has entrusted the powers of compounding offences to SAT or to the Court, as the case may be, before which the proceedings are pending, the view of SEBI as an expert regulator must necessarily be borne in mind by the SAT and the Court, and would be entitled to a degree of deference."*

112. In the present case too, this Court is of the opinion that as the sectoral regulator, PNGRB is entrusted with the power to frame appropriate regulations to ensure the objectives of the Act, and also bring about fairness in the marketplace. It has sought to achieve that, through Regulation 18. For the above reasons, it is held that the challenge to Regulation 18 cannot succeed; Adani's arguments on this aspect are accordingly rejected.

Re Point No. 3:On whether the exclusion of the disputed areas from the authorisation granted to Adani was justified.

113. Gujarat Gas has urged before this Court that Adani should not be allowed to urge this aspect, since it took chances on multiple occasions, was always aware of its rights, and even availed itself of the opportunity to participate in the bidding for the disputed (excluded) areas, and therefore, cannot be allowed to question the decision of PNGRB to grant a license to it, for some areas. It was urged that having derived benefits from the authorization, it was not open to Adani to question the same order, after unsuccessfully bidding for the excluded areas. Adani countered this argument, by saying that the interpretation of provisions of the PNGRB Act, were in a state of flux, and that until the law was clearly laid down, it could not be said that Adani was aware of its legal rights so as to preclude its claims for the disputed areas.

114. The doctrine of approbate and reprobate is based on the principle of estoppel. Paraphrased, it implies that one cannot challenge a decision, from which an advantage is enjoyed. As was tersely stated in another context, an order *"cannot be*

partly good and partly bad like the curate's egg"[50]. In *Suzuki Parasrampuria Suitings (P) Ltd. v Official Liquidator*[51] this Court described the principle as one which does not permit a litigant to *"take contradictory stands in the same case. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands."* In *Amar Singh v Union of India*[52]this Court said held that

> *"50. This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions."*

In *Joint Action Committee of Air Line Pilots' Assn. of India* v. *DG of Civil Aviation*[53] it was observed that

> *'12. The doctrine of election is based on the rule of estoppel —the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. ... Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily."*

115. These decisions, applying the principle of "approbate and reprobate" precluding a party, which derives advantage from an order or statutory instrument, or even a contract, from assailing a part of it, later, have been applied in other judgments of this court, as well.[54]In *MBP v LGK*[55], the Queen's Bench Division (Technology and Construction Court), held that:

> *"53. Codrington v Codrington 1875 LR 7 HL at 866, Lord Chelmsford referred to the doctrine in these terms:*
>
> *"He who accepts a benefit under an instrument must adopt the whole of it, confirming to all its provisions and renouncing every right inconsistent with it.*

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[50]*Union of India v Shakuntala Gupta*,(2002) 10 *SCC* 694.
[51](2018) 10 SCC 707.
[52](2011) 7 SCC 69.
[53](2011) 5 SCC 435.
[54]*Union of India v. Assn. of Unified Telecom Service Providers of India*, (2020) 3 SCC 525; *Jal Mahal Resorts (P) Ltd.* v. *K.P. Sharma* (2014) 8 SCC 866.
[55][2020] EWHC 90 (TCC).

……. ……

56. More recently, the doctrine has been expressed more generally and in broader terms. Notably, in Express Newspapers Plc v News (UK) Ltd & others [1990] 1 WLR 1320, a breach of copyright case concerned with mutual copying of news stories, the Court held that the claimant's resistance to judgment on the counterclaim was wholly inconsistent with its own claim and that on the basis of the doctrine of approbation and reprobation the claimant was not permitted to put forward two inconsistent cases. When giving judgment, Sir Nicolas Browne-Wilkinson VC put the doctrine in these terms:

"The fact is that if the defences now being put forward by the defendants in relation to the "Daily Star" article are good defences to the Ogilvy case, they were and are equally good defences to the claim by the "Daily Express" against "Today" newspaper relating to the Bordes claim. I think that what Mr. Montgomery describes as what is sauce for the goose is sauce for the gander has a rather narrower legal manifestation. There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

To apply that general doctrine to the present case is, I accept, a novel extension. But, in my judgment, the principle is one of general application and if, as I think, justice so requires, there is no reason why it should not be applied in the present case."

57. Both parties also referred me to a number of cases in which the doctrine has been raised in the context of adjudication. In particular, I was referred to PT Building Services Ltd v ROK Build Ltd 2008 EWHC 3434 (TCC), Twintec Ltd v Volkerfitzpatrick Ltd 2014 EWHC 10 (TCC), Rob Purton t/a Richwood Interiors v Kilker Projects Ltd 2015 EWHC 2624 (TCC), RMP Construction Services Ltd v Chalcroft Ltd 2015 EWHC 3737 (TCC) , and Skymist Holdings Ltd v Grandlane Developments Ltd [2018] EHC 3504 (TCC). Save in relation to the PT Building Services case to which I refer further below, I have not found these decisions particularly pertinent. That is because they are concerned with challenges to an adjudicator's jurisdiction on enforcement based, for instance, on whether the underlying construction contract was mis-described by the referring party or on whether the contractual provision relied upon to make the referral existed at all. This is not such a case.

58. All the same, certain principles arise from the case law taken as a whole:

i) The first is that the approbating party must have elected, that is made his choice, clearly and unequivocally;

ii) The second is that it is usual but not necessary for the electing party to have taken a benefit from his election such as where he has taken a benefit under an instrument such as a will;

iii) Thirdly, the electing party's subsequent conduct must be inconsistent with his earlier election or approbation.

In essence, the doctrine is about preventing inconsistent conduct and ensuring a just outcome."

116. In this case, Adani applied for authorization, after being asked by the PNGRB, to do so, in 2008. Its application was not decided by the Board; in the meanwhile, on 12.07.2010, Section 16 came into force. On 18.10.2013, the PNGRB granted authorization to Adani's CGD network in Ahmedabad city and Dascroi area, excluding 18 CNG stations of HPCL, subject to certain conditions. The disputed area was excluded from this provisional authorization. Adani was asked to furnish the performance bond. By its letter dated 28.10.2013, Adani wrote to PNGRB, underlining its position that the excluded areas were under its operation, and stating that *"In view of the above facts, we are constrained to accept the Terms and Conditions of authorization".* Adani accepted the grant of authorization and furnished its performance bond, by letter dated 31.10.2013. PNGRB replied to Adani's letter on 28.11.2013 and stated that its position stood clarified by its previous letter (intimating authorization) of 18.10.2013. Adani furnished its performance bond, on 31.10.2013, after which PNGRB issued the authorization on 28.11.2013. After receiving the authorization, Adani accepted it expressing its protest by letter dated 09.12.2013. Though Adani argues, that acceptance of this authorization was under protest, the material on record shows that this protest was registered, in terms:

(a) After Adani furnished its performance bond, despite knowledge that the disputed areas were excluded; and

(b) At the time of acceptance of authorization.

117. By furnishing the performance bond, and accepting the authorization, Adani acted on the authorization. On 01.10.2015, the Board invited bids for development of CGD networks in those disputed (excluded) areas in Ahmedabad. Adani submitted its application-cum-bid documents in respect of these areas. The auction was conducted;

after Adani realized that it was unsuccessful, it articulated its grievance for exclusion of disputed areas from the authorization granted and approached the High Court, preferring a petition under Article 226 of the Constitution, Adani sought several reliefs; the main relief claimed was the quashing of the grant of authorization to Gujarat Gas, questioning the exclusion of the disputed areas by the earlier authorization dated 28.11.2013, and challenging the *vires* of Regulation 18. It is a matter of record that PNGRB granted authorization to Adani on 04.12.2012 in respect of the Khurja area, in UP. Given these background circumstances, its argument about lack of knowledge with respect to its rights, is indefensible. Adani accepted and acted on the authorization, by furnishing the performance bond, *after which* it registered its protest (in respect of excluded areas) with the PNGRB. Even then, it proceeded to act upon the authorization.

118. In view of the factual discussion, about the background leading to the grant of authorization to Adani, and its acceptance of that authorization, furnishing of performance bond, and proceeding to act upon it, *even participating in the auction for the excluded areas* there can be no manner of doubt that it acquiesced to the action of the PNGRB, and after having unsuccessfully entered its bid, sought to challenge the authorization. Clearly, this conduct amounts to approbating and reprobating. Adani's arguments about its lack of knowledge about its true rights, in the opinion of this Court, cannot be countenanced, because it knew and conformed to the procedure under the PNGRB Act, specifically, the requirements of the regulations, and Regulation 18, when it applied and obtained authorization in other areas in the country.

119. During the course of the hearing, Adani had made a two-fold factual argument. One, that PNGRB's order rejecting its application for authorization was unreasoned and that it became aware of the reasons only in 2016, when the Board filed its counter affidavit in the High Court. Two, that the reasons do not stand up to judicial scrutiny inasmuch as factually Adani fulfilled the criteria spelt out in Regulation 18 inasmuch

as it had completed 25% of works in relation to the pipelines which it had been awarded.

120. So far as the first contention goes, there can be no doubt that an administrative authority is expected to record its reasons for any decision that it takes. In *Union of India v. E.G. Namboodiri*[56], this Court observed in the context of the obligation of every statutory administrative authority or the executive government that such authority had "*no license to act arbitrarily.*" This Court further held that:

> "*No order of an administrative authority communicating its decision is rendered illegal on the ground of absence of reasons ex facie and it is not open to the Court to interfere with such orders merely on the ground of absence of reasons. However, it does not mean that the administrative authority is at liberty to pass orders without there being any reasons for the same. In governmental functioning, before any order is issued, the matter is considered at various levels and the reasons and opinion are contained in the comments on the file. The reasons contained in the file enable the competent authority to formulate its opinion. If the order as communicated to the government servant rejecting the representation is not contained in the reasons, the order cannot be held to be bad in law. If such an order is challenged in Court of law, it is not always open to the competent authority to place the reasons before the Court which may have led to the rejection of the representation. It is always open to an administrative authority to produce evidence aliunde before the Court to justify its action.*"

121. In the present case, the PNGRB has placed on record its reasons by way of an affidavit. There is nothing to indicate that prior to approaching the Court, Adani had sought the reasons for rejection of its authorization; all evidence points to the fact that after its initial protest, it did not represent further and the authorization granted to it, appears to have been acted upon. It even proceeded to accept the sequitur to the authorisation, i.e., PNGRB's jurisdiction to auction the disputed area by participating in it. In these circumstances, in the absence of any evidence disclosing that Adani had sought for reasons or even made any attempt to secure them through the RTI Act, its belated complaint that PNGRB's order rejecting the application for authorization is illegal for the reason that it is unreasoned, cannot be countenanced. PNGRB disclosed its reasons for the decision, before the High Court. Therefore, this argument is rejected as insubstantial.

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[56] (1991) 3 SCC 38.

122. On the second aspect, i.e., that Adani fulfilled the stipulations of 25% development of the areas, there is a serious dispute inasmuch as the PNGRB has argued that the application for authorization did not contain any map which included the disputed area. This is a factual aspect. Adani countered this by stating that the boundaries of Ahmedabad area which was subjected to initial authorization granted by the State which was held to be untenable [in view of the Constitution Bench decision *Special Reference (supra)*], included those areas. In the circumstances, this Court cannot proceed on the assumption that the disputed area was in fact included in the Adani's claim when it applied for authorization to the PNGRB. Adani has argued that it was granted authorization for the entire Ahmedabad District, including the said are as under the policy of the State Government, which could not have been curtailed by relying on a power under the CGD Authorizing Regulations. It was further stated that the fact that the disputed areas were put up for auction on 1.10.2015 with a larger area, showed that the areas were not economically viable on a "standalone" basis, and, consequently the basis for exclusion of the disputed areas from Adani's authorized area was unfounded. Adani disputed PNGRB's report dated 18.2.2011 and urged that on the date of inspection, it had an operational network, and it had augmented its network in the said areas of Ahmedabad by undertaking urgent capital works pursuant to PNGRB's permission dated 11.6.2009. The authorization was also impeached on the ground that for evaluating actual physical progress and the financial commitment under Regulation 18, presence as on the appointed day was required to be seen in the entire Ahmedabad District, and not apart thereof by curtailing the ambit of Section16. It was submitted that PNGRB failed to appreciate that while undertaking development work of any CGD network, including in the Ahmedabad District, initiation of development works began in a linear manner, generally where city gas station was first established for inlet gas, which then extended to whole of the area. Under current PNGRB norms, an authorized entity was given at least 8 years to develop charge areas. Adani submitted that

consequently, PNGRB wrongfully carved out areas out of the Ahmedabad District and tested each such area as per Regulation 18, which was not permissible.

123. PNGRB submitted that the state NOC only spoke of Ahmedabad Zone; in Adani's application to Board (for grant of authorization), there was no mention of the disputed areas, i.e., Sanand, Dholka and Bavla, and the NOC only spoke of Ahmedabad city. It was urged that clause (j) (iii) of application provided for submission of a map depicting the area proposed to be covered and upon examination, the PNGRB found that the area of distribution network disclosed in the map other than Ahmedabad area, was the area of Chadkhera and Motera. Correspondingly, the DFR submitted by Adani in terms of Clause (j) (iii) of the application also did not cover the area of Sanand, Bavla and Dholka. Thus, the application submitted under Regulation 18 for grant of authorization did not cover, the annexed map or the DFR, the area of Sanand, Bavla and Dholka. It was also urged that Adani admitted to this fact in its representation dated 16.05.2012under the caption 'authorization' detailed the infrastructure set up. This made no reference to Sanand, Bavla and Dholka. It was stated that the DFR was a constitutional document of a project. And the absence of these areas from DFR, submitted on 09.05.2008 (application date), showed that as on appointed day, Adani had not even conceived a project for laying distribution network in Sanand, Bavla and Dholka, and had thus not applied for an authorization for these areas.

124. PNGRB urged that the record showed that no distribution network was under construction in these areas as on the appointed date, and relied on minutes of hearing dated 27.08.2010; on site verification report dated 18.02.2011; asset block statement filed by Adani which showed that as on 01.10.2007 (appointed date) no construction work was in progress in any of the three disputed areas and CWIP for all three areas ended only on 31.03.2019.

125. The discussion in the preceding paragraphs would reveal that there is a serious dispute about the extent of development which Adani had undertaken, as on the appointed day. Adani's reliance on the extent of areas it was given by State

authorization, and whether the excluded areas, were part of it, is not a matter which can be settled by this Court. The PNGRB relies on the application form, filed by Adani, when seeking authorization under the CGD Regulations, to say that the disputed areas were not mentioned and were also not shown in the map. This is a factual aspect. Furthermore, as to the exact nature of development, when the inspection took place in 2011, again, there is a dispute. If one considers the fact that the enactment came into force in 2007, there were many ways in which Adani could have established the exact areas it had developed as on the appointed date, such as the account of expenditure it had maintained during the relevant years; the raw material procured, the personnel employed for that period, and the periodic progress it had achieved. The materials it furnished together with the inspection report and minutes of meeting were considered by the PNGRB when it granted authorization by excluding the disputed areas. Apart from the fact that these disputes are not fit to be adjudicated in writ proceedings, this Court is also cognizant of the fact that had Adani wished to agitate these issues, it could well have chosen the remedy of an appeal. Its choice of not preferring an appeal, and approaching the Court two years after the grant of authorization is an important factor that impels this Court to desist from embarking on a factual enquiry. It is relevant to notice here, that appeals against decisions of the PNGRB are provided under Section 33 of the Act before a tribunal[57]. The period of preferring appeals is 30 days from the date of the decision of the PNGRB (Section 33(2) of the Act). Adani's conscious choice to not exercise its option to appeal against the PNGRB's order, to the extent it excluded the disputed areas, is a crucial factor for this Court to refrain from examining the factual assertions made by it.

126. Before concluding, this Court would observe that although the position in law was clarified by the five judge Constitution Bench ruling in *Re Special Reference of 2001* as far back as in 2004, and pursuant to the PNGRB Act, the appellant

[57] The Appellate Tribunal established under Section 110 of the Electricity Act, 2003 (36 of 2003), by reason of Section 30 of the PNGRB Act.

consciously applied for authorization in 2008, later secured temporary authorization to complete certain maintenance works, and was denied authorization in 2013, by initiating the present litigation in 2015, it has in effect stalled the authorization given to Gujarat Gas. Its challenge to Regulation 18 was an instance of speculative litigation which has led to avoidable delay (and the consequential escalation of cost) of the development of the network, in question.

Conclusion

127. To sum up, the points of consideration raised are answered as follows:

a. On the scope of the "deemed authorisation" clause under the proviso to Section 16 of the PNGRB Act, the decision in *Adani Gas (supra)* is held to have laid down the law incorrectly, and is hereby overruled.

b. It is held that the "deemed authorization" clause under proviso to Section 16 is *subject to* other provisions of Chapter IV, including Section 17 and, further, that *only* entities granted authorization by the Central Government, fell in that category. As a sequitur, it is held that entities which had received authorization from *States*, had to seek authorization under the PNGRB Act, in terms of Section 17(2), and in compliance with the conditions spelt out under the CGD Regulations.

c. The role of the State in granting NOC is only supportive or collaborative, in terms of the Central Government's policy, of 2006, and cannot confer any advantage to any entity, which has to seek and be granted specific authorization in terms of the PNGRB Act on the merits of its application.

d. It is held that Regulation 18 is neither arbitrary, nor *ultra vires*. The objective underlying Regulation 18, is compatible with the overall objectives of the PNGRB Act. Regulation 18 is not contraindicated by any specific provision of the Act. Further, as a sectoral regulator, PNGRB is entrusted with the power to frame appropriate regulations to ensure the objectives of the Act, and thus the challenge to Regulation 18 cannot succeed.

e. It is also held that Adani's claim is precluded by the principle of approbate-reprobate, as it accepted authorization granted by PNGRB (including exclusion of disputed areas), furnished the performance bond and even participated in the auction for the excluded areas, and only thereafter challenged authorization when its bid was unsuccessful.

f. It is held, that exclusion of the disputed areas was justified in the overall facts and circumstances.

128. Having regard to the above findings and conclusions, the appeals fail and are dismissed. In the circumstances, Adani shall bear the costs quantified @ ₹10 lakhs, payable to the Union of India.

.....J
[UDAY UMESH LALIT]

.....J
[S. RAVINDRA BHAT]

.....J
[HRISHIKESH ROY]

New Delhi,
September 28, 2021.