



COMPETITION COMMISSION OF INDIA

Cases No. 16, 17, 18, 19 and 20 of 2016

Case No. 16 of 2016

In Re:

Rico Auto Industries Limited

Informant

And

GAIL (India) Limited

Opposite Party

With

Case No. 17 of 2016

In Re:

Omax Autos Limited

Informant

And

GAIL (India) Limited

Opposite Party

With

Case No. 18 of 2016

In Re:

Omax Autos Limited

Informant

And

GAIL (India) Limited

Opposite Party

With

Case No. 19 of 2016

In Re:

Rico Auto Industries Limited

Informant

And

GAIL (India) Limited

Opposite Party



With
Case No. 20 of 2016

In Re:

Rico Castings Limited

Informant

And

GAIL (India) Limited

Opposite Party

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. U. C. Nahta
Member

Mr. Justice G. P. Mittal
Member

Appearance during the preliminary conference on 12th May, 2016:

For the Informants: Mr. Sharad Gupta, Advocate
Mr. Vinayak Gupta, Advocate

For Opposite Party Mr. Balbir Singh, Sr. Advocate
Mr. Abhishek Singh Baghel, Advocate
Ms. Harsha Rathore, Advocate
Ms. Nikita Ved, Dy. Manager (Law)



Order under Section 26(1) of the Competition Act, 2002

1. The information in Case No. 16 of 2016 is filed by Rico Auto Industries Limited (hereinafter referred to as '**Rico Auto**') under Section 19(1)(a) of the Competition Act, 2002 (hereinafter referred to as the '**Act**') against GAIL (India) Ltd. (hereinafter referred to as the '**Opposite Party**' or '**Seller**'), *inter-alia*, alleging contravention of the provisions of Section 4 of the Act. Rico Auto is primarily engaged in the business of automotive components manufacturing. It has been stated in the information that Rico Auto signed a Gas Sale Agreement with the Opposite Party on 31st March, 2009 to procure Re-gasified Liquefied Natural Gas (hereinafter referred to as '**RLNG**') at the manufacturing unit of Rico Auto located at Gurgaon, Haryana.
2. The information in Case No. 17 of 2016 is filed by Omax Autos Limited (hereinafter referred to as '**Omax Autos**') under Section 19(1)(a) of the Act against the Opposite Party, *inter-alia*, alleging contravention of the provisions of Section 4 of the Act. Omax Autos is primarily engaged in the business of auto components manufacturing. It has been stated in the information that Omax Autos signed a Gas Sale Agreement with the Opposite Party on 27th March, 2009 to procure RLNG at the manufacturing unit of Omax Autos located at Manesar, District Gurgaon, Haryana.
3. The information in Case No. 18 of 2016 is again filed by Omax Autos under Section 19(1)(a) of the Act against the Opposite Party, *inter-alia*, alleging contravention of the provisions of Section 4 of the Act. This information has been filed in relation to the Gas Sale Agreement of Omax Autos with the Opposite Party entered into on 27th March, 2009 for procurement of RLNG at the manufacturing unit of Omax Autos located at Dharuhera, District Rewari, Haryana.



4. The information in Case No. 19 of 2016 is again filed by Rico Auto under Section 19(1)(a) of the Act against the Opposite Party, *inter-alia*, alleging contravention of the provisions of Section 4 of the Act. This information has been filed in relation to the Gas Sale Agreement entered into between Rico Auto and the Opposite Party on 31st March, 2009 for procurement of RLNG at the manufacturing unit of Rico Auto located at Dharuhera, District Rewari, Haryana.
5. The information in Case No. 20 of 2016 is filed by Rico Castings Limited (hereinafter referred to as '**Rico Castings**') under Section 19(1)(a) of the Act against the Opposite Party, *inter-alia*, alleging contravention of the provisions of Section 4 of the Act. Rico Castings is primarily engaged in the business of auto components manufacturing. It has been stated in the information that Rico Castings signed a Gas Sale Agreement with the Opposite Party on 31st March, 2009 to procure RLNG at the manufacturing unit of Rico Castings located at Manesar, District Gurgaon, Haryana.
6. Hereinafter, Rico Auto, Omax Autos and Rico Castings shall be collectively referred to as the '**Informants**' or '**Buyers**'.
7. In all the above mentioned informations, substantially similar allegations of abuse of dominant position by the Opposite Party have been made. Therefore, all the informations are dealt with through this common order.
8. Each of the Informants have contended that the Opposite Party has imposed unfair and discriminatory conditions under the Gas Sale Agreement (hereinafter referred to as "**GSA**") and has indulged in certain other conducts which have not been contemplated in GSA, in contravention of the provisions of Section 4 of the Act. The brief details of the allegations are as follows:



A. Allegations regarding the unfair nature of terms and conditions of the GSA:

8.1. Make Good Gas: The quantum of gas which has not been taken pursuant to the Downward Flexibility Quantity Mechanism envisaged under GSA could be requested by the buyer as Make Good Gas at a later point of time during the tenure of GSA. It has been submitted that in terms of GSA, if a buyer does not take the Make Good Gas till the end of the duration of GSA, the buyer has to pay for that quantity even though the seller utilises that gas elsewhere for other purposes deemed fit by it and suffers no loss. On the other hand, if at buyer's request, the Seller is not able to supply the Make Good Gas for any reason till the end of the duration of GSA, the Seller is not liable to pay to the buyer any compensation for non-supply even though the buyer might have suffered heavy losses on account of such non-supply.

8.2. Restoration Quantity: If gas could not be supplied or taken owing to any *force majeure* event, the buyer could request the delivery of such deficiency (*Force Majeure* Deficiency [FMD]) at a later point of time. Such quantity requested is referred to as Restoration Quantity. The Informants have alleged that if the buyer does not take the FMD till the end of the duration of GSA, it shall be liable to pay for such quantity. However, the GSA does not require the Seller to pay any compensation to the buyer if it fails to supply the FMD quantity upon request. It has also been stated that GSA does not contain any provision to deal with a situation where the buyer is unable to take FMD due to the failure on part of the Seller to supply the same.



- 8.3. Recovery Period Gas: Recovery Period Gas denotes the total gas outstanding at the end of the basic term of GSA. It has been alleged that the GSA does not envisage liability on the Seller for its failure to deliver the Recovery Period Gas despite the request made by the buyer. On the contrary, if the Seller tenders for delivery to buyer the Recovery Period Gas, the buyer must take it and pay for such gas or incur pay for-if-not-taken liability. Such stipulation in GSA has been alleged to be one sided and unduly tilted in favour of the seller.
- 8.4. Quality: In terms of GSA, the Seller is required to deliver gas of the specification prescribed therein. However, the GSA does not envisage any stipulation or methodology whereby the Seller is required to give quality certificate. It has been alleged that no remedy is provided if the buyers/Informants test the gas and finds it off-spec.
- 8.5. Take or Pay Obligation and liability of the Opposite Party to pay liquidated damages: Under Art. 14 of the GSA, the buyer is obliged to pay for the quantities of gas not taken but agreed to be taken. It has been alleged that the buyer is required to pay even for the quantities of gas which the Seller was unable to supply due to *force majeure*. On the other hand, though the Seller is liable to pay liquidated damages if it is unable to deliver the agreed quantity of gas; however, such liability arises only in cases where the Informants procure 'alternate gas'. It has been averred that the term 'alternate gas' has been very narrowly defined and does not encompass all forms of alternate fuel. Further, the procurement of gas/fuel of different specifications also absolves the liability of the Seller. It has also



been alleged that the liability of the Seller to pay liquidated damages in a contract year is not to exceed the price of daily contracted quantity for twenty-one days. However, no such limitation is prescribed for the liability on the part of the buyers.

8.6. Force Majeure: The gist of the allegation in relation to *force majeure* clause of GSA is that while the provision identifies a large number of events as *force majeure* events for the Seller, the number of force majeure events identified for the buyers is limited. Non-inclusion of 'acts of government agency' in buyers' *force majeure* event, listing of larger number of events attributed to failure of 'LNG Tankers' as *force majeure* events for the Seller; and limiting buyers' *force majeure* relief to a specific period (while no such restrictions on sellers' *force majeure* relief), are also alleged as absolutely unfair to the buyers *vis-a-vis* the Seller.

8.7. Suspension and Termination: It has been alleged that the Seller can terminate GSA by giving 30 days prior notice if the buyers fails to take 50% or more of the contracted gas quantity during a period of 180 consecutive days. Similarly, the buyers can also terminate the GSA by giving 30 days prior notice if the seller fails to supply 50% or more of the contracted gas quantity for a period of 180 consecutive days. Though these provisions appear to be balanced, they operate adverse to the buyers if they are read together with the take or pay obligation. It has also been alleged that the Seller could terminate the GSA if the agreement between the Opposite Party and its supplier gets terminated. However, allegedly no such right of termination is available to the buyer in instances such as production constraints. It has been further submitted that the right of the Seller to terminate



GSA without providing any reason therefor and not giving any such right to the buyer to terminate GSA even in the eventuality of them being compelled to cease their operations due to serious reasons like non-availability of raw-materials clearly amounts to imposition of unfair conditions in the sale of RLNG to the buyers.

B. Allegations regarding the conducts after 20th May 2009 that were not contemplated in the GSA and amounting to imposition of unfair conditions:

- 8.8. Forcing Informants to maintain Letter of Credit in a format which enables the Opposite Party to secure payments, which are not envisaged in GSA: It has been alleged that the standard format of the Letter of Credit prescribed by the Opposite Party covers 'Minimum Guaranteed off take', a term that has not been defined under GSA. Further, the Letter of Credit format also covers take or pay liability whereas in terms of GSA, letter of credit cannot be encashed for the purpose of take or pay liability (Informants have enclosed a copy of the Letter of Credit format prescribed by the Opposite Party during 2012 and 2014).
- 8.9. Invocation of Letter of Credit for purposes not contemplated in GSA: It has been submitted that the Opposite Party encashed the Letters of Credit submitted by the Informants against their take or pay liability even though the GSA does not provide for the same.
- 8.10. Unauthorized invocation of Letter of Credit beyond the limits prescribed under GSA: It has been averred that as per the GSA,



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the Letter of Credit, in a single instance at any given point of time, can be drawable only upto an amount equal to 16 days supply of gas at the applicable price. However, the Opposite Party has encashed the Letter of Credit against take or pay liability and the amount encashed is much higher than the limit prescribed (*i.e.* value of gas deliverable for 16 days).

- 8.11. Computation of take or pay liability in such a manner not contemplated in GSA: The Informants have alleged that the Opposite Party did not make necessary nominations in terms of Art. 8.2(c) of GSA (monthly quantities and daily contract quantities) during 2014. It has been claimed that without these nominations, it is impossible to compute 'Sellers' Daily Shortfall' which in turn makes it impossible to compute buyers' take or pay liability. Nevertheless, the Opposite Party has imposed take or pay liability for 2014. Therefore, computation and imposition of take or pay liability has been alleged to be in a manner not contemplated under GSA.
- 8.12. Arbitrarily advancing the 'Buyers Due Date' to the detriment of the buyer in violation of GSA: In terms of GSA, a buyer is required to make payment within four banking days after the receipt of the invoice. However, the invoice issued by the Opposite Party required the Informants to make payment within three days (not even three banking days).
- 8.13. Arbitrarily and unilaterally doing away with the period of seven banking days after buyers due date, before notice of suspension could be issued: In terms of GSA, if the buyer fails to make payment for a period of seven banking days after the buyer's due date, the Opposite Party can issue a three days written



notice to the buyer for suspending gas deliveries. However, the Opposite Party regularly threatened the Informants in the invoices sent to them stating that gas deliveries would be disconnected without any further notice if the invoice was not paid within 3 days of its receipt.

- 8.14. Arbitrarily and unilaterally substituting disconnection for suspension of gas supplies: In terms of GSA, the Opposite Party could issue notice only for suspension of gas supplies provided the buyer fails to make payment within the period specified therein. On the contrary, the Opposite Party has been regularly giving notice of disconnecting the supply of gas instead of suspension of deliveries which has not been contemplated in GSA.
- 8.15. Forcing the Informants to make payments against incomprehensible invoices, drawn up arbitrarily by the Opposite Party, without indicating the requisite necessary details stipulated in GSA: It has been stated that the invoices issued by the Opposite Party are not in the manner as required by the GSA. It has been alleged that certain important details have not been included by the Opposite Party in the invoices issued by it which are required otherwise in terms of the GSA. The specific details required to be included in the invoices as prescribed in the GSA are logical and absolutely necessary to enable the Informants to comprehend the basis and correctness of the invoice.
- 8.16. Coercing the Informants to pay an amount towards take or pay liability and forcing them to waive of their right to ask for make-up gas: The Informants in Case No. 16, 19 & 20/2016



have stated that they have entered into a one-time settlement agreement to settle their take or pay liability for the contract year 2014 with the Opposite Party. It has been alleged that they were forced to settle this issue and forgo their right to ask for 'Make-up gas' at a later point of time.

8.17. Suspension of gas without notice and denial of dispute resolution as per the GSA: The Informants in Case No. 17 and 18/2016 have submitted that the Opposite Party suspended gas supplies to them on 31st March, 2015 without any prior notice. It was only on 1st May, 2015, after around a month that the Opposite Party informed the Informants that supplies were suspended due to non-submission of renewed Letters of Credit. These Informants have further contended that the Opposite Party also denied them dispute resolution envisaged under the GSA.

9. The Commission considered all the informations on 23rd March, 2016 and decided to have a preliminary conference with the parties on 12th May, 2016. Upon hearing the parties on the said date, the Commission directed the parties to furnish additional information. The Informants were directed to file information regarding (a) the details of day-wise, month-wise and annual quantity(ies) of gas delivered by the Opposite Party during the calendar year 2014 and the daily contract quantity as an average of the annual contracted quantity for the same period; and (b) further information/data, if any, on the relevant market and the presence of other players in the relevant market. The Opposite Party was directed to file on Affidavit: (a) the total quantity of gas committed to be taken by the Opposite Party from its suppliers and the actual quantity taken during the calendar year 2014; (b) the details of take or pay liability imposed on the Opposite Party by its suppliers for the calendar year



2014; (c) the details of overall take or pay deficiency of the customers of the Opposite Party during the calendar year 2014 as well as the corresponding take or pay liability in terms of quantity and value and the actual liability imposed by the Opposite Party on its customers; (d) the details of spot and contract price of natural gas supplied by the Opposite Party during the calendar year 2014; and (e) the basis of reduction of the take or pay liability of the customers of the Opposite Party for the calendar year 2014.

10. The Informants filed their submissions dated 27th May, 2016 giving the details of gas supplied to them during the year 2014 and the daily contracted quantity as an average of the annual contracted quantity. The Opposite Party filed its written submissions on 20th June 2016, in which it has been, *inter alia*, stated that “For the calendar year 2014, about 1671.78 MMSCM (=65283009 MMBTU) of Long term RLNG (LTRLNG) volume was under-drawn vis-à-vis the contracted quantity of LTRLNG by the customers. It is further submitted that the Opposite Party, for the previous contract years and up till September 2014, has been able to sell the under-drawn LTRLNG in the spot market, However, from September, 2014 onwards, the spot prices started to decline, thereby reversing the competitiveness of LTRLNG. In view of the same, about 350 MMSCM (=13667500 MMBTU) out of 1671.78 MMSCM (=65283009 MMBTU) of surplus LTRLNG could not be disposed off and was leftover in Opposite Party’s pipeline inventory by end of calendar year 2014 resulting in loss on account non off-take by customers, including the Informant herein... ..To take or pay liability, as imposed on the customers, was only to neutralize the losses borne by the Opposite Party due to non off-take or under-drawal by the customers as per the respective GSAs, and was not to make any profits on account take or pay deficiency. The same also formed basis of reduction in the take or pay claim by the Opposite Party.”



11. The Commission has considered the information, written submission of the parties and other materials available on record. The Commission also had preliminary conference with the parties on 12th May, 2016.
12. The Informants have alleged abuse of dominant position by the Opposite Party for imposing unfair and discriminatory conditions in GSA and for imposing other unfair conditions that were not contemplated in GSA. For the purposes of examining the allegations of the Informants under the provisions of Section 4 of the Act, it is necessary to determine the relevant market at the first instance. Thereafter, it is required to assess whether the Opposite Party enjoys a position of strength required to operate independently of the market forces in the relevant market. Only when such a position is enjoyed by the Opposite Party, it will be imperative to examine whether the impugned conduct amounts to an abuse.
13. The Commission has dealt with the market for supply of natural gas in some of its earlier cases. In Case No. 20 of 2013 [*In Re: Saint Gobain Glass India Ltd. and Gujarat Gas Company Ltd.*], the Commission noted that natural gas is a distinct product compared to the other sources of energy available to the consumers as it has distinct characteristics such as being environmentally clean, efficient, no storage and inventory carrying costs, uninterrupted and available on tap source, *etc.* Further, in Case No. 71 of 2012 (*In Re: Faridabad Industries Association (FIA) and Adani Gas Limited*), the Commission while examining the relevant product market categorised the consumers of natural gas into two different categories *i.e.*, industrial and domestic based on intended use and the price of natural gas. While industrial consumers use the purchased gas to meet the fuel and energy requirements of their plants, the end use of gas in case of domestic consumers is self-consumption/ domestic cooking purposes which are entirely different from



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industrial consumers. The same reasonings apply to the instant cases. As the Informants in the instant cases are buyers of natural gas from the Opposite Party for commercial/industrial use, the relevant product market in the instant matter is the market for '*supply and distribution of natural gas to industrial consumers*'.

14. As far the relevant geographic market is concerned, it is observed that natural gas is generally transported through either city gas distribution network or through pipeline. Laying down of city gas distribution network or pipeline is authorised by Petroleum and Natural Gas Regulatory Board (PNGRB) in every city/ state. While the city gas distribution network is confined to a particular city, a pipeline may pass through various States. In the instant case, the Informants are located at two districts viz. Gurgaon and Rewari in the State of Haryana. The Informants cannot choose a supplier operating in a different area than where their plant(s) is/are located. Therefore, each of the said areas appears to constitute a separate and distinct relevant geographic market. Accordingly, the relevant market in the instant cases would be as follows: Case No. 16/2016, Case No. 17/2016 and Case No. 20/2016 - "*supply and distribution of natural gas to industrial consumers in Gurgaon district*"; and Case No. 18/2016 and Case No. 19/2016 - "*supply and distribution of natural gas to industrial consumers in Rewari district*"
15. The Informants in Case No 17/2016 to 20/2016 have submitted that the Opposite Party is the sole supplier of natural gas in their area (Manesar and Dharuhera). The Informant in Case No. 16/2016 has submitted that the Opposite Party was and is the dominant supplier of natural gas to industrial consumers in the geographic area of Gurgaon. Neither in its written submission nor during the preliminary conference, the Opposite Party has refuted the claims of the Informants or submitted any materials to show the presence of any other suppliers of natural gas in Gurgaon, Manesar or



Dharuhera. The Commission further notes that the Opposite Party is a significant player in the business of supply of gas across India with relatively larger size, resources and expertise when compared to any other player in India. Thus, the Commission is of the *prima facie* view that the Opposite Party enjoys a dominant position in both the delineated relevant markets.

16. Coming to the examination of abuse by the Opposite Party, the Commission notes that identical allegations relating to unfair impositions by the Opposite Party under GSA upon buyers were dealt with by the Commission in its orders dated 1st April, 2016 in Case No. 94/2015 (*In Re: Gujarat State Fertilisers & Chemicals Ltd. and Gail (India) Ltd.*) and Case No. 99/2015 (*In Re: Paharpur-3P, Paharpur Cooling Towers Ltd. and Gail (India) Ltd.*). The relevant extract of the Order in Case No. 94/2015 is reproduced as under:

“8. Before going into the allegations, it would be relevant to deal with the preliminary issues raised by the parties regarding the application of Section 4 of the Act to the impugned GSA. The Commission notes that the impugned GSA was entered/ executed prior to the enforcement of Section 4 of the Act. The provisions of the Act being prospective in nature would not apply to any purported unfair stipulation imposed under an agreement that was entered into prior to the enforcement of Section 4 of the Act. Nevertheless, the unfair and discriminatory conduct of a dominant enterprise/group thereof, post the enforcement of Section 4 of the Act, is amenable to the jurisdiction of the Commission. Therefore, to bring out any abuse emanating from an agreement entered into prior to the enforcement of Section 4 of the Act, it would be relevant to look into the fact whether the dominant enterprise has pursued any unfair or discriminatory conduct post the enforcement of the said Section of the Act...

13. Coming to the examination of alleged abuses, it is observed that most of them relate to asymmetric rights and obligations of the buyers and OP under GSA. The Informant has alleged that it has been deprived of certain rights and burdened with certain onerous obligations vis-à-vis OP. For instance, the allegations relating to Make Good Gas, Restoration Quantity and Recovery Period Gas are that while



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the buyer needs to pay if it fails to take delivery, OP is not liable to pay any damages if it defaults in its supply. It has also been highlighted that the buyer is liable to pay even in situations where OP might have sold the gas, not taken by the buyer, elsewhere and suffered no loss.

14. The other allegations regarding unfair nature of the clauses of GSA include (a) the force majeure events being wider for OP and limited for the buyer; (b) no liability on OP in case of force majeure but such benefit being available to buyer only for a limited period of 60 days and thereafter (i.e. from 61st day), take or pay liability applies even if the force majeure event continues; (c) liability of seller to pay liquidated damages not to exceed the value of daily contracted quantity for 21 days whereas take or pay liability of buyer having no such limitation; (d) GSA not envisaging a mechanism whereby OP is required to certify the quality/specification of the gas supplied; and (e) while OP could terminate GSA if its arrangement with its supplier is terminated, no such right of termination is provided to the buyer to terminate GSA on account of production constraints.

15. The Commission notes that all the allegations raised in the information point to the possibilities of several conducts of OP that would be unfair but nothing has been brought through the information on record which could suggest that OP had in fact indulged in any conduct that is culpable under Section 4 of the Act. It is observed that mere possibilities under an agreement entered into prior to the enforcement of the Act cannot be a subject matter of examination under Section 4 of the Act.”

17. The proposition set above would also apply to the present matters to the extent the allegations relate to imposition of unfair conditions under the GSA as all the GSAs in the instant matters were executed prior to the enforcement of Section 4 of the Act. However, the Commission notes that the allegations in Case No. 94/2015 and 99/2015 also included the following: (a) the Opposite Party encashed the letter of credit against the take or pay liability even though the gas sale agreements did not envisage the same; and (b) the Opposite Party failed to nominate monthly and daily quantities which are crucial to compute and impose the take or pay liability. The Commission did



not find merit in these allegations, *inter alia*, on the grounds that imposition of take or pay liability under the gas sale agreement cannot be held as abusive. The Commission further observed that mere non-compliances of certain terms and conditions of the gas sale agreement cannot be a subject matter under Section 4 of the Act if the conduct arising therefrom *i.e.* imposition of take or pay liability has already been held as not abusive.

18. The Informants in the instant cases have also alleged certain other conducts of the Opposite Party, post 20th May, 2009, as abuse of dominant position. These allegations include:

- (a) Suspension of gas supply, without notice, to the Informants in Case No. 17/2016 and Case No. 18/2016 on 31st March 2015;
- (b) Denial of dispute resolution mechanism envisaged under GSA to the Informants in Case No. 17/2016 and Case No. 18/2016;
- (c) Arbitrarily and unilaterally doing away with the requirement of seven banking days envisaged under the GSA, after buyer's due date, for issuance of notice for suspension of gas. It has been alleged in all the five informations that the invoices issued by the Opposite Party states that gas supplies would be disconnected if the amount due is not paid within three days of receipt;
- (d) All the Informants have contended that the Opposite Party has arbitrarily and unilaterally substituted the term 'disconnection' for 'suspension' of gas supplies thereby avoiding the compliance requirements for suspension of gas; and



(e) In all the five informations, it has been alleged that the Informants have been forced to make payments against incomprehensible invoices, drawn up arbitrarily by the Opposite party, without indicating the requisite details stipulated in the GSA.

19. The Informants in Case No. 17/2016 and Case No. 18/2016 have contended that the Opposite Party imposed take or pay liability on them *vide* letters dated 28th February, 2015. These Informants contested the said demand *vide* letters dated 16th March, 2015, *inter alia*, on the ground that the officials of the Opposite Party gave assurances to the Informants that they would consider their request to reduce the contracted quantity. However, still the Opposite Party imposed take or pay liability and encashed the Letter of Credit *vide* its letter dated 19th March, 2015. This was contested by the Informants *vide* letters dated 24th March, 2015 along with a request for amicable settlement of the dispute in accordance with Art. 15.1 of the GSA. The Informants wrote further letters to the Opposite Party on 28th March, 2015 and 31st March, 2015, *inter alia*, seeking amicable settlement of the dispute in accordance with GSA. However, the Opposite Party did not respond to the request of the Informants but suspended gas supplies all of a sudden in the morning hours of 31st March, 2015 without any prior notice. Thereafter, the Informants wrote letters dated 3rd April, 2015 to the Opposite Party seeking appointment to discuss their issue. After, regular follow-up, the Opposite Party invited the Informants to discuss the issues on 23rd April, 2015 but the meeting could not take place since none of the officials of the Opposite Party turned up for the same. Therefore, the Informants wrote letters dated 28th April, 2015 to the Opposite Party expressing concerns regarding the failure of the said meeting. The Opposite Party finally *vide* its letter dated 1st May, 2015 informed the said Informants that supplies were suspended to the said Informants due to non-submission of renewed Letter of Credit.



20. The Commission notes that as per Art. 19.4 of the GSA, if a buyer does not maintain Letter of Credit, the Opposite Party could suspend deliveries by giving seven days' prior written notice. The said provision specifically provides that if the Opposite Party gives seven days' notice, the suspension shall commence from the seventh day following receipt of the notice by the buyer. The Informants in Case No. 17/2016 and 18/2016 had written letters dated 16th March, 2015 to the Opposite Party contesting the legality of the take or pay liability imposed for the contract year 2014. In this letter, reference was made to their earlier e-mail and letter dated 4th June, 2014 wherein they had expressed their inability to consume the entire contracted quantity and therefore, requested the Opposite Party to reduce the contracted quantity. The said Informants have claimed that the officials of the Opposite Party assured them that the contracted quantity would be reduced and on the basis of such assurance, the Informants were paying the Opposite Party as per usage. These claims of the Informants regarding their request for reduction of contracted quantity and assurance given by the officials of the Opposite Party have neither been refuted during the preliminary conference nor in the written submission filed by the Opposite Party. Thus, there appears merit in the assertion of the Informants about the assurance given by the officials of the Opposite Party. It also transpired during the preliminary conference that take or pay liabilities had been imposed by the Opposite Party only from 2015 and there was no such imposition earlier. Under these circumstances, the imposition of take or pay liability on the said Informants as per the contracted quantity under the GSA and the encashment of letter of credit by the Opposite Party appear to be an unexpected business behaviour.
21. Further, the above referred correspondence show that the Informants in Cases No. 17/2016 and Case No. 18/2016 contested the take or pay liability and sought for amicable settlement of the dispute as per the GSA but the



Opposite Party declined their request *vide* letter dated 6th April, 2015 stating that the take or pay liability was imposed in accordance with GSA and as such there is no need for settlement. It is observed that Art. 15 of the GSA provide for amicable settlement of disputes and the term 'dispute' has been defined under Art. 2 of the GSA as '*Dispute includes, any failure to agree, controversy, difference or claim between the parties arising out of in relation to this Agreement*'. The Commission notes that the issues raised by the Informants regarding the imposition of take or pay liability is in the nature of dispute as defined under the GSA. However, the Opposite Party did not come forward for amicable settlement as provided in the GSA. Subsequently, the Opposite Party also went ahead and suspended gas supplies to the said Informants from 31st March, 2015 without giving any prior notice. The reason for suspension was communicated to them only after around a month and that too after much persuasion. It is observed that suspension of supplies for more than a month is also likely to have serious impact on the business of the Informants. Though the imposition of take or pay liability, encashment of Letter of Credit and suspension of gas supplies as per contractual terms may not be *per se* abusive, the mysterious silence on the part of the Opposite Party in (a) not replying to the request of the Informants for reducing the contracted quantity; (b) not replying to the proposal of the Informant for amicable settlement of the alleged dispute; (c) doing away with the requirement of prior notice for suspension of gas; and (d) not divulging the reason for suspension of gas despite repeated attempts/requests of the Informant for amicable settlement of the alleged disputes appears to be *prima facie* unfair.

22. It is further relevant to note that, in all the five matters, *viz.* Case Nos. 16/2016, 17/2016, 18/2016, 19/2016 and 20/2016, it has been contended that the compliance of the terms and conditions of GSA with respect to the contents of invoices and nominating daily contracted quantity are crucial for



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Fair Competition
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determining and imposing take or pay liability. However, the Opposite Party did not comply with the said requirements. Nevertheless, in pursuance of the GSA, the Opposite Party imposed take or pay liability and encashed the Letter of Credit furnished by the Informants. These acts of the Opposite Party, when seen in conjunction with other conducts such as suspension of gas supplies to the Informants in Case No. 17/2016 and Case No. 18/2016 without any prior notice, denial of dispute resolution when a buyer contests the legality of take or pay liability, arbitrarily advancing buyers due date, *etc.* cannot be treated as mere non-compliance of contractual terms. Rather such high handed approach of the Opposite Party in dealing with its customers is indicative of abusive conduct. Hence, a holistic appreciation of the facts and circumstances discussed above suggests that the aforesaid conducts of the Opposite Party, *prima facie*, amount to contravention of the provision of Section 4(2)(a)(i) and 4(2)(b)(i) of the Act and thus, merit investigation.

23. In view of the foregoing, the Commission directs the DG to cause investigation into these cases under the provisions of Section 26(1) of the Act. Considering the substantial similarity of allegations in all the five informations, the Commission clubs them in terms of the *proviso* to Section 26(1) of the Act read with Regulation 27 of the Competition Commission of India (General) Regulations, 2009. The Commission directs the DG to complete the investigation and file a consolidated investigation report within a period of 60 days from date of receipt of this Order. During the course of investigation, if involvement of any other party is found, the DG shall investigate the conduct of such other parties also who may have indulged in the said contravention.
24. The Commission makes it clear that nothing stated in this order shall tantamount to final expression of opinion on the merits of the case and the



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DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein.

25. The Secretary is directed to send a copy of this order to the DG, along with the information and other submissions filed by the parties.

Sd/-
(Devender Kumar Sikri)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(U. C. Nahta)
Member

New Delhi
Date: 03/10/2016

Sd/-
(Justice G. P. Mittal)
Member