



**Present:**

**For Appellant :** Mr. Vikas Singh, Senior Advocate assisted by Mr. Amitabh Kumar, Mrs. Ela Bali, Ms. Vibha Dhawan, Ms. Diksha Rai, Mr. Parth Sehan and Mr. Aditya Gupta, Advocates

**For Respondent :** Mr. Samar Bansal, Mr. Manan Shishodia and Ms. Devahuti Pathak, Advocates for Competition Commission  
Mr. Kunal Mehra and Mr. Danish Khan, Advocates for East India Petroleum Pvt. Ltd (R-2)

Mr. Rajshekhar Rao, Mr. Kunal Mehra, Mr. Danish Khan, Advocates for East India Petroleum Pvt. Ltd.

Mr. Anshuman Srivastava and Mr. Ankit Yadav, Advocates for VPT

**J U D G M E N T****SUDHANSU JYOTI MUKHOPADHAYA, J.**

In both the appeals as common order dated 11<sup>th</sup> July, 2018 passed by the ‘Competition Commission of India’ (hereinafter referred to as the ‘**Commission**’ for short) is under challenge, they were heard together and disposed of by this common judgment.

2. The brief facts of the case are that the information under Section 19(1)(a) of the Competition Act, 2002 (hereinafter referred to as the ‘**Act**’) was filed by the Respondent (Informant) – ‘East India Petroleum Pvt. Ltd.’ (‘**EIPL**’ for short) against ‘South Asia LPG Company Pvt. Ltd.’ (‘**SALPG**’, for short – Appellant in one of the appeals herein’), alleging, *inter-alia*, contravention of the provisions of Sections 3 and 4 of the Act.

3. The case concerned access to terminalling infrastructure operated by ‘SALPG’ at Visakhapatnam Port. Pursuant to the order dated 30<sup>th</sup> December, 2011 under Section 26(1) of the Act, the Commission directed the Director

General ('**DG**', for short) to cause an investigation into the matter. After a detailed investigation, the DG submitted his Investigation Report before the Commission on 30<sup>th</sup> November, 2012.

4. During the investigation, the DG examined dominance in the upstream terminalling service at 'Visakhapatnam Port' and 'SALPG' (one of the Appellant herein) was found to be the only player. However, though the Director General found that 'SALPG' (Appellant herein) is the only enterprise in the market for upstream terminalling service at Visakhapatnam Port and possessing 100% market share, it observed that SALPG does not enjoy dominant position. The DG observed that 'SALPG' has very limited ability to dictate its prices or alter the terms of providing services in the market. The DG further observed that 'SALPG' does not possess any power to prevent entry of Informant – EIPL into the upstream terminalling service market. It was also informed that the Informant – 'EIPL' has already applied for grant of permission from 'Visakhapatnam Port Trust (**VPT**) for laying a parallel infrastructure. As such, both its customers and potential competitors enjoyed countervailing power to constrain the abusive conduct, if any, of 'SALPG'. It is also observed that the nature and structure of the market is such that despite negotiating the rates with its customers, 'SALPG' is in no position to enforce the same.

5. Although the DG investigation did not find the 'SALPG' to be dominant, it still examined the alleged abuses. The investigation revealed that 'SALPG' insists on mandatory use of its cavern and thus 'Oil Marketing Companies (**OMCs**) cannot avail blending services on piecemeal basis. The DG was of the view that 'SALPG' (Appellant herein) has valid efficiency and business justification for denying the use of its blender facility without using cavern

and also not permitting book up of 'EIPL's' (Informant) blender to "Propane" and "Butane" from the jetty owned by 'SALPG' (Informant). The DG in his investigation had noted that it is not known whether the cavern functions only as a storage unit or also plays a necessary ROLE in mixing and providing additional safety level. Further, restriction that only 25% of the total volumes of 'Very Large Gas Carrier (**VLGC**) can bypass the cavern was also found to be based on valid business justification as 'SALPG' has made significant investment in the cavern.

6. After considering the Investigation Report, the Commission forwarded it to the parties for filing their suggestions/objections. In the meantime, 'EIPL' (Informant) filed an application for cross-examination of the witnesses whose statements were recorded during investigation. The Commission granted the request and referred the matter back to the DG under Section 26(7) of the Act for conducting cross-examination.

7. The aforesaid order of the Commission for cross-examination of the witnesses under Section 27(7) of the Act was challenged before the High Court of Delhi which was dismissed and reached finality.

8. After completion of the cross-examination, the DG submitted the Supplementary Investigation Report on 30<sup>th</sup> March, 2015, which was forwarded to the parties for filing their replies/objections.

9. The Commission after hearing 'EIPL' (Informant) and 'SALPG' (Appellant herein) on 13<sup>th</sup> January, 2016 sought for further information from the parties, 'Oil Marketing Companies' (OMCs), 'Indian Oil Corporation Limited (IOCL), 'Bharat Petroleum Corporation Limited' (BPCL), 'Hindustan Petroleum Corporation Limited' (HPCL)' and 'Visakhapatnam Port Trust' on

terminalling infrastructure, safety aspects, relevant market, feasibility of tap-in and tap-out and bypass of cavern and pricing of terminalling services. 'EIPL' (Informant) and 'SALPG' (Appellant herein) filed their response. The 'Oil Marketing Companies' namely 'IOCL', 'BPCL', 'HPCL' and 'VPL' submitted their response and they were heard by the Commission.

10. Based on the material on record, including submissions of the parties and third parties, the Commission did not find sufficient reason to agree with the finding of the DG on the aspects of relevant market, dominance and abuse of dominant position and directed the parties to respond to the observations of the Commission as was made by order dated 10<sup>th</sup> January, 2018. The parties were directed to file their reply affidavits to the observations of the Commission and appear for an oral hearing. 'EIPL' (Informant) and 'SALPG' (Appellant) both filed their submissions on 20<sup>th</sup> February, 2018. They were heard by the Commission on 19<sup>th</sup> April, 2018. On analysis of the evidence and other relevant material, the Commission held that the restriction imposed by the 'SALPG' on bypass of the cavern facility are in contravention of Section 4(1) read with Section 4(2)(a)(i), Section 4(2)(ii) and Section 4(2)(b)(i) of the Act. Since the bypass restrictions were found to have restricted the business volumes of 'EIPL' (Informant), without any reasonable grounds, the same was also denial of market access, in contravention of Section 4(2)(c) of the Act.

11. Finally, the Commission observed and passed the following order:

*“60. From the facts of the case, it is evident that access to infrastructure operated by SALPG is indispensable to offer terminalling services at*

*Vishakhapatnam Port for servicing the hinterland. As has been brought out, issues in this case had its genesis in the bypass restrictions and stipulation for mandatory use of cavern, imposed by SALPG. These impositions by SALPG have priced out EIPL and reduced its business volumes substantially. To overcome these, EIPL proposed provision of tap-out and/or tap-in to the 'Butane' and 'Propane' lines from the jetty. The proposals of EIPL were not accepted by SALPG. The conduct of SALPG, being without reasonable grounds, the Commission holds the said restrictions as denial of market access, to be in contravention of Section 4 of the Act.*

61. *Having found SALPG in contravention of Section 4 of the Act, the remedies herein are intended to provide terminalling service providers, potential or existing, a meaningful access to the terminalling infrastructure at Vishakhapatnam Port, so that they can effectively compete in provision of terminalling services. Accordingly, the Commission orders the following remedies, which are considered necessary and proportionate to address the harm to competition flowing from the impugned abuses.*

62. *Effective access to the terminalling infrastructure should be granted immediately by any or all of the following options:*

(a) *SALPG shall not insist mandatory use of its cavern and shall allow bypass of cavern for both pre-mixed and blended LPG, without any restrictions; and/or*

(b) *SALPG shall allow access to its competitors, potential as well as existing, to the terminalling infrastructure at Visakhapatnam Port, subject to compliance with all safety integrity and other requirements under applicable laws and regulations framed thereunder. Such an access should avoid additional cost burden on SALPG, and the entity seeking access shall bear the cost, if any, towards necessary changes to the existing infrastructure. Under this option also, SALPG shall not insist on mandatory use of cavern and it shall allow bypass of cavern, without any restriction. SALPG shall extend full cooperation for the study/audit undertaken by VPT in relation to the remedies*

*ordered herein. Needless to say, SALPG shall not do anything raising rival's cost."*

12. So far as the imposition of penalty is concerned on 'SALPG', after thoughtful consideration the stand taken into consideration the decision of the Hon'ble Supreme Court in '*Excel Crop care Limited vs. Competition Commission of India and Anr.*' the Commission imposed penalty of Rs.19,20,70,000/- (Rupees Nineteen Crores Twenty Lakhs and Seventy Thousand only) upon 'SALPG' (one of the Appellant herein) for infringing the provisions of Section 4 of the Act.

13. The case relates access to LPG terminalling infrastructure at Visakhapatnam Port comprising of unloading arms at the jetty, blender heat exchanger and cavern. Over the years, import of pre-mixed LPG has reduced and no pre-mixed LPG was imported since 2011-12. Instead of pre-mixed LPG, basic gas namely "Propane" and "Butane" are imported separately. They are blended at the port before onward transmission to 'Oil Marketing Companies'. 'EIPL' (Informant) is user of blender of 'SALPG' (Appellant) who used to have pre-mixed LPG not through cavern but bypass the cavern. The 'EIPL' was entitled for payment of charges as well levied to terminalling charge in the case of bypass. Subsequently, 'SALPG' insisted 'EIPL' on mandatory to have supply of gas through its cavern. This entailed payment of significant charges by 'EIPL'. As a result, 'Oil Manufacturing Companies' were not finding the services offered by 'EIPL' economically viable and were constrained to avail the terminalling services offered by 'SALPG' only. The terminalling charges payable by 'Oil Manufacturing Companies' with and without use of cavern are shown below:

<b>Terminalling charges in case of bypass of cavern</b>	SALPG (200) + HPCL (105) + EIPL (719) = 1024
<b>Terminalling charges in the absence of bypass (i.e. passing through cavern)</b>	SALPG (1540) + HPCL (105) + EIPL (719) = 2364

14. The Informant contended that the 'Oil Manufacturing Companies' had to pay storage services twice i.e. Rs. 1540 to 'SALPG' and Rs.719 to 'EIPL', in the absence of bypass of cavern, if they wished to use the service of EIPL. In other words, the 'Oil Manufacturing Companies' had to incur Rs. 1024 per MT to avail the services of the 'EIPL' including Rs. 200/- to 'SALPG' as bypass charges and Rs.105/- for use of 'HPCL' – cross-country pipeline, but without bypass, they had to pay additional sum of Rs. 1340/- to 'SALPG' to avail the services of 'EIPL'. Thus, it was not economic sense for the 'Oil Manufacturing Companies' to avail the services from the 'EIPL' (Informant) and it was alleged that due to such abuse of dominance by 'SALPG', the 'EIPL' were almost out of business on account of such restrictions.

15. The 'EIPL' first proposed to use the blender of 'SALPG' and thereafter, take the output directly to 'HPCL' cross-country pipeline, bypassing the cavern. This was not agreeable to 'SALPG' which allowed bypass of cavern to the extent of 25% only to VLGC imports. As an alternate, the 'EIPL' proposed to install its own blender, for which it wanted a tap-out and tap-in from the "Propane" and "Butane" lines to discharge with blended LPG bypassing the cavern. By way of such arrangement 'EIPL' proposed to tap-out from "Propane" and "Butane" lines to take gases for mixing in its blender and, thereafter discharge the blended output back into the 'SALPG' pipelines through a tap-in. It was also not acceptable to 'SALPG'. In this

background 'EIPL' had to offer another revised proposal seeking tap-out from the "Propane" and "Butane" lines at jetty to its own blender and construction of its own infrastructure between the blender and storage facility. However, it was not accepted by 'SALPG'. It was at this stage the 'EIPL' (Informant) filed application before the Commission, who after due investigation and enquiry answered against the Respondent ('SALPG').

**CASE OF THE APPELLANT —**  
**SOUTH ASIA LPG Company Private Limited — (SALPG)**

16. In the year 1997, HPCL laid down its 8km long cross-country pipeline with the technical capability of receiving either 'pre-mixed LPG' or "Butane" exclusively. The 'HPCL' pipeline (and the pump house) never had the technical specifications to handle "Propane" at low temperature. In fact, at that point of time as only 'pre-mixed LPG' or "Butane" was being imported at the Vizag port, there was no question of "Propane" being imported and hence, 'HPCL' never envisaged a situation at the time of constructing its pipeline that it will ever be used for transportation of "Propane".

17. In the year 2007, the SALPG set up its own state of the art cavern (**Cavern**) which is a very large storage facility having a capacity of 60,000 MT along with its constituents at the Vizag Port. The Cavern is suitable for 100% "Propane" storage. The pipelines laid down by the Appellant for the transportation of the gas from the ship to the Cavern and the Cavern to the 'HPCL pipeline' are "Propane" rated i.e. they can withstand temperatures of up to (-)45 degrees Celsius. Additionally, "Propane" is a very hazardous and volatile gas due to its characteristics of high vapour pressure and low boiling point. It has an inherent characteristic of developing localized chilling in case

of any minor leaks occurring at any of the components of a pipeline. In comparison to “Propane”, ‘pre-mixed LPG’ does not have these characteristics because of lower vapour pressure and higher boiling point. Thus, the risk in the transportation of “Propane” is that if the temperature is not properly maintained and if it were to pass through the ‘HPCL pipeline’ (not rated for ‘Propane’) at a low temperature, the said pipeline is likely to embrittle causing extensive damage. In fact, even a small leakage of “Propane” has the capability of causing a huge explosion and hence, it is imperative that any pipeline which has the likelihood of getting “Propane” at low temperature should be ‘Propane’ rated so that there is no chance of any accident.

18. Because of the state-of-the-art instrumentation, control and safety systems of the Cavern, various benefits have accrued to the OMCs. The pipeline from the ship to the Cavern can take gases at an unloading rate of up to 1,000 MT/hour as against the ‘HPCL pipeline’ which can take gases at an unloading rate of 200 to 250 MT/hour from the ships directly (when the Cavern is bypassed). The Cavern helped the OMCs to bring in large cargoes of “Propane” and “Butane” separately through very large gas carriers (**VLGCs**) which could be unloaded into the Cavern very quickly leading to substantial savings to them.

19. From 2010 onwards, the prices of “Propane” drastically fell. It was economical for the OMCs to import “Propane” and “Butane” separately and to mix it using the Appellant’s facility to make LPG for further supply to its customers, the OMCs.

20. Sometime prior to 2010, ‘IOCL’ and ‘BPCL’ requested the Appellant for pumping ‘pre-mixed LPG’ and “Butane” directly into the HPCL

pipeline bypassing the Cavern so that such 'pre-mixed LPG'/'Butane" could be transported through tank trucks to reach end consumers. Such tank trucks facility was being provided by the Respondent. Even though bypass of the Cavern was never envisaged in the original design of the Appellant facility, the Appellant permitted 'IOCL' and 'BPCL' to use the bypass facility for transportation of **only** 'pre-mixed LPG' or "Butane" through the 'HPCL pipeline' for which it was appropriately rated and had the requisite technical specification. Till 2010-11 and 2015-16, 'pre-mixed LPG' and "Butane" were being imported at the Vizag Port respectively.

21. When the import of pre-mixed LPG virtually stopped from the year 2011-12, there was no possibility of permitting the direct pumping of blended LPG (i.e., pumping of refrigerated 'Propane' (at (-)45 degree) and "Butane" (at (-)5 degree) directly from the ship bypassing the Cavern into the 'HPCL' pipeline directly, as the same is not rated for taking 'Propane' even in small quantities at a low temperature.

22. Since 2010, the utilization of the Cavern was increasing and since the unloading rate of gases from the ship to the Cavern is up to 1,000 MT/hour whereas during the bypass of the Cavern, the unloading rate from the ship into the HPCL pipeline is 200 to 250 MT/hour, the HPCL pipeline is being fully utilized leaving no spare capacity for unloading of blended LPG directly from the ship into the HPCL pipeline. It may be noted that the Cavern and bypass operations cannot happen simultaneously and HPCL pipeline is the only mode of evacuation of LPG at the Vizag Port.

23. In 2010, the Respondent requested the Appellant for permission to use the bypass facility for transportation of blended LPG (i.e. use the 'SALPG' facility in piece-meal manner) which was refused by the Appellant as well as by 'HPCL' on two counts: (i) that the 'HPCL Pipeline' is not technically rated to take the blended LPG and (ii) the 'HPCL pipeline' is fully utilized by the Appellant's Cavern for supply of gas to its customers. Accordingly, there was no spare capacity in the said pipeline even if the Respondent were to transport blended LPG through the 'HPCL pipeline'. It was also contended by 'HPCL' that direct unloading of gases from the ship into the HPCL pipeline (i.e. bypassing the Cavern) will slow down the unloading operation and will be more expensive for the OMCs as the unloading rate is 200 to 250MT/hour as against the unloading rate of up to 1,000 MT/hour when unloading from the VLGCs into the Cavern happens, thus, resulting in huge demurrage costs to the OMCs because of ships being berthed for a longer time at the Vizag Port.

24. Learned counsel appearing on behalf of the Appellant also submitted that the Commission adjudicated on highly technical issues by directing the Appellant to provide the bypass of the Cavern for blended LPG on the presumption that it is safe to do so without admittedly having the technical expertise to do so. This is evident from a bare reading of Section 8 of the Act which sets out the qualifications of the members of the Commission. Further, the Commission failed to invoke —(i) Section 17 of the Act which allows it to engage technical experts having special knowledge and experience, if required for discharge of its functions; or (ii) Section 26(7) of the Act which allows the Commission to conduct further inquiry. The Commission should

have sought technical views instead of adjudicating on highly technical issues itself without having the technical expertise to do so in the first place.

25. It was further submitted that the relevant geographical market is not the Vizag Port as it was demonstrated by OMC's planning chart that many other ports in addition to the Vizag Port were being used for unloading LPG in the country and supply from every port was being made to almost every corner of the country. A few examples from the chart have been shown by way of the following table.

<b>Sl. NO.</b>	<b>Receipt location</b>	<b>Name of the port</b>	<b>Amount of LPG planned to be supplied form port to receipt location</b>
1.	Bhitoni, Madhya Pradesh	JNPT Mumbai	85,192 MT
		MLIF- Import Terminal (Mangalore)	9,127 MT
		Vizag Port	5,750 MT
2.	Bhopal, Madhya Pradesh	MILF-Import Terminal (Mangalore)	43,700MT
		JNPT-Mumbai	35,581MT
		Vizag Port	4,600 MT
		Aegis Import Terminal	13,356 MT
3.	Chandrapur, Maharashtra	MILF- Import Terminal (Mangalore)	43,296 MT
		Vizag port	9,523 MT
4.	Cherlapally, Telangana	Ennore-Import Terminal	24,830 MT
		JNPT Mumbai	5,750 MT
		MILF-Import Terminal Mangalore	6,265 MT

		TOIPL, Mangalore	3,835 MT
5.	Arrah, Bihar	JNPT Mumbai	4,669 MT
		Vizag port	54 MT
6.	Patna, Bihar	JNPT Mumbai	36,991 MT
		MLIF- Import Terminal (Mangalore)	4,663MT
		Aegis-Haldia	2,698 MT
		Vizag port	84,078 MT

26. The Commission while rejecting the said argument has only noticed the supply from Ennore and Haldia *vis-a-vis* supply from Vizag and did not notice the other ports such as MLIF (Mangalore), JNPT (Mumbai), Kandla (Gujarat), Pipavav (Gujarat), Aegis (Mumbai), TOIPL (Mangalore) etc. which were being used in the country for the transportation of LPG to the entire length and breadth of the country. Thus, the relevant geographic market is whole of India and the Appellant is not dominant in India.

27. Further according to the learned counsel for the Appellant that even if it is assumed that the relevant geographic market is the Vizag Port, even then the Appellant is not dominant. As it is not the Appellant but the OMCs that decide the entire logistics of LPG supply in India and are not dependent on the Appellant at all. Thus, the Appellant has **no** role in the LPG supply planning and merely carries out the instructions of the OMCs. Further, the prices that the Appellant charges for providing its services are negotiated with the OMCs and are approved by the Ministry of Finance for the purposes of deciding subsidy. In fact, since the last 10 years, the Appellant has not

received the full payment for providing its services to the OMCs. As per Section 19(4)(i) of the Act, the OMCs exert significant countervailing buying power on the Appellant which negates the purported dominance of the Appellant and therefore, the Appellant is not dominant even at the Vizag Port. As the Appellant is not dominant, the question of abuse does not arise.

28. Alternate submissions was also made that without prejudice to the above, even if the Appellant is assumed to be dominant, the denial of the use of bypass facility (i.e. piecemeal usage of the SALPG facility) does not amount to abuse of dominance for the following reasons:

- a. The bypass facility would result in direct pumping of the blended LPG into the HPCL pipeline and the said HPCL pipeline is not technically rated to transport the said blend as the technical requirement of receiving the said blend would require the HPCL pipeline to withstand (-)45 degree temperature (being the temperature at which an accidental supply of "Propane" could go through the HPCL pipeline) whereas the 'HPCL pipeline' is only rated to take LPG at +10 degree to + 40 degree and hence, there was no question of abuse of dominance. Moreover, the Appellant has never denied access to its facility in entirety and has in fact provided bypass of pre-mixed LPG because it was technically feasible to do so and there was spare capacity available. SALPG objects to providing bypass of Cavern for blended LPG because of capacity and technical considerations.

- b. As the HPCL pipeline is the only mode of evacuation of LPG at the Vizag Port, the OMCs require the HPCL pipeline up to its 100% capacity for the discharge of gas from the Appellant's Cavern as the rate of unloading of gases from the ships into the Cavern is up to 1,000 MT/hour whereas the rate of unloading of gases from the ships directly into the HPCL pipeline (when the Cavern is bypassed) is only 200 to 250 MT/hour and hence, there is no spare capacity available to permit bypass of the Cavern to use the HPCL pipeline.
- c. HPCL has admitted that the Cavern mode is more efficient and less costly in comparison to the bypass mode. This is because during the Cavern mode the VLGCs are unloaded into the Cavern without incurring demurrage costs as the rate of unloading is up to 1,000 MT/hour whereas during the bypass mode, the rate of unloading from ships into the HPCL pipeline is 200 -250 MT/hour which is 1/3<sup>rd</sup> of the rate of unloading of gases into the Cavern. Thus, bypass mode results in substantial demurrage charges to the OMCs because the ships are detained at the port for a longer time.
- d. The insistence upon the use of bypass cannot amount to abuse of dominance, especially when the Respondent could have easily created its own facility to transport gas from the jetty to its storage point by laying its own pipeline and in fact the permissions for which have already been granted to the Respondent and substantial work has already been done for

laying the said pipeline. SALPG believes that the design/technical feature of Respondent's pipeline is similar to the Appellant's pipeline laid from the ship to the Cavern i.e. Respondent's pipeline is also 'Propane' rated establishing thereby, that the Respondent is fully aware that the HPCL pipeline does not have the design feature to take blended LPG directly from the ship. It may be noted that given the risks involved in handling hazardous gases, terminal operators at other ports have end to end facilities for handling LPG. For example, (i) at the Mangalore port, HPCL and Total have established separate independent facilities at the same LPG jetty and (ii) at the Haldia port, there are independent facilities catering to the needs of the three OMCs.

29. It was further contended that the Appellant's facility is not 'essential' in competition law parlance and therefore, the Appellant is not obliged to share its facility. One of the pre-requisites of essential facility doctrine is that it can be replicated at a reasonable time and cost. The Respondent has itself admitted that it is possible to replicate the unloading arms and pipeline at a cost of Rs. 20 Crores. When compared with an investment of Rs. 333 Crores which the Appellant made in its facility, an amount of Rs. 20 Crores is insignificant. Further, the Appellant took approx. 4 years to Commission a complicated facility like Cavern, the Respondent could have very well replicated a comparatively easier infrastructure in less than 4 years when it has admittedly received the requisite permissions and is

in the process of laying their pipeline. It is also pertinent to highlight that the Respondent filed the complaint with the Commission in 2011 i.e. 8 years ago. In this much time, the Respondent could have replicated the facility twice over. Thus, the above clearly shows that the Respondent is seeking to free-ride on the Appellant's facility without wanting to make this investment itself. In this regard, the Appellant is relying upon the judgment of '*Oscar Bronner GmbH & Co. KG vs. Mediaprint Zeitungs and Zeitschriftenverlag GmbH & Co. KG & Others Case C-7/97, judgment of the Court (Sixth Chamber dated 26.11.1998)*' wherein the European Court of Justice, held that there is no per se rule within the aegis of the Competition Law framework which mandates interfering with a dominant undertaking's freedom to contract. The Appellant is also relying on '*Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*', 2004 SCC Online US SC 2:540 US 398 (2004) wherein the US Supreme Court recognized the right of a trader or manufacturer engaged in an entirely private business to freely exercise his own independent discretion as to parties with who he will deal with.

**CASE OF THE HINDUSTAN PETROLEUM CORPORATION LTD. — (HPCL)**

30. Learned counsel appearing on behalf of Hindustan Petroleum Corporation Ltd. submitted that the whole system of Cavern facility and pipeline system has to function as a cohesive system to enhance safety measures after a major fire had broken out in its refinery located at the outer harbour at Visakhapatnam in 1997, during an LPG discharge from a ship to its storage tanks leading to the loss of the lives of 61 persons and loss of property totalling more than Rs. 250 crores. The pipeline continues to traverse

through densely populated residential colonies with approx. population of 1 Lakh.

31. Though clause 24 envisages the offering of usage of "*...the Cavern Facility-Pipeline system with other users on reasonable terms...*" it only envisages the use of the entire system including the cavern since the clause can only be meaningfully read in conjunctive manner and not disjunctive. The Respondent has no legal right to demand piece meal usage of a facility owned by the Appellant. The Respondent has no right to demand usage of any particular portion of the facility to the exclusion of the rest, as per its business suitability and convenience. Hence, it is submitted that the piece meal access is contrary to the terms of the Lease, and that 'SALPG' Facility and the 'HPCL Pipeline' have to be used conjointly. Further, 'EIPL' has sought to either, (i) bypass the 'SALPG' Cavern, or (ii) Puncture the unloading arms of 'SALPG' at the jetty. It is submitted that any such action shall effectively dismantle the system in place and defeat the whole purpose of safety for which the whole facility has been put in place.

32. According to the learned counsel the impugned order violates principles of natural justice inasmuch as, neither HPCL was heard or issued notice to, by the Competition Commission, nor was it made a party to these proceedings, though the 'HPCL Pipeline' and 'SALPG', LPG import facility are owned and operated by 'HPCL' & 'SALPG', respectively. The issue at hand includes and affects the 'HPCL' pipeline which is owned and operated by this Appellant. It was submitted that merely seeking information and asking to fill out questionnaires from the Appellant during investigation cannot be termed as a sufficient opportunity to be heard. Therefore, it is

submitted that the Commission has failed to implead 'HPCL', as a necessary party in the instant matter, despite being aware of issues relating to safety of 'HPCL pipeline' owned and operated by the Appellant. It is settled law that the fundamental right of a citizen guaranteed under Article 19 (1)(g) is not absolute and no person has a fundamental right to insist upon the Government or any other individual for doing business with him. Reliance is placed on the decision of the Hon'ble Supreme Court in '*Krishnan Kakkanth Vs. Government of Kerala & Ors.*' - **1997 (9) SCC 495**.

33. It was stated that the Commission itself had directed appointment of an independent expert to give its opinion on the technical feasibility of the proposed modifications by its order dated 19.12.2012, and further categorically held in the impugned order that '*...the commission has on record two conflicting reports, none of which can be regarded as an objective third party study.*', therefore it is submitted that the Commission ought not to have proceeded to determine the technical feasibility and safety on the issue by itself, when admittedly it did not have the technical expertise to do so.

34. Learned counsel for the Appellant further contended that the conduct of the 'SALPG' cannot be said to be anti-competitive as it places additional burden on them and thereby they cannot be driven out of the business. It was submitted that -

- a. The entire facility is offered to everyone, including Respondent on non-discriminatory basis, albeit with the requirement of using it as an integrated facility and not in piece meal basis.

- b. The price charged for the terminalling services is determined by Ministry Of Petroleum And Natural Gas (**MOP&NG**), therefore it is fallacious to argue that SAJ.IPG sets the price.
- c. The Respondent does not bear the terminalling charges. The charges have to be borne by the importer or the end user. It is submitted that Respondent is neither the *importer nor the end user*.

35. It was further contended that the HPCL pipeline has been used predominantly for carrying pre-mixed LPG and “Butane”, as it is not “Propane” rated, i.e. it has not been designed to handle “Propane”. However, it may be noted that after the construction of the ‘SALPG’ facilities, Blended LPG necessarily passed through the ‘SALPG’ Cavern is also being carried using the ‘HPCL’ Pipeline, at present.

36. According to the learned counsel for the Appellant the Commission has directed ‘SALPG’ not to insist mandatory use of its Cavern facility and to allow bypass of Cavern. With respect, it is submitted that, while considering the complaint filed by the Respondent on the issue of dominance and abuse thereof, the Commission has issued certain directions, which are beyond the scope of its jurisdiction, ignoring the security and safety aspect, enjoined with hazardous substances, such as LPG.

37. Ordinarily, “Propane” and “Butane” are imported separately in ships, being more cost effective with “Butane” and “Propane” being stored at -2 °C

C to -5 °C and -45°C, respectively. Normally, during discharge “Propane” is pre-heated in the ship using the ship heater before being pumped out up to a temperature of (+) 5 °C, while “Butane” is pumped out without heating.

38. It is submitted that “Propane” is far more hazardous and volatile gas than “Butane”, and hence imported at around -45 °C. Any leakage of ‘Propane’ produces intense localized chilling effect, resulting in low temperature embrittlement of a pipeline leading to its breakage and explosion.

39. With regard to the design and so far as pipeline are concerned, the learned counsel for the Appellant contended that as per Engineers India Limited, the designer of the HPCL cross-country pipeline and the HPCL Operative Manual, the recommended operating temperature of the HPCL cross-country pipeline is +10 °C to +40 °C, although the fault temperature or the minimum design temperature is +1 °C. The HPCL manual also records that the operating temperature of the HPCL pipeline is +10 °C to +40 °C. The HPCL cross-country pipeline is not ‘Propane’ rated.

40. It was also submitted that in case of receipt of “Butane” or ‘pre-mixed LPG’ either directly from the ship or via the ‘SALPG's Blender’, there is no chance of failure of pipeline due to low temperature embrittlement, as the HPCL pipeline is designed to handle these products. On the other hand, it is submitted that in case of receipt of “Propane” and “Butane” after blending on board of the ship or through the ‘SALPG’ blender, without passing through the ‘SALPG Cavern’ there is every chance of LPG with temperature less than +10 °C entering the HPCL pipeline, which is below the operating temperature of the pipeline, and is hence unsuitable.

41. It was further submitted that in case the blended LPG is taken through

the Cavern from the blender then, cold product, if any, will reach the required temperature (more than +10 °C) when mixed with the large mass of LPG inside the Cavern and hence, making it impossible for cold/ refrigerated products to enter directly into 'HPCL pipeline'. The 'SALPG Cavern' acts as a buffer to correct the ratio of "Propane" and "Butane" and corrects the temperature of Blended LPG to be within the parameters of the HPCL Pipeline. Even in case there is any malfunctioning of the ship heater, the existing Cavern and its design will never allow cold 'Propane' to enter the HPCL Pipeline, thereby ensuring safety at all times.

**STAND OF the 'East India Petroleum Pvt. Ltd. - (EIPL)**

42. The land at the outer-harbour, adjoining the LPG Jetty, has been leased to 'HPCL'/'SALPG' for construction of the pipeline infrastructure, with a condition vide Clause 24 of the Long Term Lease of VPT with HPCL which clearly and specifically provides that the lessee (HPCL) or its sub-lessee (SALPG) has to share the pipeline system with other users on reasonable terms, as recommended by the lessor (VPT). The said Clause reads as under:

*"(24) That the Lessee or the sub-lessee shall share the Cavern Facility-pipeline system with other users, on reasonable terms, as recommended by the Lessor."*

43. There is only one berth in Vishakhapatnam Port where LPG can be handled. This berth has been constructed and paid for by Vishakhapatnam Port Trust (VPT). Only 'Liquefied Petroleum Gas' (LPG) receipt pipeline system facility connected to the LPG berth. HPCL-SALPG have set up the LPG-receipt facility on land leased from VPT. In fact VPT does not, in-principle, allow

setting up of independent unloading facilities and insists that the single set of unloading arms be shared by all storage services providers at the port. The same is done by VPT for two reasons (1) The LPG Jetty can only accommodate one ship at a time; (2) Repositioning of the ship for multiple set of unloading arms is highly inefficient as it wastes significant amount of valuable time for each repositioning exercise. In this context, our attention was drawn towards the response of VPT dated 12 January 2017 to the Commission as quoted hereunder:

*"VPT has directed SALPG to give a tap out. As this has not been complied with for a long time by SALPG and they are not doing so and since EIPL was informing that they are out of business and the OMCs pointed out that business of the Port was also being affected, recently permissions have been given to EIPL to set up a second set of unloading arms. However, it is more efficient for both terminals (SALPG and EIPL) to operate through a single set of unloading as unnecessary ship movement will be avoided."*

44. There is only one dispatch pipeline that moves LPG product from the unloading area to connect to other storage facilities. This dispatch line is owned and operated by HPCL. While being permitted by VPT to lay the said pipeline on its leased land, HPCL expressly agreed that all the parties who are allowed by VPT to set up bulk storage facilities at Vizag Port will be permitted to be connected to the said pipeline.

45. 'EIPL' storage facility and pipeline is connected through this HPCL dispatch line to the LPG jelly area, and is dependent on this line and the jelly-connected SALPG LPG receipt pipeline system to receive LPG product.

46. 'SALPG' insists that for using its unloading and upstream terminalling infrastructure for blended product, its storage (cavern) should mandatorily be used on account of alleged safety reasons.

47. It is submitted that EIPL is every day incurring loss of business & severe economic costs which in result adding further financial burden to IOCL/BPCL/SHV Energy Private Limited. IOCL and BPCL have already stated before Commission that access to EIPL's services would lead to the OMCs saving cost.

48. It is alleged that during the pendency of the appeal the HPCL has served a letter dated 03 December 2018 on EIPL asking EIPL to remove its pipeline connection from the SV-3 point in a week's time. EIPL has responded to the same on 11 December 2018. EIPL, vide its application dated 11 December 2018, had sought interim stay on any such unilateral action by HPCL as any disconnection of EIPL facility would render any interim order ineffective. Thereafter, HPCL has not pressed with such unilateral action in view of oral direction of the Appellate Tribunal

Prayer has been made to dismiss the appeal and to vacate the interim order of the stay.

**STAND OF VISHAKHAPATNAM PORT TRUST – (VPT)**

49. The Vishakhapatnam Port Trust has leased the Port to SALPG (Appellant). According to VPT SALPG has violated and has not complied

the long term lease dated 6<sup>th</sup> December, 2003 pursuant to which they are running business. It was submitted that HPCL has been granted a long term lease dated 6<sup>th</sup> December, 2003 for setting up its infrastructure at the outer harbour of the Vizag Port. The said lease came with an obligation under Clause 24 which required HPCL (or its sub-lessee, SALPG) to share its pipeline system with other users on reasonable terms as recommended by VPT (lessor). That the said arrangement was the very premise on which the lease was granted to HPCL.

### **ANALYSIS OF FACTS IN LAW**

50. The key objection of SALPG and HPCL is that the structural changes to its infrastructure may affect the safety integrity levels. Allowing the request made by EIPL may result into accidental release of refrigerated cargo into HPCL's pumps and cross-country pipeline leading to disastrous consequences.

51. The Commission deliberated the issue in detail and held that bypass restriction imposed by SALPG is primarily for commercial interest and the restrictions amounts to denial of market access.

52. The Vizag Port belongs to 'VPT'. 'VPT' allowed long term lease to HPCL for setting up of its infrastructure at the outer harbour of the 'Visakhapatnam Port'. The SALPG is a sub-lessee. As per Clause 24 the HPCL and its sub-lessee SALPG is required to share its pipeline system with other users on reasonable terms as recommended by 'VPT' (Lessor).

53. In furtherance of the above, when VPT gave the permission/lease to HPCL to setup the subject facility at the outer harbour, it came with a categorical obligation vide its letter dated 08.07.1997 stating that: "The Lessee

shall share the pipeline facility with other users whenever it is recommended by VPT at reasonable terms and conditions as may be decided by VPT and that the Lessee shall make necessary arrangements by planning tap-off facility to the parallel marketers in the EXIM Park area.”

54. HPCL letter dated 11.08.1998 to VPT- HPCL specifically agreed with VPT in the following words "We confirm our in-principle acceptance to share our LPG Import facilities with other PSUs and private parties who are permitted by VPT to put up LPG handling facilities at Visakhapatnam. This is in line with our earlier advice wherein we had already confirmed that our infrastructure at the outer harbour has been planned to cater to the requirement of LPG for the entire industry including, private parties who have been permitted to set up bulk LPG storage by VPT."

55. 'VPT' granted the subject lease to HPCL and SALPG as a sub lessee to cater to two requirements at the port, viz.,(i) handling terminalling services and (ii) storage services. Simultaneously, VPT granted an initial lease to EIPL as well, however, only limited to cater storage services. It is in this background that the demand by SALPG for mandatory use of its cavern is against the aforementioned lease deed inasmuch as the, storage facilities rendered by other players would be rendered a nullity if the OMCs are forced to mandatorily use SAPLG's cavern. Needless to mention, other players providing only the storage facilities will cease to exist if SALPG mandatorily forces OMCs to use its cavern for storage.

56. VPT before granting long term lease made it clear that the pipeline has to be shared with other players. The agreement or any record does not make

any mention of the mandatory usage of the cavern. Non-compliance of the aforementioned clause has led to a situation that irrespective of an OMC's desire, the OMCs will have no choice but to use the SALPG's, cavern which is impermissible.

57. EIPL had sought approval of the 'Petroleum and Explosives Safety Organisation' (PESO) for setting up of LPG blender in 2010. PESO administers Explosives Act, 1884, Petroleum Act, 1934 and Inflammable Substances Act, 1952 and the authority responsible for ensuring safety and security of public and property from fire and explosion. It grants approval after satisfaction of criteria relating to, inter-alia, safety aspects, as prescribed under the aforementioned statutes. Pursuant to the aforesaid application of EIPL, PESO vide letter dated 5th August 2010 observed that the drawing showing EIPL's proposed blender facility at the Visakhapatnam port met the approval of PESO and the same was returned with duly endorsed token of approval subject to several conditions stipulated therein. These included demonstrations of safe operating procedures and emergency response measures, undertaking from VPT regarding responsibility on firefighting arrangements and a clear consent letter from the owners of the 'Propane' and 'Butane' pipelines authorising tap off for the purpose of using the proposed LPG blender.

58. Subsequently, the detailed statement and feasibility report submitted by 'EIPL', 'PESO', inter-alia, further directed 'EIPL' to give intimation 'once the facilities are fully ready along with detailed Site/Layout and P & I Diagram of

entire area to arrange its inspection to consider granting permission for commissioning.

59. The Commission noticed that the 'PESO' had not found fault with the design of the EIPL's LPG blender and allowed it to install the same with certain conditions.

60. Before the Commission, 'SALPG' submitted that as per 'PESO' letter dated 5<sup>th</sup> August, 2010, there is a requirement that a clear consent letter should be obtained from the owners of the twin pipelines authorising tap off for the use of EIPL's proposed blending unit. It was argued that SALPG had not given any consent in this regard.

61. However, such objection was not accepted by the Commission.

62. 'SALPG' which was allowing 'EIPL' to get cash through by bypass, for no reason can deny its consent. The representative of the 'SALPG' had stated to the VPT that there are no technical constraints for provision of tap off. The relevant extracts of the minutes dated 8<sup>th</sup> November, 2010 of the meeting held at VPT, reads as under :

*"M/s. SALPG Representative informed that tampering (Tap off) of the existing system is not possible, since it is integrated system with cavern. Dy. Chairman enquired them whether there are any technical constraints for Tap off. The SALPG Representative clarified that there are no technical constraints but that the piping system is dedicated for unloading into the Cavern and further stated that M/s. EIPL, M/s. HPCL and M/s. IOCL are using the*

*integrated system of unloading facilities and Cavern including the blender. Dy. Chairman asked whether M/s. EIPL could use their blending system. M/s SALPG representative informed that it is not possible and further stated that only an end user can approach them and have a business tie up with them.”*

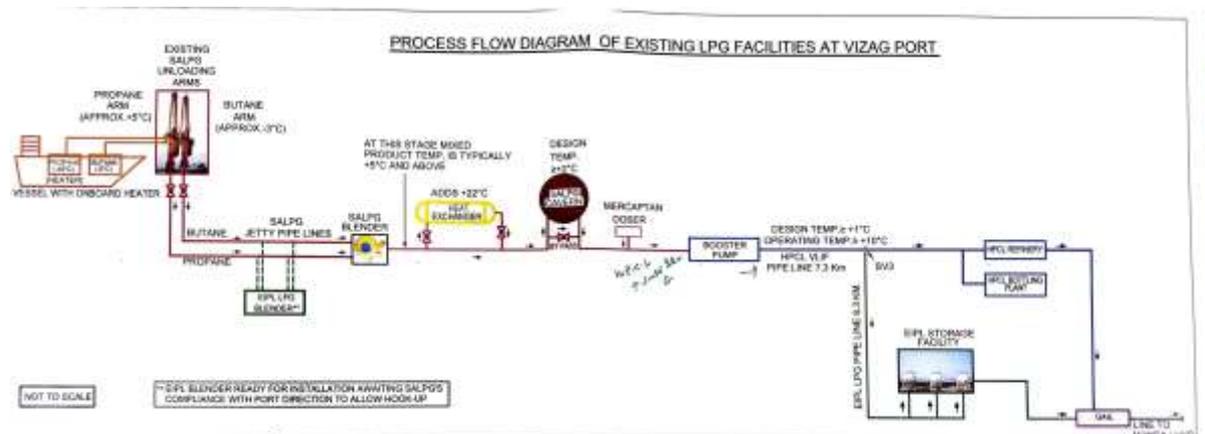
63. ‘SALPG’ insisted for mandatory use of cavern on the ground that the whole of the upstream terminalling infrastructure is an integrated system and piece-meal access has not been envisaged. There was no technical constraint in the provision of tap out nor any safety concern was expressed.

64. The Commission noticed that on investigation, it was revealed that ‘SALPG’ was initially not averse to provide a tap out from the unloading arms to the Informant but objected to tap in back into the pipeline system. VPT, in its meeting held on 16<sup>th</sup> March, 2013, also required ‘SALPG’ to provide tap off. ‘VPT’ again issued a letter dated 6<sup>th</sup> April, 2015 to SALPG to provide a tap off. Later on, ‘SALPG’ *vide* letter dated 10<sup>th</sup> June, 2015 refused to provide even tap out.

65. The Commission while noticed observed that the possibility of tap out from the jetty and the purported objections to tap out appears to be an afterthought. The terminalling infrastructure developed by ‘SALPG’ is purportedly a state-of-the art facility with an automated failsafe mechanism to address safety and emergency situations. For the said reason, the Commission rightly observed that under such circumstances, general

objection to tap-in and tap-out, without specifics regards the potential safety outbreaks being demonstrated, is considered vague and *sans* merit.

66. Learned counsel for the 'SALPG' and 'HPCL' given much stressed on temperature of 'Propane' and 'Butane'. Their main contention was that when 'Propane' and 'Butane' used to be unloaded from the ship there was no difficulty because of temperature used to be about (-) 5 degree. According to them, since the supply of 'Propane' and 'Butane' are now met separately, at different temperature that is 'Propane' at (-) 45 degree C and 'Butane' at (-) 5 degree C, in absence of proper mechanism of bring it down it may affect the pipeline and therefore, now after blending it required to be sent through 'cavern'. For proper appreciation, parties have filed the 'Process Flow Diagram of Existing LPG Facilities at Vizag Port', as under:-



67. From the 'Process Flow Diagram of Existing LPG Facilities', it is clear that when pre-mixed, gas of 'Propane' and 'Butane' used to come through heater fitted in the LPG vessel.

68. 'EIPL' explained the Seawater Heat Exchanger system is designed to heat a mixture of 'Propane' at (-45) degree centigrade and 'Butane' at (-5) degree centigrade from the mixed temperature of approximately (-20) degree centigrade to (+2) degree centigrade. Thus, heat regulation system has the ability to elevate the temperature of the products by (+22) degree centigrade. In case of import of 'Butane' and 'Propane' separately, 'Propane' alone is heated using ship heater to convert it to a positive temperature, upto (+50) degree centigrade, from (-45) degree centigrade. However, 'Butane' is not heated in ship. Both the products when transmitted out of the ship, can pick up ambient heat too. After blending of 'Propane' and 'Butane', temperature of the resultant LPG is in the range of (+5) degree centigrade to (+8.5) degree centigrade. Thereafter, the heat exchanger could further raise the temperature by (+22) degree centigrade resulting in a product of temperature in the range of (+27) degree centigrade to (+ 30.5) degree centigrade. This is definitely above (+10) degree centigrade and hence, is safe to be subjected to the cross-country pipeline.

69. From the chart 'Process flow diagram of existing LPG facilities', it is clear that when pre-mixed, gas of 'Propane' and 'Butane' used to come through a heater fitted in the LPG Vessel and used to be unloaded from existing SALPG on unloading arms. After accident in 1997 when it was made mandatory to transport of 'Propane' and 'Butane' separately and thereafter to mix the product, we find that the LPG Vessels are now coming with on-board heater. The 'Propane' which comes at (-) 45 degree centigrade after having gone through the heater enters into 'Propane' at approximately (+)5 degree centigrade. The 'Butane' with (-)5 degree centigrade, after going through

heater it is sent through 'Butane' with approximately (-) 3 degree centigrade, which used to be the temperature of the pre-mixed product. Both 'Propane' through 'propane arm' at approximately (+)5 degree centigrade and the 'Butane' through 'butane arm' at approximately (-)3 degree centigrade are unloaded in the existing SALPG arms and then moves to EIPL LPG Blender through SALPG Jetty pipeline. Then it moves to the SALPG blender and at this stage mixed temperature is typically (+)5 degree centigrade and above and thereafter, it further goes to the heat exchanger where it adds (+)22 degree centigrade and some of it goes directly both to SALPG 'cavern' and 'bypass', in the SALPG cavern design temperature is (+)2 degree centigrade whereas mixed product temperature goes directly through (+)5 degree centigrade. On bare perusal of the 'Process Flow Diagram', which is produced by the parties and accepted by all, it is clear that the 'Propane', the LPG vessels is (-)45 degree centigrade, after unloading of arm going through on board heater and blenders, the temperature do not go below such position, to accept the stand taken by the 'SALPG' or 'HPCL' that will affect the safety integrity level and will not meet the relevant requirement and may cause accidental release of refrigerated cargo into HPCL's pumps.

70. The Commission consists of 'expert body' and has taken into consideration other expert's report including the stand taken by the representative of the SALPG in its meeting held on 8<sup>th</sup> November, 2010 who informed that the tempering of (tap off) of the existing system is not possible, since it is integrated system and there are no technical constraints.

71. The Commission rightly observed that the 'SALPG' being the only player offering upstream terminalling also it has control over the terminalling infrastructure also.

72. Earlier when 'EIPL' used to supply the pre-mixed gas through bypass, it allowed to get it through bypass but at this stage SALPG had not granted any permission and before the Commission it raised the technical objection, which we noticed that which was not based on any justified 'expert report'.

73. The design parameter of cross-country pipeline of LPG is (+1) degree centigrade. The 'VPT' in its response dated 12th January, 2017 before the Commission had stated that there was no ship heater failure reported to it so far. It is for the said reason the report submitted by EIL was accepted by the Commission. The said EIL report has expressed extreme possibilities of failures and therefore the study by SALPG lacks an unbiased approach to the issue. Both design and operational parameters of blenders, heat exchanger, cavern and the cross-country pipeline were noticed by the Commission.

74. As per the EIL report, seawater heat exchanger system, which receives LPG from the blender, is designed to heat a mixture of 'Propane' at (-45) degree centigrade and 'Butane' at (-5) degree centigrade and the mixed temperature of approximately (-20) degree centigrade which brought to (+2) degree centigrade. This temperature is to avoid rock fracture due to ice formation in rock mass, which in turn is the wall of the cavern. However, neither the EIL report nor the submissions of SALPG provide details of the operating temperature level of the blender and the heat exchanger. This is the reason the Commission rightly rejected the objection raised by the SALPG.

75. According to EIPL because of the bypass restrictions and prohibitions being forced by SALPG, the Oil Marketing Companies (OMCs) have estimated to have loss of around Rs. 325 Crores. The cavern has only one receptacle and it is not possible to route different 'Propane' and 'Butane' mixes through the 'cavern' at the same time. On the other hand, EIL's storage capacity as three storage spheres and it is possible to route LPG of different mixes through these spheres.

76. The aforesaid fact was confirmed by the witness of the 'IOCL' in the cross-examination by EIPL, which reveals that the efficiency at the Visakhapatnam Port shall increase if Informant - EIPL is allowed to compete with SALPG. The continued reluctance of SALPG to provide a hook up or bypass is not the result of 'cavern' being under-utilised but that of erosion of monopolistic profits.

77. As regards 'VGLC imports', the 'cavern in itself is not responsible for facilitating VGLC imports at 'Visakhapatnam Port' as the port jetty has been designed and built to berth VLGCs. The witness of VPT in his cross-examination by SALPG also confirmed the aforesaid fact. The ports at Ennore, Haldia and Kandla have storage capacities of 30,000 MT, 30,000 MT and 15,000 MT respectively, which is much below the cavern of SALPG. Yet, they import LPG through VLGCs. The Oil Manufacturing companies (OMC including the Indian Oil company etc. ) is free to decide whether to avail the services of EIPL and SALPG. Therefore, it is rightly contended on behalf of the Informant (EIPL) that SALPG cannot dictate to have the mix product through its 'cavern'.

78. The Commission rightly held that protection of commercial interest by a dominant enterprise, at the cost of competition, is contrary to its responsibility cast under the Act. SALPG has pointed out that allowing bypass would reduce the discharge rate *i.e.* from 1000 MT/hour to 250-300 MT/hour, thereby increasing the demurrage charges to OMCs. Seen from the perspective of competition, the Commission is of the view that if option of bypass is allowed, the users, *i.e.* OMCs could in that case decide on the choice to make for after weighing the cost and other relevant factors. In other words, it is for the customers to decide whether they would like to pay for use of the cavern or opt for higher vessel retention.

79. It rightly observed that effective competition does not necessarily mean prevalence of the most efficient to the exclusion of relatively less efficient choices to consumers. Therefore, in the absence of capacity constraints to accommodate the services offered by EIPL, restraint on competition exerted by SALPG on the pretext of the former being less efficient, would not be justified.

80. The details provided by 'VPT', capacity of LPG berth was shown as 3 million MT of LPG per annum but the actual capacities utilized were only in the range of around 34% to 45%, between 2010-11 and 2016-17. For the same period, data on vessel occupation at LPG jetty at Vishakhapatnam Port suggests that the occupancy was around 28% to 37%. The relevant details are reproduced below :

Table : Year-wise (Since 01-04-2010) handling data of LPG Berth pertaining to premixed LPG/Butane and Blended LPG (Propane & Butane separately)

Exporter Importer	YEAR							(in MT)
	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	Grand Total
<b>LPG</b>								
BPCL	1,69,301	1,62,205	1,65,878	1,52,426				6,49,810
HPCL	4,79,517	5,49,331	5,65,306	4,78,902				20,73,056
IOCL	3,62,045	3,11,190	3,72,965	3,15,642				13,61,842
SHV ENE.	17,320							17,320
<b>A. Total</b>	<b>10,28,183</b>	<b>10,22,726</b>	<b>11,04,149</b>	<b>9,46,970</b>				<b>41,02,028</b>
<b>Butane</b>								
BPCL				25,468	97,270	1,47,857	1,29,684	4,00,279
HPCL				4,400	2,78,258	3,13,196	2,99,244	8,95,098
IOCL				23,450	2,15,952	2,47,859	1,61,747	6,49,008
<b>B. Total</b>				<b>53,318</b>	<b>5,91,480</b>	<b>7,08,912</b>	<b>5,90,675</b>	<b>19,44,385</b>
<b>Propane</b>								
BPCL				15,600	78,590	1,24,687	1,07,071	3,25,948
HPCL				13,600	2,52,482	2,86,909	2,84,253	8,37,244
IOCL				19,152	1,89,729	2,21,851	1,46,190	5,76,922
<b>C. Total</b>				<b>48,352</b>	<b>5,20,801</b>	<b>6,33,447</b>	<b>5,37,514</b>	<b>17,40,114</b>
<b>Grand Total (A+B+C)</b>	<b>10,28,183</b>	<b>10,22,726</b>	<b>11,04,149</b>	<b>10,48,640</b>	<b>11,12,281</b>	<b>13,42,359</b>	<b>11,28,189</b>	<b>77,86,527</b>
Source: Response dated 12 <sup>th</sup> January, 2017								

Table : data regarding, No. of days, the LPG jetty was occupied by vessels carrying LPG/Propane/Butane during 2010-16 on year-wise basis:

Salled On	YEAR (Total no. of Days Occupied)							Total
	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	
Jan	12.66	12.65	7.23	13.69	5.68	12.14		64.05
Feb	11.14	12.51	10.64	8.73	12.94	9.92		65.88
Mar	9.81	8.61	6.99	10.88	10.00	9.44		55.73
Apr	8.61	11.33	14.96	11.96	11.57	8.69	11.39	78.50
May	11.05	12.21	9.45	8.78	9.78	10.29	11.37	72.94
June	11.81	8.82	12.46	7.62	9.53	8.77	11.27	70.29
July	10.09	13.60	10.02	8.89	6.19	12.71	8.24	69.74
Aug	14.50	7.61	13.54	7.19	10.00	10.70	16.00	79.54
Sep	13.30	10.61	11.48	11.40	9.09	12.04	10.87	78.79
Oct	9.66	6.03	12.89	10.26	9.34	13.88	11.53	73.60
Nov	7.46	10.75	13.59	8.30	11.62	10.04	14.22	75.98
Dec	15.35	10.77	8.48	5.52	12.70	10.58	8.05	71.45
<b>Total</b>	<b>135.43</b>	<b>125.51</b>	<b>131.73</b>	<b>113.23</b>	<b>118.46</b>	<b>129.20</b>	<b>102.94</b>	<b>856.50</b>
Source: Response dated 12 <sup>th</sup> January, 2017								

These details show that, waiting of vessels, if any, is not on account of capacity constraints. Not even half of the actual capacity seemed to have been utilised and a more efficient scheduling on the part of OMCs and traffic management by VPT would go a long way to reduce such waiting.

81. Learned counsel for the VPT submitted that large number of related buyers have been affected and submitted as follows:

(i) **Loss suffered by OMCs and other related players**

- a. Pursuant to the directions issued by the Commission, oil importers which had earlier discontinued LPG import on account of SALPG's denial of access of the terminalling facilities to EIPL and the high handling charges levied by SALPG, have approached the VPT requesting to facilitate recommencement of LPG import operations. One such importer- SHV Energy Pvt. Ltd.- has vide its letter dated 06.10.2018 requested the VPT to revive its business operations through the Vishakhapatnam Port.
- b. Further, even IOCL has vide its letter dated 25.10.2018 stressed upon the usage of EIPL terminal inasmuch as the utilisation of the same is almost nil and the same results in OMCs incurring higher terminalling charges which are payable to SALPG.

(ii) Revenue losses **suffered by VPT**

- a. VPT being the port trust is entitled to 'Vessel Management Charges' (VMC) from the OMCs for its services rendered for the management of vessels at the port. It is submitted that the

estimated revenue of VPT for a 30000 GRT vessel with a parcel of 24000IS is Rs.170 per tonne. As duly noted by the Commission in para 54.37 of the impugned order, only 34% - 45% of the total capacity of the LPG berth was utilized between 2010-11 and 2016-17. That the same eventually leads to a loss of several crores to the VPT. It may be mentioned here that as per the calculations of VPT, in the year 2017-18 alone, VPT has suffered estimated revenue loss of approximately Re. 41 crores on account non - optimum usage of the LPG berth.

82. However, we are not inclined to give any finding as to loss, if any, suffered by VPT or manufacturing companies though it is open to the Informant (EIPL) to claim loss as claimed.

83. We, therefore, hold that bypass restriction imposed by SALPG is primary with a view to protect its commercial interest at a cost competition and the plea taken before the Commission was an after-thought. The Commission rightly held that 'SALPG' requiring users to necessarily use the cavern and pay higher charges is an unfair imposition in provision of terminalling services; and is likely to discourage imports and restrict the services otherwise offered by the Informant. The impugned restriction on bypass of the cavern facility are in contravention of Section 4(1) read with Section 4(2)(a)(i), Section 4(2)(a)(ii) and Section 4(2)(b)(i) of the Act. The bypass restrictions restricted the business of 'EIPL' was unreasonable which denied the Informant market access, in contravention of Section 4(2)(c) of the Act.

84. As we have heard the 'HPCL' and decide the case on merit, on the ground of rules of natural justice, the question of remitting the matter back to the Commission does not arise.

85. The submission of the Appellant(s) relating to 'geographical market' is misleading as at Vishakhapatnam Port LPG vessels with online heaters has been allowed by VPT to access its port. The Vishakhapatnam Port being used for unloading of LPG and is allowed by VPT, the Appellants cannot suggest that they should not be allowed to unload the 'liquid petroleum gas' at 'Vishakhapatnam Port' but in some other port to justify the abuse of their dominant position.

In view of the aforesaid finding, no relief can be granted. In absence of any merit, the appeals are dismissed. The interim order passed on 19<sup>th</sup> September, 2018 is vacated. The Appellants are directed to comply with the direction of the Commission immediately. No costs.

[Justice S.J. Mukhopadhaya]  
Chairperson

[ Justice Bansi Lal Bhat ]  
Member (Judicial)

New Delhi

18<sup>th</sup> December, 2019

/ns/