

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)**

**I.A. NO.385 OF 2015
IN
DFR NO.1570 OF 2015**

Dated: 16th February, 2016.

**Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member.**

IN THE MATTER OF:

**M/S. USAKA HYDRO POWERS (P))
LIMITED,)
having its corporate office at)
240, Okhla Industrial Estate, Phase-)
III, New Delhi-110020 through Sh.)
Manoj Gupta S/o of Late Sh.)
Rajendrda Gutpa, Director /)
Authorised Signatory.) ... **Appellant/
Applicant****

Versus

**1. HIMACHAL PRADESH)
ELECTRICITY REGULATORY)
COMMISSION,)
through its Secretary, Khalini,)
Shimla-171003.)**

2. **HIMACHAL PRADESH STATE)
ELECTRICITY BOARD LIMITED,)
through its Director, Kumar)
House, Shimla-171004.)**
3. **STATE OF HIMACHAL)
PRADESH,)
through Principal Secretary (MPP)
& Power) to the Government of)
Himachal Pradesh, Shimla-)
171002)**
4. **THE HIMACHAL PRADESH)
ENERGY DEVELOPMENT)
AGENCY (HIMURJA), SDA)
Complex, Kasumpti, Shimla)
(H.P.) – 171 009.) ... Respondents**

Counsel for the Appellant(s)/ Mr. Ajay Vaidya
Applicants Mr. Abhishek Upadhyay

Counsel for the Respondent(s) Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Ishaan Mukherjee for **R-2**

Mr. Shanti Swaroop for **R-3**

ORDER

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI – CHAIRPERSON

1. There is 560 days' delay in filing the instant appeal. Hence this application is filed praying for condonation of delay.

2. A joint petition was filed by the Appellant and Himachal Pradesh State Electricity Board Limited in the Himachal Pradesh Electricity Regulatory Commissions (**“State Commission”**) for approval of Supplementary Power Purchase Agreement under REC Mechanism under Section 86(1)(b) of the said Act read with HPERC (Conduct of Business) Regulations, in respect of Suman Sarwari Hydro Electric Project to be executed by the Himachal Pradesh State Electricity Board Ltd., with the Appellant. The State Commission vide order dated 31/10/2013 accorded its consent to the Supplementary Power Purchase Agreement subject to suitable modifications. The Himachal Pradesh State Electricity Board Ltd., was directed to execute Supplementary Power Purchase Agreement as per the modified/corrected copy thereof within 60 days from the date of the order. Supplementary Power Purchase Agreement was accordingly executed.

3. The Appellant moved a review application on 7/3/2015 before the State Commission. There was 470 days' delay in filing the review application. The only explanation offered by the Appellant was that it could not completely decipher the order passed by the State Commission and only about a week ago when the Appellant was preparing provisional balance sheet for the current financial year, it realised that the tariff rate of the entire capacity of the project has been ordered to be governed by the provisions of old Power Purchase Agreement dated 23/12/2005. The State Commission, in our opinion, rightly observed that this explanation cannot be construed as sufficient cause for the delay. The State Commission also observed that the Appellant had executed Supplementary Power Purchase Agreement on 12/11/2013 pursuant to order dated 31/10/2013 and, therefore, it cannot contend that it could not decipher the State Commission's consent order dated 31/10/2013.

4. Being aggrieved by the consent order dated 31/10/2013 and order dated 4/6/2015 rejecting the review application, the

Appellant has filed the instant appeal and in this application, the Appellant has prayed that 560 days' delay in filing the appeal be condoned.

5. We have heard learned counsel for the Appellant. He submitted that the delay in filing the appeal is caused on account of the pendency of the review application. We are unable to accept this submission. It must be noted that the review application ought to have been filed within 30 days from 31/10/2013 on which date the State Commission had passed the consent order. The Appellant slept over the matter and filed the review application after delay of 470 days. We are not inclined to condone the delay for more than one reason. Firstly, order dated 31/10/2013 is a consent order and the explanation that the Appellant could not decipher the order is totally unacceptable. It must be noted that the said order was passed on the joint petition filed by the Appellant and Himachal Pradesh State Electricity Board Limited. After this order the Appellant in pursuance thereto executed the

Supplementary Power Purchase Agreement on 12/11/2013. Therefore, the Appellant correctly understood the order. The Appellant cannot persuade this Tribunal to accept the explanation that it was unable to understand the order.

6. Mr. Anand Ganesan, learned counsel for Respondent No.2 has drawn our attention to the judgment of the Supreme Court in **Pushpa Devi Bhagat Vs. Rajinder Singh and Ors**¹ where the Supreme Court after considering Section 96(3) of the Code of Civil Procedure, 1908 (“**the CPC**”) held that no appeal is maintainable against a consent decree in view of specific bar contained in Section 96(3) of the CPC. It is not necessary for us, at this stage, to go into the question whether the provisions of the CPC are applicable to the proceedings before this Tribunal. But we can certainly draw light from **Pushpa Devi Bhagat**. After filing a joint petition and taking a consent order and after sleeping over it for a long time the Appellant seems to have filed the review application to get over

¹ (2006) 5 SSC 566

the delay and create an explanation for the delay to approach this Tribunal after the review petition was rejected to challenge the original consent order dated 31/10/2013. The Appellant tried to draw support from the judgment of the Supreme Court in **State of Kerala v. M.G. Presanna**² where the Supreme Court has held that the period up to the dismissal of a review petition, which was filed and prosecuted *bona fide* by the State ought to have been treated as satisfactorily explained while considering the explanation for the delay in filing the appeal and the delay ought to have been condoned. Firstly in that case the Supreme Court was dealing with the appeal filed by the State. Secondly, the Supreme Court clarified that the review petition must be filed and prosecuted *bona fide* by the State. Here, the review application was filed after a delay of 470 days and it cannot, by any stretch of imagination, be said to have been filed and prosecuted *bona fide*. The State Commission in its order dated 4/6/2015 rightly relied on the judgment of the Supreme Court in **Basawaraj and Ors. v.**

² (2011) 15 SCC 203

The Special Land Acquisition Officer³. It is advantageous to reproduce the relevant paragraph of the said judgment:

“15. The law on the issue can be summarised to the effect that where a case has been presented in the court beyond limitation, the applicant has to explain the court as to what was the “sufficient cause” which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, or for want of bonafide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid down by this court in regard to the condonation of delay. In case there was no sufficient cause to prevent a litigant to approach the court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the statutory provisions and it tantamounts to showing utter disregard to the legislature.”

7. Applying the above judgment to the facts of this case we are of the opinion that the delay cannot be condoned. The Appellant has behaved in a most negligent manner. The Appellant’s action lacks *bona fides*. It is not possible for us to hold that the Appellant has shown sufficient cause which

³ AIR 2014 SC 746

prevented it from approaching this Tribunal within the period of limitation. In the circumstances, the application for condonation of delay is dismissed. Needless to say that in view of the above, the appeal under DFR No.1570 of 2015 also stands rejected.

8. Pronounced in the Open Court on this 16th day of February, 2016.

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

√**REPORTABLE/NON-REPORTABLE**