

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

**IA No.494 OF 2016
IN
DFR NO.1574 OF 2016**

Dated : 15th November, 2016

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

In the matter of:-

1. **NEW USHA NAGAR**)
CO-OPERATIVE HOUSING)
SOCIETY LTD.)
Opposite Bright High School)
Village Road,)
Khandelwal Marg, Bhandup West,)
Mumbai-400 078.)... **Appellant**

AND

1. **MAHARASTRA ELECTRICITY**)
REGULATORY COMMISSION)
World Trade Centre No.1)
13th Floor, Cuffe Parade,)
Colaba, Mumbai-400 001.)
2. **TATA POWER COMPANY LIMITED**)
4th Floor, A-Block,)
Corporate Centre, Sant Tukaram Road,)
Carnac Bunder,)
Mumbai-400 009.)

3. **COMMISSIONER OF POLICE**)
 Having its office at the office of)
 Commissioner of Police,)
 D.N. Road,)
 Opposite Crawford Market,)
 Mumbai-400 001) ... **Respondents**

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
 Ms. Dipali Sheth

Counsel for the Respondent(s) : Mr. Amit Kapur
 Mr. Apoorva Misra for **R.2**

ORDER

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

1. In this appeal the Appellant has challenged order dated 05/05/2015 passed by the Maharashtra Electricity Regulatory Commission (“**the State Commission**”). There is 333 days’ delay in filing this appeal. Hence, the instant application is filed praying that the delay may be condoned.

2. It appears that the Appellant had filed writ petition in the Bombay High Court being Writ Petition No.2544 of 2015. The said writ petition was disposed of by the Bombay High Court on 23/03/2016 observing that the Appellant has remedy of filing

appeal before this Tribunal. It is the case of the Appellant that the Appellant received certified true copy of the impugned order dated 23/03/2016 on 06/04/2016 and thereafter the appeal was filed on 19/05/2016 i.e. within 42 days from the receipt of certified copy of the order. It is contended that there is no delay in filing the appeal but the present application is being filed by way of abundant caution.

3. We have heard Mr. Ganesan, learned counsel for the Appellant. He has reiterated the above explanation. Counsel has drawn our attention to the order of the Bombay High Court where the Bombay High Court while disposing of the Appellant's writ petition observed that this Tribunal can be requested to take note of the pendency of the petition filed by the Appellant in the Bombay High Court and condone the delay. Counsel submitted that the Appellant was *bona fide* prosecuting the writ petition. Delay, if any, is not intentional. Hence, in the interest of justice and having regard to the Bombay High Court's observations delay may be condoned.

4. Mr. Amit Kapur, learned counsel appearing for Respondent No.2 has strenuously opposed the application for condonation of delay. Counsel has also submitted written submissions. Gist of the said submissions is as under:

- (a) It is wrong to contend that the Bombay High Court had directed the Appellant to approach this Tribunal or had directed this Tribunal to condone the delay. The Bombay High Court had left condonation of delay to the discretion of this Tribunal vide its order dated 23/03/2016.
- (b) The Appellant is stated to have received the copy of the impugned order on 25/05/2015. However, the writ petition was filed in the Bombay High Court on 09/07/2015 i.e. on the 45th day from 25/05/2015.
- (c) Writ petition was listed before the Bombay High Court on 28/07/2015. This Tribunal became functional on 13/08/2015. Respondent No.2 raised objection to the maintainability of the writ petition by filing a reply on 14/09/2015. On

17/03/2016 Respondent No.2 apprised the Bombay High Court that this Tribunal had started functioning since 13/08/2015. The Bombay High Court disposed of the writ petition on 23/03/2016 *inter alia* on the ground that there is efficacious remedy of an appeal before this Tribunal and hence there was no need to keep the appeal pending .

- (d) According to the Appellant the Appellant received the certified copy of the Bombay High Court's order on 06/04/2016 but the Appellant filed the instant appeal only on 19/05/2016 i.e. 42 days from 06/04/2016. Thus, the Appellant failed to approach this Tribunal immediately after the disposal of the writ petition.
- (e) The present application is bereft of any details or explanation.
- (f) The Appellant had approached the Bombay High Court only on the ground that this Tribunal was not functional at the relevant time. This

Tribunal became functional on 13/08/2015. The Appellant ought to have withdrawn the writ petition immediately thereafter. The Appellant despite being aware that this Tribunal became functional on 13/08/2015 dragged its feet. The Appellant's conduct therefore lacks *bona fides*.

- (g) Period between 13/08/2015 and 23/03/2016 cannot be excluded from computation in terms of Section 14 of the Limitation Act, 1963 because it cannot be said that the Appellant was prosecuting the matter in the High Court with due diligence under *bona fide* mistake that the Bombay High Court has jurisdiction to decide the appeal.
- (h) The Appellant has failed to offer acceptable explanation. The present application is abuse of process of law and hence the application may be dismissed.

(j) Reliance is placed on the judgment of the Supreme Court in **Collector, Land Acquisition, Anantnag and Anr. v. Mst Katiji and Ors.**¹

5. We shall now examine the prayer for condonation of delay in light of factual data furnished to us and the rival contentions.

6. On 05/05/2015 the State Commission disposed of Case No.168 of 2015 filed by the Applicant - New Usha Nagar Co-operative Society Ltd by upholding the order dated 11/09/2014 passed by the Commissioner of Police Mumbai, permitting erection of Transmission Tower. The Appellant received copy of the State Commission's order dated 05/05/2015 on 25/05/2015. On 09/07/2015 i.e. on the 45th day from the State Commission's order, the Appellant filed Writ Petition No.2544 of 2015 before the Bombay High Court. The reason for filing the writ petition was stated to be unavailability of regular

¹ (1987) 2 SCC 107

bench of this Tribunal. Paragraph 45 of the said writ petition needs to be quoted in this connection.

“ 45. The present Petition is filed challenging the legality of the Order dated 5th May, 2015 passed under the provision of Electricity Regulatory Commission Act 1998. The said Act and the Rules made thereunder provided that an Appeal lies to the Appellate Tribunal for Electricity. However, the Tribunal has notified that the sitting of regular benches of the Tribunal will not take place due to administrative reasons until further Order. In the circumstances it has been notified that the parties may file for appropriate remedy if there is urgency of hearing of any fresh case, etc, as available under the law. The Petitioners state that the Petitioners are left with no other option but to approach this Hon’ble Court by way of present Petition invoking the inherent powers of this Hon’ble Court as no other alternate efficacious remedy is available to the Petitioners. A copy of the Notice dated 29th June, 2015 is annexed hereto and marked Exhibit ‘M’ ”

7. On 28/07/2015 the writ petition was listed before the Bombay High Court. Notice was issued on that day. On 13/08/2015 the regular benches of this Tribunal became functional. According to Respondent No.2, on 14/09/2015 Respondent No.2 filed its preliminary reply challenging the maintainability of the writ petition on the ground that the regular benches of this Tribunal had become functional on 13/08/2015 and therefore the writ petition was not maintainable. On

15/09/2015, the writ petition was listed before the Registrar/Prothonotary of the Bombay High Court because office objections were not removed. On that day the Appellant sought 4 weeks' time to clear the office objections.

8. Thereafter, the writ petition was listed before the Bombay High Court on 22/12/2015 and 18/02/2016 for hearing. However, it was not taken up for hearing due to paucity of time. On 17/03/2016, Respondent No.2 mentioned the writ petition before the Bombay High Court and apprised the Bombay High Court that since the regular benches of this Tribunal had become functional, the writ petition had become infructuous and needs to be disposed off forthwith. On 23/03/2016 the Bombay High Court disposed off the writ petition. The order of the Bombay High Court reads thus:

“1. After having heard both the sides and finding that there is an alternate and equally efficacious remedy of an appeal before the Appellate Tribunal and now that the Appellate Tribunal has been fully constituted, we need not keep this petition pending on our file. The petitioner has alternate and equally efficacious remedy of approaching the Appellate Tribunal and also requesting it to hold its sitting at Mumbai. During such appellate proceedings, the Tribunal can be requested to pass all such orders as are permissible in law including that of remand. Thus, as a matter of prudence and

when there is a complete remedy available, the Writ Petition need not be entertained. It is accordingly disposed of.

2. The Tribunal can be requested to take note of the pendency of this petition before this Court, and in the light of paragraph 45 of the Petition, it may be further requested to condone the delay, if any, in approaching it.”

9. It is the case of Respondent No.2 that Respondent No.2 forwarded an authenticated copy of the order dated 23/03/2016 passed by the Bombay High Court to the Appellant. As per the averment made in the instant application, the Appellant received the certified copy of the said order on 06/04/2016. The Appellant filed the appeal on 19/05/2016.

10. As stated earlier the State Commission's order dated 05/05/2015 was received by the Appellant on 25/05/2015. Since the benches of this Tribunal were not functional the Appellant filed writ petition in the Bombay High Court on 09/07/2015 i.e. 45th day from the State Commission's order. It is not possible to hold that there is any delay at this stage.

11. It is urged that this Tribunal became functional on 13/08/2015. From that day alternate remedy was available to the Appellant. The Appellant should have therefore informed this fact to the Bombay High Court and withdrawn the writ petition. It is submitted that as per Section 14 of the Limitation Act 1963 while calculating period of limitation time taken by a party in prosecuting another proceeding in a court without jurisdiction, *bona fide* and with due diligence, can be excluded. In this case it cannot be said that the Appellant was prosecuting the writ petition with due diligence and *bona fide* and therefore benefit of Section 14 is not available to it.

12. It is not possible for us to accept this submission. While dealing with this application we must keep in mind the fact that the Appellant is co-operative housing society. The Appellant had to approach the Bombay High Court because this Tribunal's benches were not functional. The Appellant cannot be blamed for that. Once the writ petition was entertained by the Bombay High Court it follows its own course. It is true that the Appellant had not removed office objections and on 15/09/2015 the Appellant sought four weeks' time to remove office objections from the

Registrar/Prothonotary of the High Court. The Appellant ought to have removed the office objections immediately, but we do not see any *mala fides* in the Appellant's conduct of not removing the office objections and taking time for that purpose. It is pertinent to note that on 22/12/2015 and 18/02/2016, the writ petition was listed before the High Court for hearing. The Bombay High Court did not take it up for hearing because of paucity of time. It is true that the Appellant ought to have informed the Bombay High Court that the benches of this Tribunal had become functional on 13/08/2015. But we are unable to read any motive to delay the matter in this lapse. According to Respondent No.2 on 17/03/2016, Respondent No.2 mentioned the writ petition before the High Court that the benches of this Tribunal had become functional. But the High Court did not dispose of the writ petition on that day.

13. The Bombay High Court disposed of the writ petition on 23/03/2016 observing that alternate and equally efficacious remedy was available to the Appellant because this Tribunal had been fully constituted. It is pertinent to note that the Bombay High Court while relegating the Appellant to this Tribunal

expressed that this Tribunal can be requested to take note of the pendency of the writ petition in the Bombay High Court and can be further requested to condone the delay, if any, in approaching it. It is argued by counsel for Respondent No.2 that there is no direction from the Bombay High Court to condone the delay. We cannot read the Bombay High Court's order in this manner. When the Bombay High Court suggests that this Tribunal can be requested to take note of the pendency of the petition before it and can be further requested to condone the delay, in our opinion, implicit in this is the Bombay High Court's expectation that this Tribunal would take a liberal and kindly view of the matter and condone the delay. The High Court's order in our opinion is the strongest point in favour of the Appellant in the peculiar facts and circumstances of the case. It was open to the Bombay High Court to merely dispose of the petition on account of alternate remedy available to the Appellant. The further observations of the High Court which we have quoted hereinabove are significant and cannot be ignored by us.

14. It is well settled that it is not the length of the delay but sufficiency of cause that has to be considered while dealing with

application for condonation of delay. Generally the courts are liberal in dealing with applications for condonation of delay out of their anxiety that interest of justice should not be defeated. However, if there is absence of reasonable and acceptable explanation the courts cannot condone delay. In this case in our opinion the Appellant has made out sufficient cause. We are unable to come to a conclusion that the Appellant was not prosecuting the writ petition in the Bombay High Court with due diligence and *bona fide*. In our opinion therefore delay deserves to be condoned by imposing cost of Rs.50,000/- on the Appellant.

15. In the circumstances, the delay in filing the appeal is condoned on the Appellant depositing with **“Sai Deep Dr. Ruhi Foundation, A/c No.952663443, A-508, Sector 19, Noida-201 301”** costs of Rs.50,000/- (Rupees fifty thousand only) within four weeks from today. On proof of payment of cost being submitted, the Registry shall number the appeal and list the matter for admission on **20/12/2016**.

16. Application is disposed of in the above terms.

17. Pronounced in the Open Court on this **15th day of November, 2016.**

(I.J. Kapoor)
Technical Member

(Justice Ranjana P. Desai)
Chairperson

✓ **REPORTABLE / ~~NON-REPORTABLE~~**