

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)**

**IA NO.316 OF 2017
IN
DFR NO.1065 OF 2017**

Dated: 21st September,2017.

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

In the matter of:

**M/S LOUDON PROPERTIES(PVT) LTD.)
6/7A, AJC Bose Road,)
Kolkata-700 017, West Bengal) ... **Applicants****

AND

1. **WEST BENGAL ELECTRICITY)
REGULATORY COMMISSION)
Poura Bhavan(Third Floor),)
Block- GD,)
415-A, Sector-III, Bidhannagar,)
Kolkata -700106,)
West Bengal)**
2. **M/S CESC LIMITED)
CESC House,)
Chowringhee Square, Chowringhee)
North, Bow Barracks,)
Kolkata-700 001)
West Bengal.) ... **Respondents****

Counsel for the Applicant(s)

Mr. Pawan Bindra
Mr. Deepak Biswas
Mr. Aditya K. Singh

Appellant's main grievance is that Respondent No.2 is refusing to supply a separate low tension/medium tension electric supply to the subject premises on the ground *inter alia* that providing LT meter would be unsafe as another supply through the HT consumer is created in the building. It is the case of the Appellant that Respondent No.2 has by refusing to provide a separate LT meter to the Appellant violated the provisions of the Electricity Act 2003. It is the grievance of the Appellant *inter alia* that the State Commission has without application of mind disposed of the complaint and review application filed by the Appellant.

3. It is now necessary to see the sequence of events. By order dated 20/03/2012 ("**the 1st impugned order**") the State Commission disposed of the Appellant's complaint making the above grievance by *inter alia* holding that no separate LT connection will be provided to the Appellant keeping in view the safety angle. The Appellant preferred a review petition which was dismissed by the State Commission on 28/06/2013. The Appellant assailed the said order before the Calcutta High Court being W.P.No.25277(W) of 2013. Admittedly during the pendency

of this writ petition the Appellant made a representation to this Tribunal. This Tribunal vide its letter dated 18/09/2013 intimated to the Appellant that the said matter would be heard before the Kolkata Circuit Bench and that the Appellant should remain present.

4. It appears that the Kolkata Circuit Bench of this Tribunal heard the matter on 08/10/2013 and 09/10/2013 and by order dated 09/10/2013, disposed it of. Since the Appellant has placed reliance on the said order it is necessary to quote it. It reads as under:

“It is now admitted that the Applicant herein has already filed Writ Petition before the Kolkata High Court challenging therein the orders dated 20th March, 2012 and 28th June, 2013 passed by the State Commission and the same is pending adjudication.

By way of the present Representation, the Applicant is seeking for the same relief from this Tribunal as is being sought by it in the Writ Petition which is pending adjudication before the Kolkata High Court.

At this stage, we are of the view that when the matter is already pending adjudication before the Kolkata High Court, it is not appropriate for this Tribunal to issue any direction on the basis of the Representation.

It is, however, open to the Applicant to pursue the matter before the Kolkata High Court. With this observation, the Representation is disposed of.”

5. It is the case of the Appellant that in view of the above order the Appellant was constrained to only pursue the writ petition before the Calcutta High Court in terms of the same.

6. Writ Petition No.25277(W) of 2013 was disposed of by the Calcutta High Court on 07/01/2015. The Calcutta High Court set aside the order dated 28/06/2013 on the ground that it was not a reasoned order. The matter was remanded to the State Commission with a direction to hear the review petition afresh. Pursuant to this direction the State Commission heard the matter. By a detailed order dated 27/03/2015 (“**the 2nd impugned order**”) the State Commission disposed of the review petition which sought review of the State Commission’s order dated 20/03/2012. The State Commission upheld the order dated 20/03/2012 by *inter alia* holding that in a building where occupiers get electric connection from a high tension source, simultaneously low tension connection from a different source (i.e. other than the existing high tension source) cannot be provided because of fire hazards and/or safety measures.

7. Aggrieved by the order dated 27/03/2015 dismissing its review petition the Appellant preferred another writ petition before the Calcutta High Court. According to the Appellant, the Appellant approached the Calcutta High Court instead of approaching this Tribunal because of the alleged grave impropriety on the part of the State Commission in not considering the primary issues raised by the Appellant despite the matter having been remanded to it by the Calcutta High Court. According to the Appellant the Appellant wanted to challenge the jurisdiction of the State Commission and therefore the Appellant *bona fide* approached the High Court instead of approaching this Tribunal.

8. The said writ petition being W.P. No. 2889(W) of 2016 was dismissed by the learned single Judge of the Calcutta High Court on 17/03/2016. Learned single Judge observed that he was not satisfied that there was any violation of any fundamental right as claimed warranting invocation of writ jurisdiction. However, the Appellant will be entitled to assail the order before this Tribunal. Learned single Judge also observed that the Appellant can satisfy this Tribunal that there was sufficient cause for not filing the

appeal within the period of limitation. The Appellant challenged the said order by filing writ appeal being FMA 2765 of 2016 in the Calcutta High Court.

9. The said writ appeal was heard on 15/02/2017. The Appellant argued before the Division Bench of the Calcutta High Court that appeal under Section 111 of the Electricity Act, 2003 (“**the said Act**”) was not an efficacious remedy because the bench of this Tribunal does not regularly sit in Kolkata. The Calcutta High Court dismissed the writ appeal on 15/02/2017 on the ground of maintainability. In the circumstances being aggrieved by the order dated 20/03/2012 (1st impugned order) passed by the State Commission dismissing the Appellant’s complaint and order dated 27/03/2015 (2nd impugned order) passed by the State Commission dismissing the review petition filed by the Appellant seeking review of order dated 20/03/2012, the Appellant has filed the present appeal.

10. Mr.Pawan Bindra learned counsel for the Appellant contended that the Appellant was *bona fide* prosecuting writ petitions and writ appeal before the Calcutta High Court. It is

only after the Calcutta High Court did not entertain the Appellant's appeal on the ground of availability of the remedy of appeal under Section 111 of the said Act that the Appellant filed the present appeal. It cannot be therefore said that the Appellant was negligent or was guilty of remissness. Counsel submitted that the Appellant did appear before the Circuit Bench of this Tribunal at Calcutta. Drawing our attention to the Circuit Bench's order dated 09/10/2013 counsel submitted that noting the fact that the Appellant had filed a writ petition before the Calcutta High Court the Circuit Bench observed that it would be open to the Appellant to pursue the matter before the Calcutta High Court. Pursuant to this order the Appellant prosecuted the proceedings before the Calcutta High Court. The Appellant cannot be faulted for it. Counsel submitted that the courts have always been liberal while considering applications for condonation of delay. It is only in cases where there is want of *bona fides* that the courts refuse to condone the delay. Such is not the case here. Counsel submitted that condonation of delay will not cause any prejudice to the Respondents as the matter will be heard on merits, but if the delay is not condoned grave prejudice will be caused to the Appellant. At the most the

Appellant can be saddled with costs. Counsel submitted that the Appellant has made out sufficient cause for condonation of delay and in the interest of justice delay may be condoned. In support of his submissions counsel relied on **Collector, Land Acquisition, Anantnag and Another v. Mrs. Katiji & Ors¹**, **State of Nagaland v. Lipok & Ors.²**, **Sainik Security v. Sheela Bai & Ors.³** and **State of NCT of Delhi v. Ahmed Jaan⁴**.

11. Mr. Dhar, learned senior counsel for the State Commission submitted that the conduct of the Appellant shows that the Appellant was aware of the statutory appeal provided under the said Act. Despite this, the Appellant approached the Calcutta High Court by way of two writ petitions and one writ appeal. Counsel submitted that the Appellant is misinterpreting the orders of the Calcutta High Court and of this Tribunal to suit his case. The Appellant is guilty of forum shopping. Counsel submitted that the application be therefore dismissed.

¹ (1987) 2 SCC 207

² (2005) 3 SCC 752

³ (2008) 3 SCC 257

⁴ (2008) 14 SCC 582

12. Mr. Sanjay Sen learned counsel appearing for Respondent No.2 submitted that there is complete lack of *bona fides* on the part of the Appellant inasmuch as knowing full well that a remedy under the said Act was available, the Appellant approached the Calcutta High Court. The Appellant is guilty of forum shopping. It is only when the Appellant was unable to get relief that the Appellant has approached this Tribunal. Counsel submitted that the Appellant's intentional and deliberate conduct is also displayed by the submissions made by it before this Tribunal. Counsel submitted that since the Appellant prosecuted proceedings in the Calcutta High Court *mala fide* the Appellant cannot take advantage of Section 14 of the Limitation Act. In effect the Appellant has forfeited its right to file appeal in this Tribunal. The Appellant has in fact abused the process of law and hence the delay ought not to be condoned. In support of his submissions counsel relied on **Neeraj Jhanji v. Commissioner of Customs and Central Excise**⁵ and **judgment of this Tribunal** dated 25/02/2008 in I.A. No.138 of 2007 in **U.P. Power Corporation Ltd v. Uttar Pradesh Electricity Regulatory Commission.** Counsel also relied on **Esha Bhattacharjee v. Managing Committee of Raghunathpur**

⁵ (2015) 12 SCC 695

Nafar Academy & Ors.⁶ where the Supreme Court has summarised the principles relating to condonation of delay in filing appeal and has refused to condone delay of 2449 days in filing the appeal.

13. Undoubtedly the court should adopt a liberal approach while considering prayer for condonation of delay if there is no evidence of *mala fide* conduct or negligent or deliberate inaction. Such approach is warranted because courts are there to administer justice and cause of justice should not suffer because of inadvertent delay caused in filing an appeal. If there is no deliberate inaction, sharp practice or forum shopping, the courts always lean in favour of condoning delay. That is why in **Mrs. Katiji** the Supreme Court stressed the need to adopt a justice oriented approach. The Supreme Court observed therein that ordinarily a litigant does not stand to benefit by lodging an appeal late; that no pedantic approach should be adopted; that the approach of the court should be rational and pragmatic and that there is no presumption that delay is occasioned deliberately. In **Lipok** the Supreme Court stated that what

⁶ (2013) 12 SCC 649

counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion to condone the delay. In **Ahmed Jaan** the Supreme Court reiterated the same principles.

14. In **Neeraj Jhanji**, the Appellant therein had filed a writ petition in the Delhi High Court against the order-in-original passed by the Commissioner of Customs, Kanpur. The Delhi High Court converted it into a statutory appeal under the Customs Act 1962. Objection was raised to the jurisdiction of the Delhi High Court. The Appellant therein then withdrew the appeal with liberty to approach the jurisdictional High Court. The Delhi High Court dismissed the appeal as withdrawn. The Appellant therein filed statutory appeal before the Allahabad High Court. The Allahabad High Court dismissed it by observing as under:

“21. In the present case also as in Ketan V. Parekh, the appellant was assisted and had the services of the counsel, who are expert in the central excise and customs cases. They first filed a writ petition, and then without converting it into appeal obtained an

interim order. They kept on getting the matter adjourned and thereafter in spite of specific objection taken, citing the relevant case law, which is well known, took time to study the matter. Thereafter, they took more than one year and three months to study the matter to withdraw the appeal. They took a chance, which apparently looking to the facts in Ketan V. Parekh case and this case appear to be the practice of the counsel appearing in such matters at Delhi High Court and succeeded in getting interim orders. The Supreme Court has strongly deprecated such practice of forum shopping. In this case also there is no pleading that the writ petition and thereafter appeal was filed in the Delhi High Court, under bona fide belief that it had jurisdiction to hear the appeal and that the appellant was pursuing the remedies in wrong court with due diligence. The appellant, thereafter, caused a further delay of 20 days in filing this appeal, which he has not explained.

22. For the aforesaid reasons, we are of the opinion that the appellant is not entitled to the benefit of Section 14 of the Limitation Act. This appeal is barred by limitation by 697 days, which has not been sufficiently explained by the appellant.”

The Appellant therein filed a special leave petition in the Supreme Court. The Supreme Court dismissed the special leave petition with costs after observing that the writ petition or the appeal filed before the Delhi High Court was not *bona fide* and that the Appellant therein took a chance in approaching the High

Court at Delhi which had no jurisdiction in the matter. Following is the relevant observation of the Supreme Court:

“3. The very filing of writ petition by the petitioner in the Delhi High Court against the order-in-original passed by the Commissioner of Customs, Kanpur indicates that the petitioner took a chance in approaching the High Court at Delhi which had no territorial jurisdiction in the matter. We are satisfied that filing of the writ petition or for that matter, appeal before the Delhi High Court was not at all bona fide. We are in agreement with the observations made by the Allahabad High Court in the impugned order. The Allahabad High Court has rightly dismissed the petitioner’s application of condonation of delay and consequently the appeal as time barred.”

15. In **Esha Bhattacharjee**, the Appellant therein a teacher by profession was not allowed to join duty by Managing Committee of the school on 22/11/2009. She approached the High Court. Learned Single Judge by interim order dated 25/02/2004 directed that the service of the Appellant therein shall not be disturbed until further orders. The said order was challenged in appeal by the Managing Committee of the school before the Division Bench of the Calcutta High Court. There was 2449 days delay in filing the appeal. The Division Bench condoned the delay. The Appellant’s appeal against the said order was allowed

by the Supreme Court. The Supreme Court reiterated the principles laid down by it in several judgments and quoted the following paragraph from its judgement in **N. Balakrishnan v.**

M. Krishnamurthy⁷:

“11. ... The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae ut sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.”

The Supreme Court observed that the Managing Committee was expected to behave with responsibility and the plea of lack of knowledge lacked *bona fides*.

⁷ (1998) 7 SCC 123.

16. Against the backdrop of the above judgments of the Supreme Court to which our attention is drawn by the counsel we shall examine the facts of this case. We must bear in mind that what counts is not the length of delay but the sufficiency of the cause. We will therefore not go only by the huge delay in filing the appeal. We will examine the conduct of the Appellant. We will examine whether the Appellant was honestly and *bona fide* prosecuting some other remedy or he was forum shopping. If the Appellant is guilty of *mala fide* conduct delay cannot be condoned.

17. After the State Commission dismissed the complaint filed by the Appellant vide its order dated 20/03/2012, the Appellant preferred review application which was dismissed by the State Commission on 28/06/2013. The Appellant assailed the said order before the Calcutta High Court vide W.P.No.25277(W) of 2013. The said order being appealable under Section 111 of the said Act, the Appellant ought to have challenged it in this Tribunal. The Appellant was aware of the availability of the said remedy because during the pendency of the said writ petition on the same cause of action the Appellant filed a representation

before the Kolkata Circuit Bench of this Tribunal. The Kolkata Circuit Bench gave a hearing to the Appellant. After realising that the Appellant had filed a writ petition in the High Court seeking the same relief and the said writ petition was pending adjudication, the Kolkata Circuit Bench felt that it was not appropriate for it to issue any directions on the Appellant's representation. Since the writ petition was pending in the Calcutta High Court, the Circuit Bench observed that it was open to the Appellant to pursue the matter before the Calcutta High Court. The said order is quoted by us hereinabove.

18. The Appellant's contention is that because of the above observations of the High Court the Appellant was constrained to pursue the writ petition. We are unable to accept this submission. Since the writ petition was already filed in the Calcutta High Court and the Calcutta High Court was seized of the matter, the Circuit Bench could not have told the Appellant not to pursue the said writ petition. The observations made by the Circuit Bench cannot be interpreted to mean that the Circuit Bench gave any liberty to the Appellant to pursue the writ petition in the High Court. Propriety demanded the Circuit

Bench to await the orders of the Calcutta High Court. Choice to pursue the matter before the Calcutta High Court or file appeal in this Tribunal was with the Appellant. At that stage the Appellant ought to have withdrawn the writ petition and filed appeal in this Tribunal which was the appropriate remedy. The Appellant did not do that.

19. By order dated 07/01/2015, the Calcutta High Court set aside the order dated 28/06/2013 passed by the State Commission whereby the State Commission had dismissed its review petition seeking review of order dated 20/03/2012, on the ground that it was not a reasoned order. The review petition was remanded to the State Commission with a direction to decide it afresh and pass appropriate order. Pursuant thereto the State Commission decided the review petition and by its order dated 27/03/2015 disposed it off.

20. The Appellant was fully aware about the existence of alternative remedy of appeal under the said Act. If the Appellant wanted to challenge the State Commission's order dated 27/03/2015, it should have at least at that stage filed appeal in

this Tribunal. But the Appellant chose to file another writ petition in the High Court. It is stated in the application that the Appellant preferred the second writ petition “questioning the impropriety that had perpetuated in the decision making process of the State Commission” and one of the grounds raised before the High Court was “improper exercise of jurisdiction by the State Commission inasmuch as failing to appreciate the various statutory provisions prohibiting the ongoing acts, omissions and commissions being perpetuated by Respondent No.2”. The Appellant’s case is that the State Commission committed grave impropriety in not considering, despite the matter having been remanded to it by the High Court, the primary issues raised by the Appellant. Assuming that the grievance of the Appellant was true, this Tribunal could have taken care of it. The Appellant ought not to have side-tracked the appropriate remedy of appeal to this Tribunal, the existence of which was known to it. It is impossible to accept that the Appellant filed the second writ petition in the High Court under honest, genuine and *bona fide* belief that it was proper to approach the writ court rather than this Tribunal.

21. The said writ petition was dismissed by learned single Judge of the High Court on 17/03/2016. The order dated 17/03/2016 indicates that the Appellant's counsel tried to justify filing of writ petition and not filing the appeal to this Tribunal on the ground that there was a violation of principles of natural justice and there were flaws in the decision making process. Learned single Judge rejected the said argument by observing that there was no violation of fundamental rights as alleged. Learned single Judge observed that if there is any legal infirmity in the order, the order is easily assailable before this Tribunal. Learned single Judge dismissed the writ petition on the ground that remedy of appeal is available to the Appellant. While dismissing the writ petition learned single Judge observed that it would be open to the Appellant to satisfy this Tribunal that there was sufficient cause for not filing the appeal within the period of limitation.

22. Thus, the Calcutta High Court made it clear to the Appellant that the writ petition was misconceived as there was no violation of principles of natural justice and that the appropriate remedy was an appeal to this Tribunal. At that stage at least the Appellant ought to have approached this Tribunal. But the

Appellant chose to file a writ appeal before the Division Bench of the Calcutta High Court challenging order of learned single Judge dated 17/03/2016. The Appellant submitted before the Division Bench of the Calcutta High Court that appeal under Section 111 of the said Act was not an efficacious remedy because the Circuit Bench of this Tribunal does not sit regularly in Calcutta and the last such hearing was conducted on 01/04/2014. This submission was totally misconceived and the Division Bench of the Calcutta High Court refused to accept it. The writ appeal was dismissed on 15/02/2017. It was improper for the Appellant to urge that the statutory remedy provided under Section 111 of the said Act was not an efficacious remedy when on his representation the Kolkata Circuit Bench of this Tribunal had heard the Appellant. In any case, since this Tribunal functions at Delhi the Appellant could have filed appeal in Delhi. This Tribunal hears appeals filed against the orders of all the State Commissions of the country. If this argument is accepted the litigants from different States of the country would instead of filing appeal in this Tribunal file writ petitions in the High Court of the concerned State. That would be against the mandate of the said Act. In our opinion the Appellant's conduct of filing two

writ petitions and one writ appeal in the High Court clearly amounts to forum shopping. The Appellant is not a litigant who is unaware of the law and the procedure. As we have already noted, the Appellant all along knew that an appeal lies to this Tribunal. In order to justify invocation of writ jurisdiction the Appellant falsely alleged that there was violation of fundamental rights which submission was rejected by the Calcutta High Court. We have no hesitation in observing that by repeatedly approaching the Calcutta High Court, the Appellant took a chance, hoping that it would get a favourable order. When all such attempts failed the Appellant approached this Tribunal causing a huge delay of 1783 and 685 days in filing the appeal. The Appellant has described this delay as “inadvertent delay”. This description deserves to be rejected.

23. In the circumstances we have no hesitation in observing that the Appellant’s conduct lacks *bona fide*. The Appellant was not *bona fide* prosecuting the proceedings in the Calcutta High Court. This case is completely covered by the Supreme Court’s judgment in **Neeraj Jhanji** where the Supreme Court dismissed the Special Leave Petition of the Appellant therein as he had

taken a chance in approaching Delhi High Court which had no jurisdiction. We may also draw support from the Supreme Court's observations in **Esha Bhattacharjee** that the conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration; it is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach. What is distressing to note is that the Appellant is trying to justify its *mala fide* conduct on totally untenable grounds.

24. In the circumstances the instant application for condonation of delay will have to be dismissed and is accordingly dismissed.

25. Consequently the appeal under the above DFR shall also stand dismissed.

(I. J. Kapoor)
Technical Member

(Justice Ranjana P. Desai)
Chairperson