

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

**IA NO. 424 OF 2017 IN
DFR NO. 4120 OF 2016**

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:

JALA SHAKTI LTD.)
THROUGH ITS AUTHORISED SIGNATORY)
SHRI AUDITYA YADLAPATI)
REGD. OFFICE : H.NO. 135,)
UPPER JULAKARI, CHAMBA,)
HIMACHAL PRADESH – 176318) **.... Appellant(s)**

Vs.

1. HIMACHAL PRADESH ELECTRICITY)
REGULATORY COMMISSION)
THROUGH ITS SECRETARY,)
KEONTHAL COMMERCIAL COMPLEX,)
KHALINI, SHIMLA – 171002)

2. HIMACHAL PRADESH STATE ELECTRICITY)
BOARD LTD.)
THROUGH ITS DIRECTOR,)
KUMAR HOUSE, SHIMLA,)
HIMACHAL PRADESH – 171004)

3. THE HIMACHAL PRADESH ENERGY)
DEVELOPMENT AGENCY)
(HIMURJA),)
THROUGH ITS DIRECTOR, SDA COMPLEX,)
KASUMPATI, SHIMLA,)
HIMACHAL PRADESH – 171009) **.... Respondent(s)**

Counsel for the Appellant(s) : Mr. Buddy A. Ranganadhan
Mr. Raunak Jain

Counsel for the Respondent(s) : Mr. Pradeep Misra for R-1

Ms. Swapna Seshadri

Mr. Anand K. Ganesan for R-2

ORDER

1. The Appellant operates 5 MW Dunali Hydro Electric Power Project ("**the said Project**") in the State of Himachal Pradesh. The Appellant has challenged in this appeal order dated 19/09/2015 passed by the Himachal Pradesh Electricity Regulatory Commission ("**the State Commission**") in Petition No.198 of 2014. There is 397 days' delay in filing the appeal. Hence, in this application the Appellant has prayed that the said delay be condoned.

2. It is stated in the application that since the Appellant was similarly situated as other Small Hydro Projects who had executed the PPAs after 01/07/2006 and whose tariff had been determined as Rs.2.95 per unit, the Appellant filed petition before the State Commission being Petition No.9 of 2016 on 01/12/2015 praying for similar treatment and amendment of tariff of the Appellant from existing Rs.2.50 per unit to Rs. 2.95

per unit in the amended PPA from the date of commissioning of the Project i.e. 16/05/2013. Since the Appellant had executed the PPA after 01/07/2006, the State Commission by its order dated 03/08/2016 rejected the said petition as being barred by res judicata. It is stated that the Appellant's project specific tariff petition (Petition No.198 of 2014) having been rejected by the order dated 19/09/2015, the Appellant was constrained to seek the relief of insertion of the rider in the PPA to come at par with other similarly situated generators in the State and therefore when the Appellant filed its second petition being Petition No.9 of 2016, it was pursuing a remedy which according to it was within the jurisdiction of the State Commission to grant. However, by order dated 03/08/2016, the State Commission rejected the said second petition as being barred by res judicata. The said order was communicated to the Appellant on 09/08/2016. It is submitted that therefore the period from 01/12/2015 to 09/08/2016 should be excluded as per provisions of Section 14 of the Limitation Act 1963 from the period of limitation because during this period the Appellant was *bona fide* prosecuting another proceeding.

3. So far as the period from 09/08/2016 till the date of filing of the present appeal, that is till 15/12/2016 is concerned the same is explained as under:

“8. As stated earlier, Petition No.9/2016 was filed by the Appellant before the State Commission on 01/12/2016 and the same has been dismissed by the State Commission vide its order dated 03/08/2016 (communicated to the Appellant on 09/08/2016). Appellant took about three weeks time to collect the files and documents connected to the proceedings from their advocate in Himachal Pradesh. Since the Appellant’s head office is in Hyderabad, the plant in Chamba had to send the documents to the head office for their scrutiny and necessary advice.

9. That around 01/09/2016, after going through the order dated 03/08/2016, and because of multiplicity of past litigations, Appellant began collating all the relevant documents for each of

the previous proceedings. Due to incomplete documents with the Appellant at Hyderabad, the plant at Chamba was further requested to send all the connected documents and files relating to each proceeding initiated by the Appellant in the past before the State Commission.

10. *After collecting and collating all the files and past proceedings, Appellant contacted his advocate in New Delhi on 22/09/2016 and sent the necessary set of documents which were received in the office of the advocate on 26/09/2016. The advocate, after perusing through the order dated 03/08/2016 and documents sent by the Appellant, advised the Appellant to file an appeal against the order dated 03/08/2016. However, due to complexity of issues, it was further advised that an opinion may be obtained from a senior advocate in respect of the order dated 19/09/2015 since more than a year had elapsed in respect of the said proceedings. This process took about three weeks time due to complexity of*

issues and multiplicity of documents and past proceedings.

11. *That as per advice of the counsel, an opinion was sought from the senior advocate who advised that the Appellant should file two appeals against both the orders i.e. order dated 19/09/2015 in Petition No.198/2014 as well as order dated 03/08/2016 in Petition No.9/2016. The said opinion was given on 02/11/2016 due to intervening Diwali holidays.*

12. *That thereafter, the counsel drafted both the appeals and sent it to the Appellant for their approval and necessary comments on 21/11/2016, who also sent it further to their local advocate appearing before the State Commission for his necessary comments. Ultimately, the Appellant as well as their local advocate sent revised drafts of the appeals back to the counsel on 08/12/2016.*

13. *That due to large number of annexures and documents and because many of the annexures had to be re-typed, the appeal has been filed by the Appellant on 15/12/2016 after taking due care of the rules and procedures prescribed by the Hon'ble Tribunal. From the above, it can be ascertained that the Appellant has been diligently and bonafidely pursuing the appeal and has been taking steps to file the same before this Hon'ble Tribunal at the earliest, albeit, due to circumstances described above, the Appellant has been able to file the same with delay. This delay was neither intentional nor was it in the interest of the Appellant to have caused any such delay. It would therefore be in the interest of justice that this Hon'ble Tribunal be pleased to condone the said inadvertent delay."*

4. We have heard Mr. Buddy Ranganadhan learned counsel for the Appellant, who reiterated the above submissions and submitted that the Appellant has made out sufficient cause.

Counsel submitted that grave and irreparable harm will be caused to the Appellant if the delay is not condoned and hence in the interest of justice delay be condoned.

5. Ms. Swapna Seshadri learned counsel appearing for Respondent No.2 has opposed the prayer for condonation of delay. Counsel submitted that filing of Petition No.9 of 2016 by the Appellant before the State Commission shows that the Appellant had accepted the principle laid down by the State Commission in the impugned order dated 19/09/2015 passed in Petition No.198 of 2014 that there could be no project specific tariff determination qua the Appellant and therefore the Appellant filed Petition No.9 of 2016 seeking change in clauses of the PPA. Merely because Petition No.9 of 2016 was decided against the Appellant by order dated 03/08/2016, the Appellant cannot now seek to challenge the same. Counsel submitted that doctrine of election would come in play in such a situation. Counsel submitted that since the Appellant chose to accept the impugned order and chose to file petition on the basis thereof, the Appellant cannot now challenge the impugned order which it had accepted because it is against the Appellant. In this

connection counsel relied on **C. Beepathumma & Ors. v. Velasari Shankaranarayana Kadambolithaya & Ors**¹. and **Mumbai International Airport Private Ltd. v. Golden Chariot Airport & Anr.**². Counsel submitted that no acceptable explanation is given even for further period i.e. from 09/08/2016 to 15/12/2016 and hence the application be dismissed.

6. The State Commission has also opposed the condonation of delay application on similar grounds.

7. We are unable to accept the submission that the Appellant cannot file appeal against the impugned order because the Appellant had accepted it and filed a petition on the basis thereof and such conduct would attract the doctrine of election. There can be no dispute about the principles laid down by the Supreme Court in the above judgments. But the point of distinction is that in this case by order dated 03/08/2016 the State Commission rejected the second petition filed by the Appellant pursuant to the impugned order on the ground that it was barred by res judicata. It was not dismissed on merits. It is in these circumstances that

¹ (1964) 5 SCR 836

² (2010) 10 SCC 422

the Appellant had to file the present appeal. The period from 01/12/2015 to 09/08/2016 will therefore have to be excluded as per provisions of Section 14 of the Limitation Act, 1963. In any case nature of the issues involved is such that in-depth examination of the merits of the case is necessary.

8. So far as period between 09/08/2016 till the date of filing of appeal on 15/12/2016 is concerned, the explanation offered by the Appellant has been quoted by us hereinabove. In the interest of justice therefore the delay will have to be condoned after saddling the Appellant with costs of Rs. 10,000/- to be paid to **“National Defence Fund, PAN No.AAAGN0009F, Collection A/c No.11084239799 with State Bank of India, Institutional Division, 4th Floor, Parliament Street, New Delhi”** within three weeks from today. On proof of costs being paid, the Registry shall number the appeal and list the appeal for admission on **24th October, 2017.**

9. The Application is disposed of in the above terms.

(I. J. Kapoor)
Technical Member

(Justice Ranjana P. Desai)
Chairperson