

COURT-II
IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)

ORDER IN IA NO. 1626 OF 2018 IN
DFR NO. 4374 OF 2018 ON THE FILE OF THE APPELLATE
TRIBUNAL FOR ELECTRICITY, NEW DELHI

Dated: 05th December, 2018

Present: Hon'ble Mr. Justice N.K. Patil, Judicial Member
Hon'ble Mr. S. D. Dubey, Technical Member

In the matter of:

Lalitpur Power Generation Company Ltd
B-10, Sector-3,
Jamnalal Bajaj Marg,
World Trade Centre
Noida-201 301 (U.P.)

..... Appellant(s)

Versus

1. Uttar Pradesh Electricity Regulatory Commission,
Through its Secretary,
Vidhyut Niyamak Bhawan,
Vibhuti Khand, Gomti Nagar,
Lucknow-226010.

2. Uttar Pradesh Power Corporation Ltd,
Through its Chairman and Managing Director,
Shakti Bhawan 14 – Ashok Marg,,
Lucknow-226010.

..... Respondent(s)

Counsel for the Appellant(s) : Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Anand K.Ganesan
Ms. Swapna Seshadri
Ms. Neha garg
Ms. Parichita Chowdhary
Mr.Upendra Prasad
Mr. Sanjay Singh
Mr. Brij Mohan for LPGCL

Counsel for the Respondent(s) : Mr. C.K.Rai
Mr. Sachin Dua for R-1

Mr. Rajiv Srivastava
Ms. ,Harshita Sinha
Mr. Hemant Sahai
Ms. Puja Priyadarshni
Mr. Shresth Sharma
Mr. Nived.V. for R-2/UPPCL

PER HON'BLE TECHNICAL MEMBER, SHRI S.D. DUBEY

ORDER

The present application IA No.1626 of 2018 has been filed by the Appellant in DFR No.4374 of 2018 praying for condonation of delay of 738 days in filing the Appeal. In the instant application, the Appellant has prayed as under:-

- (a) Condone the delay of 738 days which has occurred in filing the appeal from the Impugned Order dated 21.09.2016 passed in Petition No.1101 of 2016 passed by the State Commission;
- (b) Pass any such further order(s) as deemed fit and proper.

2. The application seeking condonation of delay under Rule 30 of APTEL Rules, 2007 was heard on 30.11.2018. The learned senior counsel, Mr. C.S. Vaidyanathan, appearing for the Appellant submitted the date of events from the passing of the order dated 21.09.2016 by the Uttar Pradesh Electricity Regulatory Commission. He submitted that observing several inconsistencies and errors apparent on the face of record in the said order, the Appellant had

preferred review petition being Petition No.1155 of 2016 on 20.12.2016. The learned counsel further contended that the review of the order dated 21.09.2016 was preferred on the following aspects:-

- (i) Disposing off the main petition under the garb of deciding the interim application;
- (ii) Adjudicating on issues not even raised in the petition;
- (iii) Violation of principles of natural justice;
- (iv) The main issue raised in the petition regarding the Agreement dated 04.11.2015 having been entered into under duress not being heard or decided by the State Commission.
- (v) The terms of the Agreement are against the Regulations framed by the State Commission and cannot be binding on the parties, let alone on the State Commission;
- (vi) Parties cannot by agreement modify the provisions of the Statutory Regulations which are framed under Section 181 & 182 of the Electricity Act, 2003 and are in the nature of delegated legislation.

3. The learned senior counsel for the Appellant further submitted that the State Commission took 666 days' for adjudication of the review petition and finally disposed of by its impugned order dated 17.10.2018. Further, the Respondent, UPPCL had also filed a Review Petition No.1190 of 2017 against a different order dated 14.02.2017 passed in Petition No.1115 of 2016 which was primarily filed by the Respondent, UPPCL for seeking approval of the draft supplementary PPA.

4. The State Commission after hearing both the Review Petitions namely 1155 of 2016 & 1190 of 2017 together and decided both the petitions vide the impugned order dated 17.10.2018. The learned senior counsel for the Appellant further submitted that the State Commission has grossly erred in allowing the Review Petition filed by the UPPCL on the issue of approval of an one sided agreement dated 04.01.2015 in contravention of its own findings in the previous orders which has caused great prejudice to the Appellant. He contended that the Review order is being challenged in so far as Petition No.1190 of 2017 filed by the UPPCL is concerned.

5. Advancing his arguments further, learned senior counsel for the Appellant reiterated that the fact there is no delay in filing the present Appeal as far as the impugned order dated 17.10.2018 is concerned. However, a delay of cumulative 738 days has occurred while reckoning from the date of interim order i.e. 21.09.2016. He also placed on record that out of 738 days, the State Commission itself has taken 666 days' in deciding the review petition filed by the Appellant.

6. ***Per contra***, learned counsel appearing for the Respondent No.2/UPPCL submitted that, the present Appeal under which the instant IA is filed is devoid of merits, a gross abuse of the process of law in as such as the Appellant herein is seeking to absurd the legal and valid orders passed by the learned State Commission. He further submitted that in the present application for condonation of delay, the petitioner has failed to establish and demonstrate a valid and legal reason towards the cause of delay for a period of 738 days in filing the present Appeal. The learned counsel further pointed out that while the Appellant has

taken a ground in its application that instead of filing of the Appeal, the petitioner had preferred a review petition. However, the grounds taken in the review petition since dismissed by the State Commission are same as those taken in the present Appeal. It is settled law that the application of condonation of delay has to be scrutinized strictly and the applicant seeking such indulgence must necessarily demonstrate its cause to seek relief from the court. The Appellant despite being in a position to demonstrate day-wise delay, has chosen not to provide the same. The present application seems to have been filed to merely comply with the procedural requirements. It is a settled position in law that in case of for the purpose of limitation, each and every day of delay has to be properly explained with sufficient cause which caused such delay.

7. The learned counsel for Respondent No.2 further contended that, the principles which are to be followed in the matter of condonation of delay have been succinctly set out by this Hon'ble Tribunal in the judgment passed in the case of Gulbarga Electricity Supply Company Limited Vs. JSW Steel Ltd. and Ors. dated 01.08.2014.

8. The learned counsel for the Respondent No.2 also pointed out that there has been a changing stand and pleadings by the Appellant from time to time as far as his prayer for judicial redressal is concerned.

9. Making a rejoinder submission to the objections advanced by the learned for the Respondent No.2, learned senior counsel, Mr. C.S. Vaidyanathan, appearing for the Appellant placed reliance on a number of judgments such as "*Collector, Land Acquisition, Anantnag & Anr. Vs. MstKatiki & Ors. (1987) 2 SCC*

107; *State of Nagaland Vs. LipokAo* (2005) 3 SCC 752; and *Ram Nath Sao Vs. Gobardhan Sao* (2002) 3 SCC 195". Applying the principles laid down in the above judgments, the learned senior counsel for the Appellant contended that the delay in the present matter deserves to be condoned ignoring the hyper technical issues raised by the Respondent No.2 without even properly looking into the submissions made by the Appellant in its application for condonation of delay. In reply to the contentions of the learned counsel for Respondent NO.2 that the Appellant should have filed the Appeal before this Tribunal against the order of the State Commission dated 21.09.2016 and while keeping the present appeal in abeyance, the Appellant should have preferred its Review Petition before the State Commission, he was quick to submit that the said contention is completely untenable and unreasonable against the legal procedure as it is a settled principle of law that a review petition cannot be filed after filing of an Appeal. To support his contention, the learned senior counsel for the Appellant cited the judgment of the apex court in *Thungabhadra Industries Ltd. vs. Govt. of A.P.*, (1964) 5 SCR 174 : AIR 1964 SC 1372.

10. Having regard to the submissions of the learned senior counsel for the Appellant and learned counsel for Respondent No.2/UPPCL, we note that the order of the State Commission dated 17.10.2018 is a comprehensive, composite order deciding the review petitions of both the parties against which the Appellant has filed the instant Appeal well in time as prescribed under the statute. The learned senior counsel for the Appellant at the outset rightly pointed out that, even though the delay has been explained with proper computation, it is a well settled principle of law that the meaning of every day's delay must be explained

is not to be construed and applied literally, and this Tribunal ought to apply the law in a meaningful manner which subserves the ends of justice. The term “sufficient cause” employed by the legislature has to be interpreted in the spirit and philosophy of law. The apex court has laid down and reiterated the principle pertaining to the condonation of delay in a number of its catena of judgments.

11. It is worthwhile to extract hereinunder the “Collector, Land Acquisition, Anantnag & Anr. V. MstKatiki & Ors.(1987) 2 CC 107 reads as under:-

“The legislature has conferred the power to condone delay by enacting Section 5 [Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring appeal or making the application within such period] of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on “merits”. The expression “sufficient cause” employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice – that being the life-purpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in the matter instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that :

- 1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.*
- 2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.*
- 3. “Every day’s delay must be explained” does not mean that a pedantic approach should be made. Why not every hour’s delay, every second’s*

delay? The doctrine must be applied in a rational common sense pragmatic manner.

- 4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.*
- 5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.*
- 6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.*

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the "State" which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a step-motherly treatment when the "State" is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file-pushing and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the Collective cause of the community, does not deserve a litigant-non-grata status. The courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even-handed justice on merits in preference to the approach which scuttles a decision on merits. Turning to the facts of the

matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time-barred, is therefore, set aside. Delay is condoned. And the matter is remitted to the High Court. The High Court will now dispose of the appeal on merits after affording reasonable opportunity of hearing to both the sides.”

12. In the case of State of Nagaland Vs. LipokAo (2005) 3 SCC 752 , as held in Para No.8,9,10,11 & 12 and also in case of Ram Nath Sao Vs. Gobardhan Sao (2002) 3 SCC 195 wherein, as held in Paragraph 12 reads as under:-

“12. Thus it becomes plain that the expression “sufficient cause” within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party. In a particular case whether explanation furnished would constitute “sufficient cause” or not will be dependent upon facts of each case./ There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over-jubilant disposal drive. Acceptance of explanation furnished should be the rule and refusal, an exception, more so when no negligence or inaction or want of bona fides can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine-like manner. However, by taking a pedantic and hypertechnical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis

terminates, either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way.”

13. In view of the well settled law of the apex court and this Tribunal's judgments and applying the above principles laid down, the delay in the present case deserves to be condoned. Therefore, the stand taken by Respondent NO.2 in their reply not be justiciable having regard to the peculiar case, as stated supra. Taking into consideration, the facts and circumstances of the case, we are of the considered view that delay in filing has been explained satisfactorily, sufficient cause has been shown, same is accepted and delay in filing is condoned. Keeping this in view, we found *prima facia* the case is required for consideration on merits. For the foregoing reasons, as stated supra, the instant application filed by the Appellant is allowed. Delay is condoned. Accordingly, IA stands disposed of.

DFR NO. 4374 OF 2018

Registry is directed to number the Appeal and list the matter for admission on **07.12.2018**.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

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