IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

IA NO. 762 OF 2018
IN
DFR NO. 1540 OF 2018

Dated: **21st December, 2018**

Present: **HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER**
HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

IN THE MATTER OF

1. **Uttarakhand Power Corporation Ltd.,**
"Victoria Cross Vijeta Gabar Singh Urja Bhawan",
Kanwali Road, Dehradun - 248001 **…. Appellant**

VERSUS

1. **M/s Greenko Budhil Hydro Power Pvt Ltd.,**
Village Kharamukh, PO Garola,
Bharmour Tehsil, District Chamba,
Himachal Pradesh-176309
Through its Managing Director

2. **Uttarakhand Electricity Regulatory Commission**
"Vidyut Niyamak Bhawan". Near I.S.B.T.,
P.O. Majra Dehradun (Uttarrakhand)-248171
Phone : 91-135-2641115, 01-135-2641119
Through its Secretary

….Respondents

Counsel for the Appellant … Mr. Pradeep Misra

Counsel for the Respondent(s)… Mr. Hemant Singh
Mr. Tushar Srivastava for R-1

Mr. Buddy Ranganadhan
Ms. Stuti Kishan for R-2

ORDER

PER HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER

1. The Appellant has filed the instant application for condoning the delay of 472 days in filing the Appeal contending that the State

Commission has passed the impugned order on 30.11.2016 and the certified copy of the order was received by the Appellant on 02.12.2016. They immediately brought to the notice of the State Commission orally pointing out the mistake in the impugned order. However, the mistake was not corrected. Therefore, the Appellant was constrained to move the application for clarification of the impugned order on 03.10.2017. The application filed by the applicant for clarification was rejected by the State Commission vide order dated 18.12.2017. Thereafter, the matter was examined in the Appellant Corporation at various levels and it was decided to prefer the Appeal against the impugned order passed by the State Commission. Accordingly, the representative of the Appellant Corporation visited the office of the counsel at Delhi on 31.03.2018 and the Appeal was prepared and has been filed on 01.05.2018.

2. Further, the learned counsel appearing for the Appellant has filed an Additional Affidavit contending that Greenko Budhil is the only Large Hydro Power Plant outside the State of Uttarakhand with which UPCL has signed a PPA for entire capacity and the UERC had determined the tariff for the same. In fact, other than State PSU plants (have already surpassed the useful life), it is the only Large Hydro Plant for which the tariff was determined by the Respondent No. 2 / UERC. The Respondent No. 2 UERC had issued the tariff order on 30.11.2016. The same was received

by the Appellant UPCL on 02.12.2016 who had forwarded it to Director (Finance). The Appellant UPCL is a young organization with not so sufficient manpower. Officer working in Commercial department had not witnessed any such determination in the past and the determination of tariff for Large Hydro Plant has some peculiar differences from the way tariff is determined for Small Hydro Plants. Therefore, certain gross mis-considerations by Respondent No. 2 UERC were not noticed at that time. In fact, Respondent No. 2 UERC had for the first time determined such tariff and that is why wrongly considered some parameters which are so important for the correct and fair determination of tariff. While evaluating the bills of the plant some specific issues came up like how to calculate PAFM of the plant which depends upon Declared Capacity (DC) and was required to be provided by SLDC. However, SLDC had reservation in verifying the DC on the ground that the plant was situated outside the State and was not within the jurisdiction of State Load Despatch Centre (SLDC). The SLDC had accordingly written to the National Load Despatch Centre (NLDC) for verifying the same on their behalf but the NLDC had refused by mentioning that the Tariff was determined by State ERC and hence the NLDC was not authorized to verify the DC. The matter was later taken before the Respondent no. 2 UERC which intervened and after numerous meetings had deliberated a procedure for verification of DC. In the meanwhile, the Appellant UPCL had also gone through the details

given in the State Regulations as well as Central Regulations and had noticed that in the determination of Tariff, the Respondent No. 2 UERC had taken certain parameters which were not in accordance with the Regulations. The Appellant UPCL had also approached the Respondent No. 2 UERC and was asked to take up the matter by filing a Petition and accordingly the Appellant UPCL had filed a clarification Petition on 03.10.2017.

3. The Respondent No. 2 UERC, rather than considering the merits of the case had declared the same vide its order dated 18.12.2017 as review and dismissed the same on technical ground and also justified its original order on certain justifications. The said order was received on 19.12.2017 in the office of Managing Director, Appellant UPCL and the same had been forwarded to Director (Finance). The order was examined and accordingly the proposal for filing an appeal before this Tribunal was forwarded by the Regulatory Wing of Appellant UPCL on 21.12.2017. Director(Finance) vide his comments dated 23.12.2017 had ordered for calculating the approximate yearly financial impact on account of the present issues. Director (Finance) was informed on 29.12.2017 about an approximate impact of Rs. 4.5 crores annual. Later the file was approved by Managing director, Appellant UPCL on 06.01.2018. Thereafter, the matter was forwarded to Legal Wing of the Appellant UPCL for engagement of counsel

in the matter on 09.01.2018. The Legal Wing had proposed an advocate for the matter and thereafter a detailed discussion was held with the advocate on 17.01.2018 wherein the Counsel has advised that Appeal has to be filed against the main order dated 30.11.2016. Accordingly, the Appellant UPCL felt necessitated that they had strong reasons and matter is very important considering the impact on public at large, approached the present Counsel for Appellant. A meeting was held in the last week of January, 2018 and the counsel for the appellant understood the importance of present appeal as non-consideration by this Tribunal would lead to undue/unethical financial gain to the generator at the cost of the interest of common consumers of the State. Accordingly relevant papers alongwith notes prepared in light of discussions were forwarded to the Counsel for the Appellant on 09.02.2018. The requisite fee was arranged as per the instructions of Counsel and Appeal was accordingly prepared and the same was presented before this Tribunal on 01.05.2018. Therefore, due to some inadvertent mistake in the office of Counsel for Appellant some delay has occasioned. He very humbly submitted that present appeal involves issues of great importance and thus it would be in the interest of justice that the delay may kindly be condoned and the case may kindly be decided on merits. Besides this, the impugned judgment will have long-lasting impact on the utility and the consumers of the State at large and the same will set down a wrong precedent and affect the interest

of the innocent consumers for no fault on their part. Therefore, the delay so occasioned is bonafide, unintentional and liable to be condoned in the interest of justice and equity. In the event the delay is not condoned the Appellant UPCL will suffer huge financial loss. Besides this, impugned order will set up a very wrong precedent. Therefore, he humbly submitted that the delay in filing may be condoned and the mater may be heard on merits in the interest of justice and equity.

4. The learned counsel appearing for the Respondent No. 1 has filed a detailed reply to the application filed by the applicant/appellant seeking condonation of delay in filing the appeal contending that there is an unexplained delay of 472 days in filing the present appeal. He stated that from a perusal of the application filed by the Applicant/Appellant seeking condonation of delay, it is evident that absolutely no reasons, whatsoever, have been provided to explain the above delay. In addition to the said application, the Applicant/Appellant filed an additional affidavit which is dated 01.08.2018 purportedly explaining the reasons behind the above delay. It is submitted that the said additional affidavit also fails to disclose any reasons which resulted in the above huge delay in filing the accompanying appeal.

5. In the additional affidavit in para 5, the Applicant/Appellant contended that its Commercial Department did not witness any such tariff determination in the past which has been carried out for the Respondent No. 1. At the outset, the said reasoning is vague and cannot at all be considered. Further, the Respondent No. 1 is only a 70 MW hydro power plant, and it cannot be said that a tariff determination proceeding for the said hydro power plant is so complex that the Applicant/Appellant failed to understand the same which led to the delay. A bare perusal of the said para evidences that the reasons are being created by the Applicant/Appellant in order to hide its own failure in acting within a reasonable period of time. The Applicant/Appellant was completely aware of the tariff proceedings, which lasted for almost one year. The Appellant never chose to represent itself during the tariff determination process before the Commission, despite being served repeatedly with all documents and filings done by the Answering Respondent. The Applicant/Appellant has no basis to state that they could not understand the tariff proceedings. Therefore, the Applicant/Appellant cannot seek an excuse that they could not understand the proceedings. This proves that the reasons put forth by the Applicant/Appellant to justify the huge delay, are completely frivolous. The present appeal is an abuse of process of law, and the excuses for condonation of delay are akin to playing mockery

with this Tribunal. As such, the appeal ought to be dismissed on the ground of delay.

6. It is clear that the Applicant/Appellant was aggrieved by consideration of certain parameters by the Respondent Commission in passing the impugned tariff order. As such, the said para evidences that the Applicant/Appellant was always aware of the issue by which it was affected, and that despite the same it chose to stay silent and not take any action in either filing a review, or filing an appeal against the impugned order. For filing an appeal, what is required is the knowledge about how an order affects the rights of a party. In the present case, from a reading of para 8 of the additional affidavit, it is evident that the Applicant/Appellant knew for a long time that it was aggrieved by the impugned order. From a bare reading of para 9 to 22 of the additional affidavit, it is evident that, even if the submissions made in the said affidavit are taken at face value, the decision to file appeal was conveyed to the advocates of the Applicant/Appellant on 17.01.2018. After the said intimation, the appeal came to be filed only in the month of May, 2018. There is no explanation whatsoever, as to what transpired in between January, 2018 and May, 2018, which resulted in further delay in filing the present appeal. The Appellant has failed to defend the huge delay of 472 days in filing the appeal. As such, the appeal is liable to be dismissed on account of the

delay occured in filing the same. It is submitted that sufficient reason have to be provided for explaining each day's delay in filing an appeal, which has not been done in the present case. As per Section 111 of the Electricity Act, 2003, the same provides for a period of 45 days within which an appeal may be preferred. As such, the Applicant/Appellant has actually filed the appeal after a lapse of 517 days (472+45 days), which cannot be condoned on account of non-existence of any valid reasons. .On this ground also, the application filed by the applicant is liable to be dismissed on the ground of latches.

7. In view of the above, the learned counsel appearing for the Respondent No. 1 further submitted that the Applicant/Appellant failed to give any sufficient reason for the delay in filing of the present appeal. Condoning the huge delay of 472 days, without any sufficient reason, would be, per se, contrary and illegal to the powers vested with this Tribunal under Section 111 of the Act. Therefore, he submitted that no court could be justified in condoning such an inordinate delay of 472 days, even by imposing any conditions such as costs. A cost can only be imposed if the Applicant/Appellant prima facie satisfied a court of law that there was some bonafide reason which resulted in delay. In the instant case, there is no such bonafide reason, and hence the delay ought not to be condoned even with costs. Having regard to the facts and

circumstances of the case, it is clear that the Applicant /Appellant was not diligent throughout by its inaction, when it decided not to file the appeal at the appropriate time within the limitation period as prescribed under the law. Hence, the application filed by the Applicant/Appellant seeking condonation of delay in filing the appeal may be dismissed on the ground of delay and latches.

8. After careful consideration of the submissions made by the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondents, the only point that arises for our consideration is whether the Applicant/Appellant has explained the delay in filing the Appeal satisfactorily and sufficient cause has been shown to be looked into in the instant case having regard to the facts and circumstances of the case as stated supra.

9. The learned counsel, Shri Pradeep Misra, appearing for the Appellant, humbly submitted that delay in filing has been explained in para 1(a) to (g) and that due to these reasons delay of 472 days has been occurred which is bona fide, unintentional and liable to be condoned in the interest of justice. Further, he was quick to point out and submitted that he has filed an additional affidavit on behalf of the Appellant explaining the

delay in filing the Appeal in para 2 to 21 of the Additional Affidavit dated 02.08.2018 and contended that the balance of convenience lies in favour of the Applicant as if delay is not condoned the consumer will be unnecessarily burdened. Hence it will be in the interest of justice that delay may kindly be condoned. In the light of the reasons assigned, the delay has been explained satisfactorily and sufficient cause shown, as stated supra, the same may kindly be accepted and the delay may kindly be condoned.

10. Shri Hemant Singh, learned counsel appearing for the Respondent No. 1 contended that, there is an unexplained delay of 472 days in filing the present appeal. The reasons for not condoning the delay are explained in para 2 to 11 of the reply on behalf of the Respondent No. 1 to the application filed by the Applicant/Appellant seeking condonation of delay in filing the appeal alongwith the affidavit. The said reasoning may be accepted on the ground that there is a huge delay of 472 days and condoning it without any sufficient reason would be per se contrary and illegal to the powers vested with this Tribunal under Section 111 of the Act. Therefore, he submitted that the instant application seeking condonation of delay in filing the appeal may be dismissed as misconceived.

Our Consideration and Analysis

11. In the light of the submissions made by the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondent No. 1, let us consider the case in hand.

As per Section 94 (1)(f) of the Electricity Act, 2003, an Appropriate Commission shall have the same powers as are vested in a civil court under the Civil Procedure Code for reviewing its decision, directions and order. In the present case, the State Regulatory Commission shall have the same powers as vested in a Civil Court under the Civil Procedure Code for reviewing its decisions, directions and order. Even though delay has been explained hereinabove, it is a settled principle of law that the meaning of **"Several days' delay must be explained",** is not to be construed and applied liberally and the Tribunal ought to have applied the law in a meaningful manner which would subserve the common ends of justice and equity. The term **"sufficient cause"** as implied by the legislature ought to be interpreted in the true spirit and philosophy of law. The Apex Court in catena of judgments has laid down and reiterated the principles pertaining to the condonation of delay in number of its judgments. It is significant to note that it is worthwhile to refer to a few of the judgments regarding well-settled law laid down for condoning the delay in filing the Appeal which reads as hereinunder :-

Collector, Land Acquisition, Anantnag & Anr. vs. Mst Katiki & Ors. (1987) 2 SCC 107, wherein it is held that 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 live purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters 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 stepmotherly 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."
>
> (Emphasis supplied)

Further, in case of **"State of Nagaland v LipokAo (2005) 3 SCC 752**", it is held that :

> "The proof by sufficient cause is a condition precedent for exercise of the extraordinary restriction vested in the court. What 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."
>
> (Emphasis supplied)

In **O. P. Kathpalia v. Lakhmirf Singh [(1984) 4 SCC 66]** a bench of three Judges held that "**if the refusal to condone the delay results in grave miscarriage of justice, it would be a ground to condone the delay."**

(Emphasis supplied)

The Apex Court in the case of **"Ram Nath Sao v Gobardhan Sao (2002) 3 SCC 195,** held as hereinunder :-

> "In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependant 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 jubilation of 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 fide 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 hyper technical 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 list 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."
>
> (Emphasis supplied)

12. This Tribunal reiterated that the expression "every day's delay must be explained" does not mean that a pedantic approach should be made. The doctrine must be applied in a rational common sense pragmatic manner. 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. 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. Judiciary is not respected on account of its power to legalise 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.

13. Further, it is noteworthy to place reliance on the Judgment of the Supreme Court in (1996) 3 SCC 132 as held in para 11, which reads as hereinunder :

> *"11. -It is notorious and common knowledge that delay in more than 60 per cent of the cases filed in this Court - be it by private party or the State - are barred by limitation and this Court generally adopts liberal approach in condonation of delay finding somewhat sufficient cause to decide the appeal on merits. It is equally common knowledge that litigants including the State are accorded the same treatment and the law is administered in an even-handed manner. When the State is an applicant, praying for condonation of delay, it is common knowledge that on account of impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file-pushing, and passing-on-the-buck ethos, delay on the part of the State is less difficult to understand though more difficult to approve, but the State represents collective cause of the community."*
>
> (Emphasis supplied)

14. Further, in the case of "State of Nagaland v. Lipok AO and Others as reported in "(2005) 3 SCC 752" in para 15 wherein it is held as under :-

> *"15. It is axiomatic that decisions are taken by officers/agencies proverbially at slow pace and encumbered process of pushing the files from table to table and keeping it on table for considerable time causing delay - intentional or otherwise - is a routine. Considerable delay of procedural red-tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression "sufficient cause" should, therefore, be considered with pragmatism in justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay".*
>
> (Emphasis supplied)

15. Taking into consideration the facts and circumstances of the case and the law laid down by the Apex Court and this Court in host of judgments, the instant application filed by the applicant/appellant is liable to succeed by condoning the delay in filing the Appeal in the interest of justice and equity. The fact that it was the UPCL 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/Appellant. The balance of convenience lies in favour of the Applicant/Appellant as if the delay is not condoned, the consumer will unnecessarily be burdened. Hence, we are of the considered view that it will be in the interest of justice and equity that the delay be condoned.

The Appellant/Applicant hereby declines that nothing material has been concealed or suppressed.

16. The learned counsel appearing for the Respondent No. 1, Shri Hemant Singh, has taken us through the reply filed by him and pointed out that the application filed is misconceived as huge delay has not been explained properly and sufficient cause has not been shown. This is nothing but an abuse of the process of the court. Such a submission may not be appropriate for consideration by us in the instant case taking into consideration that, the counsel appearing for the Respondent No. 1 is defending the case of the generator at the cost of the interest of the common consumer of the State and keeping in view the interest of the consumer of the State at large, we opine that otherwise the same will set a wrong precedent and affect the interest of the innocent and illiterate consumers for no fault on their part. Therefore, we are of the considered view that the contention of the counsel appearing for the Respondent No. 1 may not be acceptable having regard to the peculiar facts and circumstances of the case in hand.

17. Taking all these relevant factors into consideration and specifically keeping in view the interest of consumers, we thought it fit having regard to the facts and circumstances of the case as sated supra, that the delay in filing has been explained satisfactorily and sufficient cause has been made out, the same is accepted and the delay in filing is condoned and the

objection raised by the Respondent No. 1 in its reply is not a sufficient ground and is not acceptable for not condoning the delay in filing the appeal as made out by the Appellant/Applicant. Taking all these factors into consideration, as stated supra, it would be just and suffice for this Tribunal to impose some reasonable cost by way of compensation to meet the ends of justice.

18. For the foregoing reasons as stated above, the instant application filed by the Applicant/Appellant is allowed, the delay in filing is condoned and the IA stands disposed of

The Applicant/Appellant is hereby directed to deposit a sum of Rs. 50,000/- in the Defence Organisation named "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 a period of four weeks from the date of the receipt of a copy of this Order.

In the event such cost is not deposited within four weeks from the date of receipt of copy of this Order by the Applicant/Appellant, the order passed by this Tribunal stands vacated without further orders.

PRONOUNCED IN THE OPEN COURT ON THIS 21ST DAY OF DECEMBER, 2018.

(Ravindra Kumar Verma)
Technical Member

(Justice N.K. Patil)
Judicial Member

√ **REPORTABLE**
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