

COURT-I**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)****IA NO. 799 OF 2019 IN
DFR NO. 1581 OF 2019****Dated: 29th January , 2020****Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member****In the matter of:****BSES Yamuna Power Ltd. & Anr.****.... Appellant(s)****Versus****Central Electricity Regulatory Commission & Ors.****.... Respondent(s)**

Counsel for the Appellant(s) : Mr. Buddy A. Ranganadhan
Mr. Rahul Kinre
Ms. Meghna Chandra

Counsel for the Respondent(s) : Mr. M.G. Ramachandran, Sr. Adv.
Ms. Poorva Saigal
Ms. Ranjitha Ramachandran
Mr. Shubham Arya for R.2

ORDER**(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)**

This IA is filed seeking condonation of delay of 516 days in filing the appeal. In brief, the circumstances which led to filing the present application are as under:

2. Petition No. 89/MP/2016 came to be filed before the Central Electricity Regulatory Commission ("**CERC/Commission**") pertaining to adjudication of disputes between BRPL and BYPL with PPCL regarding

declaration of availability by Pragati – III Combined Cycle Power Project. This petition was disposed of on 02.11.2017. A Review Petition came to be filed before CERC along with IA No. 29 of 2018 seeking condonation of delay of 112 days in filing the Review Petition. Without deciding the Review Petition on merits, IA No. 29 of 2018 came to be dismissed on 05.02.2019 rejecting condonation of delay application. Appeal No. 80 of 2019 came to be filed before this Tribunal on 06.03.2019 assailing the Order dated 05.02.2019 passed in Review Petition. This appeal came to be disposed of by this Tribunal by Order dated 12.03.2019 with the following directions:

“Learned counsel for Appellant submits that Appellant is desirous of withdrawing the Appeals. Accordingly, Appellant is permitted to withdraw Appeal No. 80 of 2019 and liberty is reserved to the Appellant to file appeal against the main order subject to other procedures including limitations.”

3. Subsequently, present appeal is filed with the delay of 516 days.
4. Appellants/Applicants broadly narrated different events between different periods why delay has occurred in filing the instant appeal. According to them, between 02.11.2017 to 18.12.2017 one Mr. Vishal Anand, Advocate on record, who was not keeping well died on 02.12.2017, therefore there was void in pursuing the litigation till 17.12.2017. Apart from that, the staff of the Appellants were already

occupied with the process of tariff order passed by the State Regulator i.e., Delhi Electricity Regulatory Commission for determination of ARR for FY 2017-18 and True Up of Accounts up to FY 2015-16. Several legitimate expenses of Applicants/Appellants were disallowed by the State Commission, therefore the Appellants were engaged in identification of issues pertaining to tariff orders. Several Review Petitions pertaining to different tariff orders came to be filed before the State Commission. Considerable time was taken for these matters. Therefore, the Appellants were unable to examine and scrutinise the impugned review order. There was also regulatory audit by Delhi Commission. This also consumed man power and also time of the Applicants.

5. The newly appointed lawyer for the Appellant was since on vacation, it took some time to instruct and prepare papers for filing of respective tariff petitions for FY 2018-19 and True Up of 2016-17. On account of lengthy petitions pertaining to tariffs, they could not attend to the facts of the present appeal. Regulatory and legal team of the Applicants/Appellants were completely engaged in the audit of the Appellants. This is reflected in the tariff order dated 28.03.2018. Once regulatory requirements were completed, the process of drafting review petition was undertaken and review petition came to be filed subsequent

to 25.03.2018. Meanwhile, public hearing of petition No. 68 of 2017 was conducted and the legal team was engaged in the preparation of responses to the comments and objections raised by different stakeholders. After verification of the Review Petition, finally it could be filed before CERC only on 09.04.2018.

6. Review Petition No. 17 of 2018 was filed seeking review of several directions on the ground of apparent error on the face of record. As stated above, delay condonation application came to be filed wherein delay of 112 days was sought to be condoned. Listing of review petition along with other petitions was done on 16.10.2018. The matter was reserved for orders for about six months. Ultimately, on 05.02.2019 orders were passed rejecting Review Petition after dismissing the condonation of delay application. Subsequently, on 06.03.2019, Appeal No. 80 of 2019 was filed against impugned order dated 05.02.2019 passed in Review Petition. Since the Review Petition was not disposed of on merits, Applicants only sought for remand of the matter. On 12.03.2019, this Tribunal passed the above order reserving liberty to the Applicants/Appellants to challenge the impugned order dated 02.11.2017. Applicants/Appellants contend that the delay caused in filing the present appeal was not intentional and it was beyond the control of the Applicants. The present appeal could not be filed on time

since Review Petition No. 17 of 2018 was pending before the Commission till 05.02.2019. Though Appeal No. 80 of 2019 was filed challenging Order dated 05.02.2019, the said appeal was withdrawn and subsequently the present appeal challenging original order came to be filed. The Appellants contend that the delay of 516 days is due to unforceable and uncontrollable events. There are *bona fide* reasons for such delay. If delay is not condoned, Applicants/Appellants will suffer irreparable loss and injury. With these submissions they have sought for condonation of delay of 516 days in filing the present appeal.

7. As against this, 2nd Respondent filed objections contending that the application *per se* is not maintainable. According to them, Order dated 02.11.2017 passed by the Commission dismissing the petition filed by the Applicants/Appellants is justified. Applicants/Appellants, in terms of the said order, are liable to pay fixed/capacity charges in respect of the availability declared by Respondent No.2. Even the dismissal of delay application in Review Petition was justified since no sufficient cause was shown for filing Review Petition No. 17 of 2018 with such delay. They further narrate Order 47 Rule 7 of CPC contending that the Order dated 05.02.2019 passed by CERC dismissing the Review Petition is justified. When Review petition itself is dismissed on account

of delay of 112 days, according to Respondent No.2 present appeal with delay of 516 days cannot be entertained.

8. They place reliance on the judgment of this Tribunal in Appeal No. 58 of 2008 dated 22.07.2009. Even otherwise, according to them, the Applicants/Appellants have not made out sufficient cause for condoning inordinate delay of 516 days in filing the appeal. According to them assessment of tariff orders and the audit process as one of the reasons cannot be a ground for condonation of delay in filing this appeal. The tariff orders came to be passed by the State Commission on 31.08.2017 and Review Petition No. 17 of 2018 has been filed only on 27.11.2017. Even the contention of the Applicants that the entire legal and regulatory team of Applicants were pre-occupied with different proceedings before the State Commission and were unable to pursue the Order dated 02.11.2017 would only indicate the negligence, inaction and casual attitude of the Applicants.

9. The Review Petition was pending and oral arguments were made by this Respondent as early as on 16.10.2018. According to the Respondent, the conduct of the Applicants clearly indicate lethargic attitude and the explanation for condonation of delay is without any genuine reasons. No justifiable cause is forth coming. The Order dated 05.02.2019 passed by Central Commission while dismissing delay

application in Review Petition No. 17 of 2018 clearly establishes casual manner in which the Applicants have taken scare of the matter in question. He places reliance on the following Judgments in support of his contentions.

- i) Brijesh Kumar & Ors. vs. State of Haryana and Ors. (AIR 2014 SC 612)
- ii) Basawaraj and Ors. vs. The Spl. Land Acquisition Officer (AIR 2014 SC 746)
- iii) Vellaithai, K. Thnagavedivel and K. Valarmathi vs. V. Duraisami (2010 (1) MLJ 1092)

With these submissions, they have sought for dismissal of this application.

10. Heard learned counsel for both the parties.

The point that would arise for our consideration is “***whether the delay in filing the appeal deserves to be allowed or not?***”

11. First and foremost fact one has to realise in this case is, the Appellants/Applicants did not keep quiet from 02.11.2017 till filing of this appeal. They did attempt to pursue the remedy available to them by filing Review Petition against the Order dated 02.11.2017. To its misfortune the said Review Petition was not dismissed on merits but it

came to be dismissed since delay application in filing Review Petition was dismissed by CERC.

12. Subsequently, the appeal came to be filed challenging the said dismissal order dated 05.02.2019. For the reasons best known to the Applicants/Appellants the said appeal was withdrawn after liberty granted to them to file the appeal against the original Order dated 02.11.2017. With this process coupled with other problems like death of the Advocate, lengthy tariff petitions, public hearing of tariff petitions, audit by Regulatory Commission seems to have taken most of the time of the Applicants/Appellants.

13. If the Applicants/Appellants were not aggrieved by Order dated 02.11.2017, the question of filing review and then the appeal against dismissal of review order would not have happened. The very fact that the Applicants/Appellants were pursuing the matter in different proceedings would indicate that they were not negligent but were wrongly pursuing the matter. We rely upon the following decisions on this aspect as held by the Hon'ble Supreme Court i.e., the decision in **Raghu Forwarding Agency and Another vs. Union of India and others** (2003 (12) SCC 272) and **Bussa Overseas and Properties Private Limited and Another vs. Union of India and another** (2016

(4) SCC 696). The relevant paras 6, 7 & 8 of **Raghu Forwarding Agency's** case and para 30 of **Bussa Overseas and Properties Private Limited** read as under:

Paras 6, 7 & 8 of Raghu Forwarding Agency's case

"6. We have no doubt in holding that so far as the order dated 7th December, 2000 dismissing the application for review is concerned the appeal filed by the appellant was certainly within limitation. The limitation for filing the appeal is 30 days. The order in review petition was dated 7th December, 2000. The period between 12th December, 2000 and 3rd January, 2001 was the time requisite for obtaining certified copy of the order appealed against within the meaning of Sub-section (2) of [Section 12](#) of Limitation Act. Excluding the time lost in obtaining the certified copy of the impugned order, the appeal filed on 17th December, 2001 (sic 17-1-2001) was certainly within limitation. The appeal against the order dated 7th December, 2000 was not liable to be dismissed as barred by time.

7. As against the impugned order dated 3rd August, 1999 the limitation for filing the appeal came to an end on 2nd September, 1999. The review was filed on 3rd September, 1999 which remained pending upto 7th December, 2000. In the meantime, on 2nd December, 2000 the appellant had applied for certified copy of the order dated 3rd August, 1999 which was ready and delivered on 16th January, 2001. If only the review application would have been filed on 2nd September, 1999 the entire period from 2nd September, 1999 to 16th January, 2001 would have been liable to be excluded from counting the period of limitation under [Section 5](#) read with [Section 14](#) and [Section 12](#) of the Limitation Act and then the appeal filed on 17th January, 2001 would have been within limitation. We are of the opinion that in the facts and circumstances of the case too technical a view of matter of limitation should not have been taken and the delay in filing the

composite appeal against the main order dated 3rd August, 1999 as also the order dated 7th December, 2000 passed in review petition should have been condoned so as to enable the appeals being heard on merits.

8. For the foregoing reasons, the appeal is allowed. The application filed by the appellant before the High Court seeking condonation of delay in filing the writ appeals is allowed. The delay in filing the appeals is condoned. The appeals before the High Court shall stand restored to file and shall be taken up for hearing. However, we make it clear that this order shall not be construed as expression of any opinion on the merits or maintainability of any of the appeals before the High Court which shall be heard and decided only thereat.”

Para 30 of *Bussa Overseas and Properties Private Limited's* case

“30. The decisions pertaining to maintainability of special leave petition or for that matter appeal have to be seemly understood. Through in the decision in Shanker Motiram Nale the two-Judge Bench referred to Order 47 Rule 7 of the Code of Civil Procedure that bars an appeal against the order of the court rejecting the review, it is not to be understood that the Court has curtailed the plenary jurisdiction under Article 136 of the Constitution by taking recourse to the provisions in the Code of Civil Procedure. It has to be understood that the Court has evolved and formulated a principle that if the basic judgment is not assailed and the challenge is only to the order passed in review, this Court is obliged not to entertain such special leave petition. The said principle has gained the authoritative status and has been treated as a precedential principle for more than two decades and we are disposed to think that there is hardly any necessity not to be guided by the said precedent.”

14. In the light of the above decisions on the law laid down by the Hon'ble Supreme Court , we are of the opinion that even if delay in filing

the appeal were to be condoned, at the most the matter would be heard and decided on merits after giving opportunity to the Respondent herein. Therefore, no prejudice of any nature is caused to the Respondent. However, with the different proceedings undertaken by the Applicants/Appellants some inconvenience must have been caused to the Respondent. The same could be compensated by imposing costs on the Applicants/Appellants. Accordingly, delay of 516 days in filing the appeal is condoned on payment of cost of Rs.50,000/- (Rupees fifty thousand only) to be paid to the 2nd Respondent within two weeks from today.

15. Accordingly the IA is disposed of. Subject to production of the receipt showing payment of cost, Registry is directed to number the appeal and list the matter on 02.03.2020.

16. Pronounced in the open court on this the 29th day of January 2020.

S.D. Dubey
[Technical Member]

Justice Manjula Chellur
[Chairperson]

REPORTABLE/~~NON-REPORTABLE~~