

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:19th Sept'2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

IA No.294 OF 2014
IN
DFR No.1684 OF 2014

- 1. Bangalore Electricity Supply Company Limited.,
K R Circle,
Bangalore-560 001**
- 2. Hubli Electricity Supply Company Limited
P B Road, Navanagar,
Hubli-580029**
- 3. Mangalore Electricity Supply Company Limited.,
Paradigm Plaza, A.B Shetty Circle,
Mangalore-575 001**
- 4. Gulbarga Electricity Supply Company Limited
Main Road, Opposite Parivar Hotel,
Gulbarga-585 101**
- 5. Chamundeshwari Electricity Supply Company Limited.,
No.927, L J Avenue New Kantharaj Urs Road,
Saraswathipuram,
Mysore-570 009**

... ..Appellant(s)

Versus

- 1. Karnataka Electricity Regulatory Commission
6th & 7th Floor,
Mahalaxmi Chambers
No.9/2, M.G. Road,
Bangalore-560 001**

- 2. Indian Wind Energy Association (in WEA)
1st Floor, A-Wing, AMDA Building
7/6, Siri Fort Institutional Area
August Kranti Marg,
New Delhi-110 049**

- 3. Indo Wind Turbine Manufacturers Association
Suit No.A-2, OPG Towers
74 (Old No.133), Santhome High Road,
Chennai-600 004**

- 4. Indian Wind Power Association
“SHAKTHI Towers”,
Tower No.1, Door No.E,
6th Floor No.766,
Anna Salai,
Chennai-600 002**

- 5. Mytrah Energy (India) Limited
No.80001, 8th Floor, Q City,
Nanakramgudea,
Gachibowli,
Hyderabad-500 032**

6. **Karnataka Renewable Energy Development Limited(KREDL),
No.39, “Shanthigruha”,
Bharath Scouts and Guides Buildings,
Palace Road,
Bangalore-560 001**
7. **The Principal Secretary,
Department of Energy,
Government of Karnataka,
M S Building,
Bangalore-560 001**

.....Respondent(s)

**Counsel for the Appellant(s) : Mr. B C Thiruvengadam
Mr. T Manik**

**Counsel for the Respondent(s) : Mr. Vishal Gupta r R-3 and R-4
Mr. G S Kannur for R-6 & 7
Mr. Shridhar Prabhu**

ORDER

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. Bangalore Electricity Supply Company Limited and four others are the Applicants/Appellants herein.

2. They have filed the Appeal as against the Impugned Order dated 10.10.2013 passed by the Karnataka State Commission determining the tariff of Wind Energy Generators for 10 years with a control period of 5 years. Even though the Impugned Order was passed on 10.10.2013, this Appeal has been filed only on 7.7.2014 with a delay of 216 days. Therefore, they have filed the Application in IA No.294 of 2013 to condone the delay of 216 days in filing the Appeal.
3. The Applicants have given explanation for the said delay both in the Application to condone the delay and also in the additional Affidavits filed later as well as in the Written submissions.
4. This Application is stoutly opposed by the Respondents on the ground that the explanation offered by the Appellants/Applicants through the various Affidavits is not only not satisfactory but also would suffer from the lack of diligence and that apart, the contrary stand taken by the Appellants/Applicants in these Affidavits filed on different dates would establish that the said explanation is false.
5. Both the parties have cited a number of authorities to substantiate their respective submissions.

6. We have carefully considered the submissions and also gone through the authorities.
7. The learned Counsel for the Respondent specifically pointed out that the Applicants have taken different stand by giving different explanation for the delay through their Applications and subsequent Affidavits and the Written Submissions. Hence, let us refer to the contents of each of the Affidavit filed by the Applicants.
8. The gist of the explanation which is given in the Application dated 5.7.2014 filed on 7.7.2014 to condone the delay along with Appeal is as follows:

“(a) The Applicants/Appellants are the different Government and public Sector entities and it took time for them to coordinate themselves for examining the possibility of preferring of an appeal and in getting the approval of appropriate authorities;

(a) The CERC Regulations and parameters adopted by KERC contained inherent flaws and errors which required detailed examination of the said Regulations.

The delay was caused due to the above reasonings”.

9. In the Additional Affidavit which was filed on 8.7.2014 on behalf of the Applicants, they have given the following explanation for the delay:

(a) The Advocate for the Appellant/Applicant who was entrusted with the task of drafting the Appeal and coordinate with various Applicants fell ill in the month of April, 2014 and remained absent and was unable to be reached over the phone due to poor network connection.

(b) As the Advocate for the Applicants was working on a computer system with a password, no one was able to access the same.

(c) Due to court vacation all the advocates practicing on the litigation side in the Firm were away to their native places till the end of June.

(d) Subsequently on 3rd June, 2014 the advocate engaged by the Applicants resigned from the position of an Associate in the Law Firm citing health reasons.

(e) Due to resignation of the Advocate, drafting of the Appeal had to be handed over to another Advocate and draft was required to be sent to various Applicants which took considerable amount

of time in getting the approval and completing other formalities pertaining to filing of the Appeal. Resultantly, filing of the Appeal got further delayed.”

10. Further additional Affidavit has been filed on behalf of the Appellants/Applicants i.e. on 30.8.2014. The contents of the explanation offered in the said Affidavit are as under:

“(a) Appellants came to know that certain Appeals have been filed against the impugned order by some of the Respondents. It was considered prudent in larger public interest to wait till the receipt of the copies of the said Appeals.

(a) M/s. Indian Wind Energy Association (R-2) filed an Appeal No.11 of 2014 on 3.12.2013 against the Impugned Order dated 10.10.2013. The Indian Wind Turbine Manufacturer Association (R-3) filed another Appeal on 19.12.2013 against the same impugned Order. During the course of preparing reply for the Appeals, filed by the R-2 and R-3, another Appeal No.82 of 2014 was filed on 7.2.2014 by Guttaseema Wind Energy.

(b) The Applicants/Appellants had to evaluate the said Appeals and arrive at a consensus for filing

the common reply as well as for preparing the present Appeal.

(c) A detailed perusal of all the said appeals revealed that they stressed upon the Application of CERC (Terms and Conditions for Tariff determination of Renewable Energy Sources) Regulations, 2012 on the KERC's methodology of determining the wind energy tariff. The preliminary study on the same in March, 2014 revealed that CERC Regulations, 2012 for Wind Energy have several inaccuracies and the same cannot become guiding principles for KERC. Hence it was essential to highlight these fallacies found in CERC Regulations while seeking on one hand downward revision of the tariff determined by the KERC and on the other hand opposing the Appeals filed by the Respondent.

(d) Reply in the Respondent's Appeals was filed in time. However, the present Appeal would question the applicability of CERC Regulations, 2012 in so far as it is expected to be followed as binding guidelines by KERC. While filing this Appeal, the Appellants were fully aware that the scope of the Appeal would not involve altering the

CERC Regulations and would need to take care that the emphasis is to ensure that they do not become binding guidelines to KERC. Hence, the services of an independent Project Financial expert were availed so that these Appellants would be able to substantiate their claim if this Appeal is admitted and set for hearing.

(e) Since the Tribunal was closed for summer vacation in the month of June, 2014 the Appeal could not be filed during that period and it could be filed only on 7th July, 2014.

11. Lastly, Applicants filed the written arguments on 3.9.2014 giving the explanation for the delay which reads as under:

(a) The Impugned Order which was passed on 10.10.2013 was received by the Appellants on 19.10.2013.

(b) The delay of 216 days includes the 30 days of summer vacation observed by the Tribunal from 01 June to 29th June, 2014.

(c) As the said appeal has been filed very soon after the re-opening of the Tribunal after summer vacation of i.e. 30 days may be excluded and the delay would be only of 186 days. The long delay is not wilful.”

12. The learned Counsel for the Applicants/Appellants has cited the following authorities:

- (a) **AIR 1996 SC 1623** State of Haryana Vs Chandramani;
- (b) **(2012) 3 SCC 563** Office of the Post Master General vs Living Media Ltd & Anr;
- (c) **MANU/SC/8004/2007** U P State Electricity Board Vs Pooran Chandra Pandey;
- (d) **AIR 1988 SC 897** Ramegowda vs Spl Land Acquisition Officer;
- (e) **AIR 1987 SC 1353** Collector, LA, Anantnag vs Katiji;
- (f) **AIR 1996 SC 2750** Spl Tahsildar, LA Kerala vs K V Ayisumma;
- (g) **2008 (11) SCALE 2455** State (NCT Delhi) vs Ahmed Jaan;
- (h) **AIR 2005 SC 2191** State of Nagaland Vs Lipok AO

13. While objecting to the Application to condone the delay, the learned Counsel for the Respondent on the strength of their reply have submitted that the explanation given by the Applicants in all their Affidavits is mutually contrary and also not satisfactory and therefore the Application to condone the delay may be dismissed.

14. The learned Counsel for the Respondent also cited some authorities which are as under:

- (a) Brijesh Kumar and Ors vs State of Haryana and Ors **AIR 2014 SC 1612**;
- (b) Office of the Chief Post Master General and Ors Vs Living Media India Ltd and Anr **(2012) 3 SCC 563**;
- (c) State of UP Thr. Exe. Engineer and Anr Vs Amar Nath Yadav **(2014) 2 SCC 422**;
- (d) **IA No.245 of 2012 in DFR No.1089 of 2012** Tamil Nadu Electricity Board Vs M/s. Indian Wind Power Association and Anr;
- (e) **IA No.245 of 2012 in DFR No.1089 of 2012** titled as Tamil Nadu Electricity Board Vs M/s. Indian Wind Power Association & Anr;
- (f) Basawaraj and Ors Vs The Spl. Land Acquisition Officer **AIR 2014 sc 746**;

15. In the light of the rival contentions, we now consider the question as to whether the explanation is satisfactory and the same would indicate “sufficient cause” to condone the delay.

16. It cannot be disputed that on going through all their Affidavits, it is clear that the contents of the explanation given by the Appellants through these four Affidavits would indicate that the Applicants have made contrary plea giving different explanation for the said delay.

17. The main ground urged by the Applicant is that they are the Government Companies and it took time for them to

coordinate among the Applicants before the Appeal could be filed and that was how the delay was caused.

18. While considering this explanation, it would be worthwhile to refer to few important relevant dates:

(a) The Impugned Order was passed on 10.10.2013;

(b) The Appellants received copy of the Impugned Order on 19.10.2013;

(c) The period of 45 days in filing the Appeal from the date of receipt of the Impugned Order expired on 3.12.2013;

(d) One of the Respondents i.e. R-3 filed the Appeal in Appeal No.11 of 2013 against the Impugned Order dated 3.12.2013. The same was admitted on 21.1.2013. At that time, the Counsel for the Applicants in these Appeals appeared before the Tribunal on 26.2.2014 and undertook to file the Vakalatnama as well as reply in the Appeal. Similarly, Indian Wind Turbine Manufacturers Association (R-3) also filed another Appeal on 19.12.2013. Guttaseema Wind Energy also filed another Appeal in Appeal No.82 of 2014 on

7.2.2014. When these Appeals were admitted, the learned Counsel for the Applicants was present.

(e) The Applicants filed their common reply on 21.4.2014 in all the Appeals. Even after the Appellants/Applicants filed their reply in these Appeals dated 21.4.2014, the Applicants did not take steps to file the Appeal as against the Impugned Order dated 10.10.2013. On the other hand they filed this Appeal only on 7.7.2014 against the impugned order dated 10.10.2013.

19. According to the Applicants/Appellants due to lack of co-ordination among the Applicants, the said delay was caused.
20. This explanation cannot be countenanced since there is no necessity for all the Applicants/Appellants to file one common Appeal as against the Impugned Order dated 10.10.2013. Any one of them could have filed the Appeal independently within the time frame. This was not done. At least, after coming to know that the Respondents already filed the Appeals as against the Impugned Order, they could have filed the Appeals. They have not chosen to do the same. Even after filing their reply in all the Appeals filed by the Respondents the Applicants could have filed the Appeal at that time itself. But, they did not take immediate steps for filing the Appeal.

21. Admittedly, there is no valid reason pointed out by the Applicants for the delay in filing the Appeal which was ultimately filed only after two months i.e. on 7.7.2014 after filing reply in the other Appeals.
22. The submissions of the Applicants/Appellants that the detailed examination of the Impugned Order and the CERC Regulations by the Applicants had caused the delay in filing the Appeal, cannot be a valid explanation for the delay since the Applicants have filed the common reply in Appeal No.11 of 2014 on 21.4.2014 itself.
23. Having taken a particular stand through the reply in Appeal No.11 of 2013, the explanation now offered by the Applicants that they required further time to go through the Impugned Order and to examine the CERC Regulations cannot be countenanced.
24. The Applicants relied upon a number of judgments rendered by the Hon'ble Supreme Court wherein it has been held that the delay can be condoned in the interest of justice and in the public interest. The said judgments are not applicable to the present case as no public interest is involved in this case.
25. It is settled position of law as laid down by the Hon'ble Supreme Court as cited by the Counsel for the Respondent that the delay in filing an Appeal irrespective of number of

days has to be satisfactorily explained by showing the “sufficient cause”. The delay in co-ordination amongst the Applicants/Appellants cannot be construed to be a “sufficient cause” at any cost.

26. The Applicants have submitted that the period of summer vacation has to be deducted while calculating the period of limitation. This is quite strange. This cannot be a valid explanation since the summer vacation was only for the sitting of the Tribunal and not for the Registry. In fact, it was notified through the Notifications that the Registry will work even during the summer vacation on all working days. Therefore, the plea of the Applicants that the period of summer vacation has to be excluded is liable to be rejected.
27. As pointed out by the learned Counsel for the Respondent the Applicants have put the blame for the delay in filing the Appeal on their Advocate who was to prepare the Appeal and since he has now left the Law Firm, some delay was caused. This explanation has not been referred to in the earlier Application as well as in the subsequent Affidavits and the Written Notes filed later.
28. As a matter of fact, the Law Firm has a number of Advocates on its internship. If there is any delay on the part of one Advocate, the Applicants should have assigned the matter to

any other Advocate for drafting and filing the Appeal. This was not done.

29. Hence, this explanation cannot be accepted in view of the fact that already the Applicants have filed a reply on 21.4.2014 itself in the Appeals filed by the Respondents.
30. One other explanation offered by the Applicant is that it decided to file the Appeal only on account of the fact that the Respondents filed the Appeals as against the common Impugned Order.
31. Thus, it is crystal clear that before the Respondents filed the Appeal, the Applicants had decided not to file the Appeal.
32. As indicated above, the reply in those Appeals had been filed by the Applicants in the said Appeal as early as on 21.4.2014. Even there after, they have not taken steps to file the Appeal immediately and on the other hand they filed the Appeal only on 7.7.2014.
33. The Appellants/Applicant's main point is that the Applicants are a Government and Public Sector Entities and hence the delay may be condoned.
34. The learned Counsel for the Appellant has cited the judgment of Hon'ble Supreme Court AIR 1996 SC 1623 in the case of State of Haryana Vs Chandramani and Others.

35. In this decision, it has been held that a certain amount of latitude could be shown to the Government functionaries since the procedural delay is incidental to the decision making process.
36. There is no dispute about this position.
37. As pointed out by the learned Counsel for the Respondent, the Hon'ble Supreme Court in AIR (2012) 3 SCC 563 Office of the Post Master General Vs Living Media Ltd and Anr quoted this judgment in the case of State of Haryana Vs Chandramani has held that in the matter of condonation of delay when there was gross negligence, the Government Department cannot take advantage by requesting to show some latitude on the strength of the earlier decision.
38. According to the learned Counsel for the Applicants, the Chandramani case was dealt by the Full Bench of three judges of the Hon'ble Supreme Court whereas the case of Office of the Post Master General has been rendered by two Bench judge and that therefore, it cannot be considered as a binding law.
39. This contention in our view is quite untenable.
40. In fact, the Hon'ble Supreme Court in Chief Post Master General Case took into consideration of the said judgment in Chandramani's case and said that when there is a

negligence or in action or lack of bona fide, a liberal construction cannot be given even to the Government Departments.

41. Therefore, the submission of the Applicant that the Chief Post Master General case is not binding is liable to be rejected.
42. In the present case, we are only concerned with the explanation offered by the Applicant.
43. As indicated above, different explanations have been offered by the Applicants through its different Affidavits on different dates. This would show that the Applicants have not come with clean hands.
44. That apart, the explanation offered by the Applicants with reference to the summer vacation in which the Appeal could not be filed before the Tribunal is utterly false in as much as the Registry of this Tribunal was working throughout the summer vacation period.
45. The learned Counsel for the Applicants without verifying the facts have made false statement in this Application to condone the delay that due to the intervention of the summer vacation further delay was caused and therefore, the long delay may be condoned.

46. We are not concerned with the number of day's delay. We are only concerned with the conduct of the parties who were not prompt in prosecuting the Appeal immediately after the Order was passed or at least immediately after receipt of the notice in the Appeals filed by the Respondents.
47. As mentioned above, the details given by the Applicants in various Affidavits do not reflect the diligence on the part of the Applicants and on the other hand, they have emboldened to give false explanation in order to get the delay condoned.
48. This is a fit case where the Applicants who were said to be Government machineries have to be directed to pay exemplary cost in view of the fact that they took different stand while giving explanation which is found to be false and wrong. However, we refrain from imposing a cost since we hope that the Government machineries, the Applicants at least in future would ensure that it would not recur.
49. In view of the above, the Application to condone the delay of 216 days in filing the Appeal is dismissed as there is no "sufficient cause" shown. Consequently, the Appeal also is rejected.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:19th Sept, 2014

~~√REPORTABLE/NON-REPORTABLE~~