

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

**IA Nos.224 of 2010, 225 of 2010, 226 of 2010 & 227 of 2010
(In Appeal Nos. 26, 27, 28 & 29 of 2009)**

Dated:- 27th August, 2012

**Present : Hon'ble Mr.Justice M.K. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr.Justice P.S. Datta, Judicial Member**

**I.A. No. 224 of 2010
(In Appeal No.26 of 2009)**

Sothorn Electricity Supply Company
of Orissa Ltd. (SOUTHCO),
incorporated under the provisions of
the Companies Act, 1956 and having its
registered office at 123-A,
Mancheswar Industrial Estate,
Bhubaneswar

... Appellant

Versus

1. Orissa Electricity Regulatory Commission,
Niyamak Bhawan, Unit-VIII,
Bhubaneswar-751 012,
Distt. – Khurda, Orissa.
2. M/s Orissa Consumers' Association & FOCO,
Biswanath Lane,
Cuttak – 753 002,
Orissa.
3. M/s Jayashree Chemicals Limited,
P.O.-Jayshree,
Distt.: Ganjam, Orissa-761025.
4. Grahak Panchayat, Friends Colony,
Parlakhemundi.

5. Mr. Ramesh Ch. Satpathy, Secretary,
National Institute of Indian Labour, 302 (B),
Beherasahi, Nayapali, Bhunaneswar-751 012.
6. East Coast Railway,
B-2, Rail Vihar, Chandrasekharapur,
Bhubaneswar-751 023.
7. Mr.T.C. Padhi,
M/s Behrampur Cold Storage,
Konisi, BED-1,
Berhampur-761 025.
8. Mr.Pravakar Dora,
Advocate, 3rd Lane Vidya Nagar,
Co-operative Colony, Rayagada-765 001.
9. Shri R.P. Mahapatra,
Plot No.775 (Pt.), Lane-3,
Jayadev Vihar,
Bhubanesar-751013.
10. Utkal Chamber of Commerce and Industry,
N/6, I.R.C. Village, Nayapalli.
Bhubanesar-751015.
11. Mr.Jogendra Behera,
Fellow Scholar, XIMB, Utility Regulation
Research Centre, Xavier Institute of Management,
Bhubaneswar-751 013.
12. Mr.K.C. Mahapatra,
Chairman, PDC, F/6,
NJB Nagar,
Bhubaneswar.

I.A. No. 225 of 2010
(In Appeal No.27 of 2009)

Western Electricity Supply Company
of Orissa Ltd. (WESCO),
incorporated under the provisions of

the Companies Act, 1956 and having its
registered office at 123-A,
Mancheswar Industrial Estate,
Bhubaneswar

... Appellant

Versus

1. Orissa Electricity Regulatory Commission,
Niyamak Bhawan, Unit-VIII,
Bhubaneswar-751 012,
Distt. – Khurda, Orissa.
2. M/s Orissa Consumers' Association & FOCO,
Biswanath Lane,
Cuttak – 753 002,
Orissa.
3. Mr. Suryakanta Pati, Manager (Elec.),
OCL India Ltd., At : 1/12, OCL New Coloy,
PO/PS: Rajgangpur, Distt. Sundergarh,
Orissa-770 017.
4. Mr. A.P. Mishra, VP,
M/s. Larsen & Toubro Limited,
Kansbahal Works : PO.Kansbahal,
Distt. Sundergarh, Orissa – 770034.
5. Mr. Arjun Kumar, CEDE,
South Eastern Railway,
Garden Reach, Kolkata – 700 043.
6. Mr.Ramesh Mehta, President,
M/s Rourkela Chamber of Commerce & Industry,
Chamber Bhawan, Rourkela-769 004.
7. Mr. Ramesh Ch. Satpathy, Secretary,
National Institute of Indian Labour, 302 (B),
Beherasahi, Nayapali, Bhunaneswar-751 012.
8. Mr. Shyama Bihari Prasad,
M/s Top Tech Steel Pvt. Limited,
F-4/31, Civil Township, Rourkela,
Sundergarh-769 004.

9. Mr.Sudarsan Goal,
M/s. Subh Ispat Limited,
Jaibahal, Kalunga Road,
Rourkela, Distt. Sundergarh-769 012.
10. Mr. Sunil Agarwal,
M/s Shree Jaganath Alloys Pvt. Ltd.,
Besanti Colony Road, Udit Nagar,
Rourkela, Sundergarh-769 004.
11. Mr. Amit Agarwal,
M/s Bajrangbali ReRollers Pvt. Ltd.,
Lal Building Kacheri Road,
Rourkela, Distt. Sundergarh-769 012.
12. Mr. Suwendu Ku. Das,
M/s Scan Steel Ltd., Main Road,
Rajgangpur, Distt. Sundergarh,
Orissa-770 017.
13. Mr.Sitaram Agarwal,
M/s Attitude Alloys Pvt. Ltd.,
Ghurudu Khamar,
Vill: Bijayanagar, PO-Barkot,
Distt. Deogarh-13.
14. Mr.Sunil Choudhury, MD
M/s. Omkar Steels Pvts. Ltd., F-9,
Civil Township, Rourkela-769004.
15. Mr.Satya Sunder Kara,
M/s Shree Metalicks Ltd., Gurudwara Road,
Barbil, Distt. Keonjhar-758035.
16. Mr.Gobardhana Pujari, General Secy.,
Sundergarh District Employer's Association,
AL-1, Besanti Nagar, Rourkela-769 012,
M/s Shree Metalics Ltd., Gurudwara Road,
Barbil, Distt.Keonjhar-758035.
17. Mr.Surendra Da
General Manager, Nagarika Samiti,

- Rourkela-769 004.
18. Mr.Susanta Kumara Pradhan,
General Secretary, Resident Association,
Civil Town Ship, Rourkela – 769 004.
 19. Mr. Chitaranjan Mohanty,
Basanti Forum, Basanti Nagar,
Rourkela-769 012.
 20. Mr. Nrusingh Charana Panda,
M/s. Grihasti Udyog, Chhend Basti,
Rourkela-769 015.
 21. Mr. Samir Kumar Mishra,
Advocate, Belpahar,
Jharsuguda.
 22. Mr.Sanjay Gagodia,
M/s. Scan Steel Ltd., Q-1,
Civil Township, Rourkela-769 004.
 23. Mr.Balamukund Kadamwala,
M/s Lingaraj Feeds Limited,
Kachery Road, Rourkela,
Sundergarh-769012.
 24. Mr.Pravakar Dora,
Advocate,3rd Lane Vidya Nagar,
Co-operative Colony,
Rayagada-765 001.
 25. Utkal Chamber of Commerce and Industry,
N/6, I.R.C. Village, Nayapalli.
Bhubanesar-751015.
 26. Shri R.P. Mahapatra,
Plot No.775 (Pt), Lane-3,
Jayadev Vihar, Bhubaneswar,
Orissa – 751 013.
 27. Mr.G.N. Agarwal,
Gen.Secy. Sambalpur District,
Consumer Federation Balaji Mandir Bhawan,

Khetrajpur, Sambalpur-768 003.

28. Mr. Jogendra Behera,
Fellow Scholar, XIMB, Utility Regulation
Research Centre, XIMB, BBSR-751 013.
29. Mr.T.C. Padhi,
M/s. Berhampur Cold Storage,
Konisi, BED-1,
Berhampur-761 025.

I.A. No. 226 of 2010
(In Appeal No.28 of 2009)

North Electricity Supply Company
of Orissa Ltd. (NESCO),
incorporated under the provisions of
the Companies Act, 1956 and having its
registered office at 123-A,
Mancheswar Industrial Estate,
Bhubaneswar

... Appellant

Versus

1. Orissa Electricity Regulatory Commission,
Niyamak Bhawan, Unit-VIII,
Bhubaneswar-751 012,
Distt. – Khurda, Orissa.
2. M/s Orissa Consumers' Association & FOCO,
Biswanath Lane,
Cuttak – 753 002,
Orissa.
3. Mr.Devashish Mahanti, President,
M/s North Orissa Chamber of Commerce & Industry,
Ganeswarpur Industrial Estate,
Balasore-756 019.
4. Mr.C.P.Bhartia, M.D.,
M/s Jagdamba Gases Pvt.Ltd.,
Balasore-756 019.

5. Mr.Ramesh Ch. Satpathy, Secretary,
National Institute of Indian Labour, 302 (B),
Beherasahi, Nayapalli,
Bhubaneswar-751 012.
6. East Coast Railway,
B-2, Rail Vihar, Chandrasekharpur,
Bhubaneswar-751 023.
7. Chief Electrical Engineer. S.E. Railway,
Garden Reach, Kolkata-700 043.
8. Ferro Alloys Corpn., ITd., GD-2/10,
Chandrasekharpur,
Bhubaneswar-751 023.
9. Balasore Alloys Limited,
Balgopalpur,
Balasore, Orissa-756 020.
10. Shri R.P. Mahapatra,
Plot No.775 (Pt.), Lane -3,
Jayadev Vihar,
Bhubaneswar-751 013, Orissa.
11. Mr.Pravakar Dora,
Advocate, 3rd Lane Vidya Nagar,
Co-operative Coloy, Rayagada-765 001.
12. Mr.P.K. Dey,
CO, MIs. MSP Steels Ltd.,
Haladiaguna, Keonjhar.
13. Mr.Sanjay Pattnaik,
Chief Resident Executive,
Tata Steel Limited,
273, Bhoumanagar,
Unit-IV, Bhubaneswr-751 001.
14. Jindal Stainless Steel,
50-HIG, BDA, Jaydev Vihar,
Bhubaneswar-751 013.

15. Utkal Chamber of Commerce and Industry,
N/6, I.R.C. Village, Nayapalli.
Bhubanesar-751015.
16. Mr.Ashok Kumar Mishra, MD,
M/s. IDCOL Ferro Chrome and Alloys Ltd.,
PO: Ferro Chrome Project,
Jaipur Road, Distt. Jaipur-755 020
17. Mr. Jogendra Behera,
Fellow Scholar, XIMB, Utility Regulation
Research Centre, XIMB, BBSR-751 013.
18. Mr.T.C. Padhi,
M/s. Berhampur Cold Storage,
Konisi, BED-1,
Berhampur-761 025.
19. Mr. Satya Sunder Kar,
M/s Shree Metaliks Ltd., Gurudwara Road,
Barbil, Distt.Keonjhar-758035.

I.A. No. 227 of 2010
(In Appeal No.29 of 2009)

Western Electricity Supply Company
of Orissa Ltd. (WESCO),
incorporated under the provisions of
the Companies Act, 1956 and having its
registered office at 123-A,
Mancheswar Industrial Estate,
Bhubaneswar

... Appellant

Versus

1. Orissa Electricity Regulatory Commission,
Niyamak Bhawan, Unit-VIII,
Bhubaneswar-751 012,
Distt. – Khurda, Orissa.

2. Grid Corporation of Orissa Ltd.,
Janpath, Bhubaneswar, Orissa-751 022.
3. Shri Jayadeva Mishra,
N-4/98, Nayapalli,
Bhubaneswar,
Orissa
4. M/s Orissa Consumers' Association & FOCO,
Biswanath Lane,
Cuttak – 753 002,
Orissa.
5. Confederation of Indian Industry (CII)
8, Forest Park, Bhubaneswar.
6. Mr.K.C. Mahapatra,
Chairman, PDC, F/6,
NJB Nagar,
Bhubaneswar.
7. Ferro Alloys Corpon. Ltd.,
GD-2/10, Chandrasekharpur,
Bhubanesar-751023.
8. Mr.Mangu Srinivas, AGM(Tech),
Rawmet Ferros Industries Pvt.Ltd.,
2B, Fortune Towers, CS Pur,
Bhubanesar.
9. Utkal Chamber of Commerce and Industry,
N/6, I.R.C. Village, Nayapalli.
Bhubanesar-751015.
10. Nesco,
Januganj, Balasore-756 019.
11. Shri R.P. Mahapatra,
Plot No.775 (Pt.), Lane-3,
Jayadev Vihar,
Bhubanesar-751013.

12. Southco,
Courtpetta,
Berhampur-760004.
13. Mr.G.N.Agarwal, General Secretary,
Sambalpur District Consumers Federation,
Balaji Mandir Bhawan,
Khetrajpur,
Sambalpur-768 003.

Counsel for the Appellant(s) : Mr. Buddy A.Ranganadhan,
Mr.Shiv K.Suri,
Mr.Hasan Murtaza,
Mr.Junaira Rehman &
Ms. Shilpy Chaturvedi

Counsel for the Respondent(s) : Mr. Rukwik Panda for OERC,
Mr.Raj Kumar Mehta,
Mr.Anthryami Upadhyay,
Mr.Lakhi Singh for R-3
(in Appeal No.29/09)

Mr. C.S.Chauhan ,
Ms. Rajdipa Behura for R-6
(in Appeal Nos.26 & 28/09),
Mr.A.P.R.Rao(Rep.) for R-6
Mr.G.Pujari for R-4, 12,16, 20
& 24 (Appeal No.27/09)

JUDGMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. The four Appeals being Appeal No. 26 of 2009, 27 of 2009, 28 of 2009 and 29 of 2009 were filed by Southern Electricity Supply Co. of Orissa Ltd. (SOUTHCO), Western Electricity Supply Co. of Orissa Ltd. (WESCO), North

Eastern Electricity Supply Co. of Orissa Ltd. (NESCO) and Western Electricity Supply Co. respectively against an order dated 20.3.2008 determining the Aggregate Revenue Requirement and Bulk Supply Tariff of the four utilities as aforesaid for the Financial Year 2008-09 and the order dated 12.08.2008 passed by the Orissa Electricity Regulatory Commission whereby the said Commission rejected the review petitions of the four appellants. The appellants who are the distribution companies had filed separate petitions before the Commission on 30.11.2007 for approval of ARR and determination of power supply tariff and retail supply tariff for the FY 2008-09. The Commission passed an order on 20.3.2008 determining the ARR and two kinds of tariff against which the appellants filed review petitions which however were dismissed by the Commission's order dated 12.8.2008.

2. The grounds in the memorandum of Appeals in all the four cases filed by the distribution companies are substantially one and the same because they are directed against the Commission's order determining ARR and two

kinds of retail supply and order of the rejection of review preferred by them. Initially, on 20.2.2009 the Appeals were admitted with direction to the issuance of notice to the respondents through dasti service.

3. The cause title of the Appeals disclose that the Appeals have been preferred against the principal order dated 20.3.2008 and the review order dated 12.8.2008 and paragraph 6 of the memorandum of Appeal makes an averment that the Appeals are within the period of limitation. This averment is the hot bed of contest by the respondents particularly the respondent No. 2 namely Orissa Consumers' Association and FOCO represented by Mr. R.K. Mehta, learned Counsel. It is the settled judicial principle that when an order passed in review petition becomes affirmation of the order passed in the main proceeding then such order on review merges with the principal order passed in such main proceeding so that limitation of the period prescribed in the statute has to be computed with reference to the date of the disposal of the main case and if in this respect the Appeal before the

Tribunal with reference to the appealable order is found to be time barred then an application would lie for condonation of the period of delay in preferring the Appeal. This is more so because the law is well settled that the order passed in review under Order 47 Rule 1 Civil Procedure Code is non appealable. This Tribunal then headed by a Two Member Bench admitted the Appeal on 20.2.2009. It was on 19.3.2010 exactly a year after the admission of the Appeal Mr. R.K. Mehta, learned Counsel appearing for the respondent raised the preliminary point that the Appeal was not maintainable since it was time barred and as no application for condonation of delay was filed under order 41, rule 3 A of the Civil Procedure Code which was introduced by the 1976 amendment of the said Code that mandates filing of an application for condonation of delay together with the filing of memorandum of Appeal when Appeal is time barred. It was this submission of Mr. Mehta on that day that led the Tribunal to direct the respondents to file affidavit in reply which of course has been filed subsequently.

4. It was thereafter on 6.8.2010 that the appellants filed four interlocutory applications being IA No. 224 to 227 of 2010 praying for condonation of delay.

5. In Appeal No. 26 of 2009 preferred by SOUTHCO, it has been contended in IA No. 224 of 2010 that the review petition before the Commission was filed within a period of limitation of 90 days in terms of the Commission's regulation and the Commission's order was passed on 12.8.2008 which was received by the appellant on 26.8.2008, while the present Appeal was filed 10.10.2008. According to the appellant, the appellant was honestly pursuing the review application filing of which before the Commission is recognized in law and the appellants understanding is that the period between 20.3.2008 and 10.10.2008 could be excluded for the purpose of computing the period of limitation and the judgment of the Supreme Court in *Raghu Forwarding Agency and Another Versus Union of India and Others reported in (2003)12 SCC 272* was cited. We shall advert to the decision at the appropriate place of this treatment. Secondly, it has been contended

that the total duration of 204 days the most part of which was spent in filing application for review and having an order thereon. The third ground is that the appellants took time to file the Appeal after co-ordinating with the Central Office, Bhubaneshwar, local Office at Sambalpur, collecting data and information, giving instructions for drafting to learned Counsel in Delhi and this paraphernalia contributed to the delay.

6. In Appeal No. 27 of 2009, the WESCO filed IA No. 225 of 2010 praying for condonation of delay exactly on the line adopted in IA No. 224 of 2010.

7. In Appeal No. 28 of 2009, preferred by NESCO an application for condonation of delay was filed being IA No. 226 of 2010 and the grounds of Appeal are the same.

8. In Appeal No. 29 of 2009, the WESCO preferred IA No. 227 of 2010 and the grounds of condonation of delay are the same as in IA No. 224 of 2010.

9. On the whole, the particulars of dates in Appeal Nos. 26 of 2009, 27 of 2009 and 29 of 2009 are that the main order was passed on 20.3.2008, the order was communicated on 21.3.2008, review application was filed on 20.6.2008, review application was heard on 7.8.2008, review order was passed on 12.8.2008 and such order was communicated on 26.8.2008 and the Appeal was filed on 10.10.2008. The official seal of this Tribunal reveals the date of filing as 10.10.2008 although it was registered subsequently. In Appeal No. 28 of 2009 there is a slight advantage of the appellants in this that this Appeal was filed on 7.10.2008.

10. In Appeal No.26 of 2009, there are 12 respondents including Orissa Electricity Regulatory Commission and of these 12 respondents, the respondent No.6 namely East Coast Railway alone filed a written objection against the application for condonation of delay and was represented by Mr. Rajdipa Behura, learned counsel. In Appeal No.27 of 2009, there are 29 respondents including the Commission and none is contesting the application for condonation of delay. In Appeal No.28 of 2009, there are 19 respondents

and it is again the respondent no.6 namely, East Coast Railway who filed a written objection. In Appeal No.29 of 2009, there are 14 respondents and it is the respondent No.2 namely Grid Corporation of India Ltd. represented by Mr. R.K. Mehta, learned Counsel who is seriously contesting the application for condonation of delay and throughout the hearing Grid Corporation of India Ltd's learned counsel who alone made forceful oral submissions opposing the applications for condonation of delay.

11. Though an order passed in review is not appealable a litigant has legal right to prefer a review against an order made in Appeal and when an Appeal is preferred against an appealable order the period spent between the filing of review application against the appealable order and the date of such order/or communication thereof passed in review is normally considered in judicial parlance a formidable ground for condonation of delay in preferring the Appeal against the main order with which an order in review, if it is a rejection order, merges. It is not necessary to dwell on the facts pleaded in Appeal or in review

application as also the balance of merit and demerit of each other's case because the sole point for consideration is whether there is good ground for condonation of delay.

12. The order dated 20.3.2008 is said to have been communicated to the appellant on 28.3.2008 and the review order dated 12.8.2008 is said to have been communicated to the appellant on 26.8.2008 and there is no denial of the respondents in this respect. The review applications were filed within the period of limitation in terms of the Commission's Regulations and the date of filing is 20.6.2008. The period between 20.6.2008 when the review application was filed and 26.8.2008 when the review order was communicated is self evident, a matter of fact and of record, admitting of no dispute and controversy. Therefore, the judicial approach, as it has been for a long long time, has been that when the right of review is statutory right irrespective of the question whether the review application was meritorious or not the Courts and the Tribunals normally are inclined to condone this period. The period of delay which is rightly to be explained by the appellants then

is the period of the second spell which will be one between 26.8.2008 and 10.10.2008 (7.10.2008 in Appeal No. 28 of 2009 although the appellants in this Appeal claimed that they filed the Appeals on 26.9.2008). This becomes a period of roughly 44 days and not beyond that. The date of admission of the Appeal or the date of registration seal in the registry is of no consequence.

13. Initially, for days together Mr. Mehta based his arguments on the proposition that as the Appeals were not accompanied by application for condonation of delay the Appeals were not maintainable. The question is whether the word “shall” as it appears in Order 41 Rule 3A (1), CPC is mandatory so much so that memorandum of Appeal if it does not accompany an application for condonation of delay shall visit with dismissal. Interpretation of Order 41 Rule 3A (1) had engaged the attention of different High Courts of India notably, Gujarat High Court, Patna High Court, Karnataka High Court, Calcutta High Court and Kerala High Court. (AIR 1987 Gujarat 2005; AIR 1983 Patna 189; AIR 196 Karnataka 199; AIR 1988 Kerala 48 and AIR 1988 Cal 28). All these High Courts have held at different times

but consistent with each other to the effect that the provision noted above is not mandatory but is a directory one for the reason that the provision of Order 41 Rule 3A (1) CPC does not provide for any penal clause to the effect that in the event of the breach of provisions the memorandum of Appeal will visit with dismissal. It has been held by these High Courts that the procedure is the handmaid of justice, and to sub-serve the ends of justice the provision has to be read as directory, meaning thereby that the Courts have discretion to permit a litigant to put in an application for condonation of delay in the matter of admission of Appeal even when the memorandum of Appeal when it was filed did not have the application for condonation of delay with it. As held by the Hon'ble Supreme Court in plethora of cases beginning with 1955 and up to this day that the question is as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. Only when consequence of failure to comply with a prescribed requirement is provided by the statute itself, there can be no manner of doubt that such statutory requirement must be

interpreted as mandatory (AIR 2001 SC 2313). Karnataka High Court (ibid) has held that even when there is no application for condonation of delay opportunity has to be given to show cause so as to have the question of limitation heard, while the Gujarat High Court has held that because of non-compliance with the provision an Appeal cannot be straightaway dismissed. The Full Bench of Kerala High Court (ibid) has held that an order dismissing the Appeal is a decree that can be the subject matter of second Appeal, as such provisions or Order 41 Rule 3A(1) CPC does not in any manner affect that principle. Even when a plaint is defective under Order 7 Rule 11CPC it does not warrant straight away rejection because the party has to be given opportunity for rectification of the defects.

14. In this connection, provision of Order 8 of Rule 1 CPC may be referred to. Here also the word “shall” appears to convey the idea that the written statement has to be filed not later than 90 days from the date of the summons. The question arose before the Hon’ble Supreme Court whether this provision is directory or mandatory. The Three Judge Bench decision of the Supreme Court in *Salem Advocate Bar*

Association Vs. Union of India AIR 2005 SC 3353 had held that the provision providing for maximum period of 90 days for filing the written statement is not mandatory and the Court is not altogether powerless to extend time in consideration of factuality of a case. Order 8 Rule 10, CPC similarly uses the word “shall” in the matter of pronouncement of judgment when written statement under Order 8 Rule 1 or Rule 9 is not filed within time permitted by the Court. The Hon’ble Court held that the word “shall” as it appears in Order 8 Rule 10 does not disentitle the Court not to pronounce judgment but instead would entitle the Court to ask the defendant for filing written statement. Neither in Order 8 Rule 1 nor in Order 41 Rule 3A (1) there is any mischief clause that would have partaken of the character of deciding whether the word “shall” occurring in a statute is directory or mandatory.

15. Here in our case review application was in time. In fact, the entire time was lost before the Commission in connection with hearing and disposal of review application. Pendency of review application which was lawfully filed

before the Commission is normally considered to be a good ground for condonation of delay.

16. The next submission of Mr. Mehta that the appeals are liable to be dismissed on the ground that application for condonation of delay was not filed when the appeal was admitted for hearing is difficult to concede to. This submission was made after it was pointed out to Mr. Mehta that filing of an application for condonation of delay together with the filing of memo of appeal as is supposed to be necessary is not an absolute mandate in view of plethora of decisions of different High Courts and also Hon'ble Supreme Court which held that the provision is not mandatory. Now this submission that as on that day when the appeals were admitted by this Tribunal no application for condonation of delay was put in and subsequent filing of application for condonation of delay only when the respondent GRIDCO Ltd. pointed out before the Tribunal about the appeal being time barred will be of no effect is difficult to accept for the reason that the Appellant proceeded on the mistaken belief that the Appeal was within time and hence on the basis of averment made in the memorandum of Appeals the Appeals

were mistakenly admitted, but such admission is no admission in the eye of law because the Appeals were time barred and when it was pointed out before the Tribunal that by mistake the Appeals were admitted the Tribunal which has the power to recall the order proceeded with the question of limitation, and in fact the applications, for condonation of delay have been filed which have been heard days together keeping aside hearing of appeals on merit subject to admission of appeal upon condonation of delay. Further, when the Tribunal proceeded to hear the applications for condonation of delay it virtually amounts to this that the Tribunal ignored such earlier mistaken admission and was not inclined to go into merit of the appeals although no written order has been passed recalling such mistaken admission of the appeal. Therefore, applications for condonation of delay have given a new dimension in this that subject to allowance or otherwise of such applications order regarding admission will follow. The decision in the State of *M.P. Vs. Pradeep Kumar* (2000)7 SCC 372 is of no aid to Mr. Mehta because in this decision the Hon'ble Supreme Court held that Order 41 Rule 3A does not

foreclose a chance for the appellant to rectify the mistake of not filing the application for condonation of delay along with the appeal either on his own or being pointed out by the Court. This is what different High Courts have pronounced in series of decisions before this decision was rendered. Therefore, it is the law settled that before an appeal is admitted an application for condonation of delay has to be there. This decision cannot be taken aid of when a Tribunal on the basis of wrong averment in memo of appeal admits the appeal which is not a lawful admission and such order of admission passed by mistake is *not est*. The decision in *Maya Devi Vs. M.K Krishna- AIR 1981 Kerala 240* does not help the appellant because what has been held here is that application for condonation of delay has to be filed before admission of the appeal. This is what the Hon'ble Supreme Court held in *Pradeep Kumar*. The Calcutta decision in *Shipra Vs. Ajit Kumar (AIR 1988 Cal 28)* as referred to by Mr. Mehta which deals with the philosophy of Order 41 Rule 3A with erudition does really help the respondent. The decision of the Privy Council referred to by Mr. Mehta reported in AIR 1917 PC 179 is relevant and is useful for us to the extent

where it has been held that question for condonation of delay is open for consideration even when appeal is admitted ex-parte.

17. It is the submission of Mr. Buddy A Ranganadhan, learned Counsel for the appellants that wrongful admission of appeal cannot preclude a Court from either dismissing an appeal as being belated or time barred or alternatively permitting an appeal to be heard after the condonation of delay. Therefore, the Tribunal has to examine whether there is sufficient cause for condonation of delay.

18. Mr. Buddy A Ranganadhan, learned Counsel for the appellant cites the decision in *Smt. Sandhya Rani Sarkar Vs. Smt. Sudha Rani Debi reported in (1978) 2 SCC 116*. This decision is very appropriate to the appeals in hand because here in this decision also an appeal was admitted inadvertently and when it was pointed out before the High Court that the appeal was barred by time the High Court examined the application for condonation of delay subsequently filed and admitted the appeal for hearing. Certain observations of the Hon'ble Supreme Court are relevant.

“The High Court rightly held that the appeal was barred by limitation, and then proceeded to examine the submission of the appellant before it that the appellant was prevented by a sufficient cause from preferring the appeal in time and the delay should be condoned. The High Court having examined all the relevant materials placed before it, has exercised its discretion in favour of the appellant by condoning the delay and admitting the appeal of file. In the facts and circumstances of this case, could it be said that the High Court committed an error in exercising its discretion in favour of the appellant before it?”

19. At paragraph 7 of the judgment certain pertinent observations of the Hon’ble Supreme Court are there which to our estimation answer the objections of Mr. Mehta.

“Very serious exception is taken to one observation of the High Court that an application for condoning the delay was submitted simultaneously with filing the appeal though in fact it was done nearly four years after filing of the appeal, and that the

office of the High Court was misled by certain averments made in the Memo of Appeal which the Registry prima facie accepted and numbered the appeal without insisting upon an application for condonation of delay or bringing that fact to notice of the Court on whose cause list the appeal was listed for admission. Now, it is undoubtedly true that the application for condonation of delay was made on August 8, 1972 and there is some factual error in stating in judgment that the application was simultaneously filed with the appeal. But this aspect is not very material as the delay had to be explained till the date of filing of the appeal and not at any rate after filing of the appeal or till the application for condoning the delay was made. It is true that in the memo of Appeal it has been stated that the appeal is directed against the judgment and decree dated April 30, 1962 as amended and/or modified by orders dated January 8, 1968 and February 2, 1968. The averments are factually correct and, therefore, it could not be said

that they are made with a view to misleading the Registry of the High Court. By the decree dated April 30, 1962 purchase was directed to deposit the balance of consideration within the stipulated time and at the request of the purchaser the time was first extended by the Trial Court and then by the High Court in Civil Revision Application No.3195 of 1965 on two different occasions, viz., on January 8, 1968 and February 2, 1968. Therefore, no exception can be taken to these averments which are factually correct though the appeal would lie obviously against the decree dated April 30, 1962. It, however, appears that as the appeal was numbered and was even admitted, though the application for condoning delay was not made till the appeal was placed on the cause list and was actually taken up for hearing when an objection was raised that the appeal was barred by limitation. It is obviously at that stage that the application for condoning delay was made.”

20. Mr. Mehta's argument that the decision in *Sandhya Rani* was made before Order 41 Rule 3A came into statute leads us nowhere because a time barred appeal unaccompanied with application for condonation of delay is not to be visited with dismissal without giving an opportunity to the appellant to explain the delay by filing an application for condonation of delay. Secondly, when the matter came up in appeal before the Hon'ble Supreme Court the new provision had already come into being and though the provision was not exactly quoted in the decision of the Hon'ble Supreme Court the law as it stands now was already stated then. There is no conflict at all between *Sandhya Rani and Pradeep Kumar*, both being consistent with each other.

21. Mr. Mehta's argument that delay has to be explained till the day when application for condonation of delay was filed is perhaps not the law in as much as in *Sandhya Rani's* case we have seen in paragraph 7 that "*delay had to be explained till the date of filing of the appeal and not at any rate after filing of the appeal or till the application for condoning the delay was made.*"

22. Mr. Mehta made a submission that the appellant by making untrue statement in the Memo of Appeal to the effect that the appeal was within time lulled the Tribunal to believe that the appeal was in time knowing fully well that the statement was wrong and untrue to the knowledge of the appellants. Mr. Buddy A Ranganadhan made a forceful submission that the memo of the appeal makes it explicitly clear that the appeal is directed against the order dated 20.3.2008 and the review order dated 12.8.2008 and the appeals were filed in the bonafide belief that the limitation for appeal should commence from the date of the order passed in review, and even when such belief may not stand the scrutiny of law such erroneous belief may not stand in the way of this Tribunal considering the applications for condonation of delay. For the Tribunal it is difficult to pronounce with definitiveness that the averment that the appeals were filed within the specified period was made falsely to the conscious knowledge and belief of the appellants. For a certain period of time confusion was there in some quarters as to whether limitation would start from the date of the order passed in review. This position has

been made clear by the Hon'ble Supreme Court unambiguously that when the order passed in review is one of rejection it merges in the main order which is appealable and thus the period of limitation would count from the date immediate after passing of the appealable order. Again in *Sandha Rani's* case the position was similar to this one. The Hon'ble Supreme Court held "*We have gone through the application filed by the appellant before the High Court praying for condoning delay. It was asserted that the appeal is within time and alternatively it was prayed that delay, if any, be condoned. The High Court examined both limbs of the contention. We see no contradiction in what is stated in the application and what the High Court found as a fact.*"

23. Mr. Buddy A Ranganadhan cited a decision of the Karnataka High Court in *Smt. Sudhatai & Anr. Vs. The Joint Registrar of Co-operative Societies and Ors. (ILR 2009 KAR 286, 2009(3) Kar LJ 247)*. In this decision it has been held that consideration of an application for condonation of delay arises at two stages. At the first stage if the Tribunal is prima facie satisfied that the appellant was prevented by sufficient cause for not filing the application in time may

admit the appeal keeping the question of limitation open for consideration at the second stage when the respondent appears. In view of the decision in *Pradeep Kumar and Sandhya Rani* of the Hon'ble Supreme Court it is not necessary to dwell on the situation in the case before the Karnataka High Court.

24. Now, in the written submissions filed by Mr. Mehta, learned Counsel for GRIDCO Ltd., the respondent No.2 in Appeal No.29 of 2009 it was stated that the appeal was barred by limitation by 159 days, not 204 days as stated in application for condonation of delay. The matter of the fact is that the principal order was passed on 20.3.2008 and the order passed in review was communicated to the appellant on 26.8.2008. Explanation of delay is evident between the period 20.3.2008 and 26.8.2008, it being that the appellants had been pursuing their review applications which were permitted under the law. The second spell of delay is the period between the 26.8.2008 and 10.10.2008 which is roughly a period of 44 days and this delay has been attempted to be explained with the following submission:

“It is submitted that the Applicant/Appellant, took time inter alia, for pursuing the Main order as well as the Review Order, taking a decision to file an Appeal, co-ordinating between its Central Office at Bhubaneswar and the local office at Burla, Sambalpur, inter alia, by collecting data, information etc., giving instructions for drafting the Appeal and thereafter, sending the same to the Applicant/Appellants’ Advocates in New Delhi alongwith the necessary record, inter alia, co-ordination between various offices took some time. Hereto annexed and marked Annexure-II is a statement showing the relevant dates. It is respectfully submitted that in the interest of justice, delay be condoned”

25. The earlier notion of need to explain delay by day to day is no longer insisted upon. What is required is consideration of amount of delay and a reasonable explanation thereof. Explanation in absolute terms is well-nigh impossible, for it varies from case to case, circumstance to circumstance and where justice is of

paramount importance adherence to too much of rigidity is perhaps not the judicial consensus of the day. It is a litigant who is before us, not the speaker for it. The appellant has taken us to the decision in *Raghu Forwarding Agency and Another Vs. Union of India & Ors. (2003) 12 SCC 272* where a similar situation was addressed to by the Hon'ble Supreme Court. It was a case where Appeal against the original order was barred by limitation. Review petition was also dismissed. The appellant filed Appeal against the main order as also the order passed in review. In the instant case also the original order and the order in review have both been challenged. So far as the memorandum of Appeal is concerned in the reported case, the High Court dismissed the Appeal for limitation. Review was dismissed on merit, as occurred in the instant case also. The Hon'ble Supreme Court was of the opinion that too technical a view of the matter should not have been taken. We are bolstered by the rationale of this decision. The quantum of delay, it is well accepted, has no direct nexus in law with sufficiency of the cause. Therefore, the extent of delay must not determine whether the cause is sufficient or not. The review

application before the Commission was not found barred by limitation. It is submitted by learned Counsel for the appellants with reference to application for condonation of delay that the litigant was under the bonafide belief and impression that the period of limitation would start from the date of termination of review proceedings and the averment in the memorandum of Appeal was not a misleading one as is alleged by Mr. Mehta's client. It is submitted that the appellants are statutory companies which have their own procedural formalities, namely, co-ordination between the Central office at Bhubaneswar and local office at Sambalpur that took some time, time spent to take a decision at the highest level to prefer an Appeal, consultation with the learned Advocates in Delhi, drafting of memorandum of Appeals and filing of the same are the series of procedures that contributed to the delay of 44 delays computed from the date following the date of disposal of the review applications which were honestly pursued in terms of the law. In our considered opinion there has been made a reasonable explanation of delay.

26. We summarize our reasoning as follows:

- 1) Series of judicial pronouncements have made the position clear that ordinarily a Court or a Tribunal does not become too technical in approach to the consideration of condonation of delay.
- 2) A reasonable explanation of delay, of course, not lacking in bonafide convinces the Court.
- 3) The law that an order passed in review is non-appealable is of no consequence here.
- 4) In the instant case filing of review application before the Commission was a legal right available to the litigant which was pursued.
- 5) Review application was not dismissed on the ground of limitation.
- 6) Review application was disposed of on merit.
- 7) The main order was appealable.
- 8) A considerable amount of time was spent in the hearing and passing of the review order.
- 9) The mere fact that in *Sandhya Rani's* case the provision of Order 41 Rule 3A was not quoted is of no consequence because the decision is in consonance with that provision.

10) There is no repugnancy between *Pradeep Kumar* and *Sandhya Rani* .

11) The delay of 44 days during the 2nd spell after disposal of the review application has been reasonably explained.

12) *Ragu Forwarding Agency's* case is akin to ours.

13) Initial wrong admission of the Appeal does not alter the situation in view of *Sandhya Rani's* case.

27. On the grounds of what we have summarized above, we would allow the four applications for condonation of delay subject to payment of cost of Rs.20000/- by the Appellants in respect of each of the Appeals payable in favour of “ **National Association for the Blind, Delhi State Branch, Sector-5, R.K. Puram, New Delhi-110022**” on or before 17.09.2012.

Justice P.S. Datta
Judicial Member

Mr. Rakesh Nath
Technical Member

Justice M. Karpaga Vinayagam
Chairperson

Dated:- 27TH August, 2012

REPORTABLE/NON-REPORTABLE

PR