

COURT-I

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**IA NO. 194 OF 2020
IN DFR NO. 51 OF 2020**

Dated: 26th July, 2021

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. Ravindra Kumar Verma, Technical Member**

In the matter of:

**Solar Energy Corporation of India Limited ... Appellant(s)
Versus
Welspun Energy Private Limited & Ors. ... Respondent(s)**

Counsel for the Appellant(s) : Mr. M. G. Ramachandran, Sr. Adv.
Mr. Prabhas Bajaj

Counsel for the Respondent(s) : Mr. Basava Prabhu S. Patil, Sr. Adv.
Mr. Ankur Sood **for R-1**

Mr. Shashwat Kumar
Mr. Rahul Chouhan
Ms. Himangini Mehta
Mr. Naman Mittal **for R-2**

ORDER

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

IA No. 194 of 2020

(Application for condonation of delay in filing the Appeal)

This Application came to be filed seeking condonation of delay of 365 days in filing the Appeal against impugned Order dated 17.12.2018 passed in Petition No. 95/MP/2017 on the file of Central Electricity Regulatory Commission (for short “**CERC/Central Commission**”).

According to Appellant, the Respondent – Central Commission by the impugned order granted certain reliefs to Respondent No.1 - Welspun Energy Private Limited:

The Appellant submits that there were basic errors apparent on the face of record and that there existed sufficient grounds for review and rectification of the impugned order. Accordingly, on 30.01.2019, the Appellant filed Petition being No. 02/RP/2019 for review and recall of the order dated 17.12.2018. Further, even during the extended period of 90 days, Respondent No.1 failed to commission the 100 MW Solar Power Project. As such, without prejudice to its stand in the Review Petition, SECI terminated the PPA on 11.04.2019. Thereafter, on 24.04.2019 Respondent No.1 filed a petition being Petition No.125/MP/19 seeking extension of time for completion of the 100 MW Power Project. The Central Commission after hearing both the Petitions, by order dated 11.12.2019, dismissed the Review Petition No.02/RP/2019 filed by the Appellant.

Appellant further submits that on receipt of the Order dated 11.12.2019, the Appellant decided to file an appeal under Section 111 of the Electricity Act, 2003. Accordingly, the Counsel in Delhi were contacted and various documents as required were forwarded to the Counsel. The draft Appeal was prepared and sent to the Appellant on 04.01.2020. Thereafter, in view of the subsequent developments including the passing of order dated 13.01.2020 by the Central Commission and order dated 17.01.2020 by this Tribunal, further modifications were carried out to the draft Appeal and the draft appeal was finalized.

Since Appellant filed review petition, the Appellant could not have challenged the order dated 17.12.2018 in an appeal before this Tribunal in view of the Judgment dated 11.09.2014 in the matter of ***Steel Authority of India Limited vs. Central Electricity Regulatory Commission and Ors*** in Appeal No. 41 of 2014, holding that an Appeal would not be maintainable when a Review Petition raising the very same issues is pending for adjudication. Therefore, the Appeal is being filed after the dismissal of the review Petition by the order dated 11.12.2019 of Central Commission.

In the process there has occasioned a delay of 365 days in filing the present Appeal, which is solely on account of the afore-mentioned reasons,

and the delay was wholly bona-fide and unintended. Appellant prays that the delay therefore, be condoned.

Per Centra, Respondent No.1 filed reply in brief as under:

According to Respondent No.1, the Applicant has filed the instant application seeking condonation of a long delay of 365 days in filing of the accompanying appeal without providing any reasonable explanation for such inordinate delay. The application is liable to be rejected because of –

- (a) The appeal and the application filed by the Applicant are not accompanied by any board resolution and are only supported by a Letter of Authority. In this context, they made reference to the judgments in the cases of (1) ***Nibro Ltd. v. National Insurance Co. Ltd. AIR 1991 Del. 25***, and (2) ***Baker Oil Tools (India) Pvt. Ltd. v. Baker Hughes Ltd. 2011 (47) PTC 296 (Del)***.

The authorisation to file a written statement cannot be used to file an appeal. Accordingly, the Applicant has failed to provide any authorisation based on which the appeal is filed.

(b) The filing of the review petition and the appeal, while accepting the benefit received under the CERC order, tantamount to approbate and reprobate. In this context, they made reference to the judgments in the cases of (1) **Dexters Ltd. v. Hill Crest (1926) 1 KBD 0348**, and (2) **Priyanka Overseas Pvt. Ltd. v. Union of India AIR 1991 SC 583**.

According to Respondent No. 1, the Applicant has no right to appeal against the CERC order since it has availed full benefit thereof in the form of the amount of INR 6,48,00,000/- received by it in terms of the order. The appeal and the review petition are *ex facie* mala fide actions.

Respondent No. 1 further submits that the Applicant has filed the review petition and the appeal in bad faith with the sole intention of frustrating the relief granted in the CERC order. Even after accepting the benefit under the CERC order, the Applicant acted in complete bad faith to frustrate the Respondent No.1's implementation of the project.

According to Respondent No.1, it was ready to complete the project, but the Appellant had blocked the implementation of the project at every stage.

Respondent No.1 further submits that the Applicant has also acted in bad faith by challenging the jurisdiction of the CERC in Petition No. 95/MP/2017 before this Tribunal in Appeal No. 402/2017, even though the Applicant has accepted the jurisdiction, other petitions preferred by other power generating companies.

- (c)** The review petition filed by the Applicant was dismissed after due consideration of all the issues raised and was not dismissed on the ground of lack of jurisdiction or other cause of like nature. The Applicant itself admits, in its application, that the appeal raises the very same issues as the review petition. Hence, the Applicant cannot claim the benefit of extension of limitation in terms of Section 14 of the Limitation Act, 1963.
- (d)** There has been inordinate delay even after dismissal of review petition. The Applicant has failed to provide any sufficient cause explaining the delay after 11.12.2019 when the review petition filed by

the Applicant was dismissed by the CERC. Even if the period during which the review petition against the order dated 17.12.2018 was pending before the CERC is excluded, there is a delay of 43 days in filing the delay. The application fails to provide any plausible explanation or reason for this delay. This delay is further compounded by the fact that the Applicant had already filed the review petition raising the exact same issues and, therefore, should have been well placed to file the appeal in a timely manner.

In the present case, the Applicant has failed to provide any satisfactory explanation other than referencing the normal processes of a government body. The explanation given does not amount to “sufficient cause” for condoning the inordinate delay of 365 days in filing the appeal. Respondent No.1 submits that the application seeking condonation of delay in filing the appeal therefore, may be dismissed.

***Per Centra*, the Appellant filed rejoinder, in brief as under:**

Appellant submits that the Appeal and the Application have been filed and are supported by the Affidavit of the duly authorized officer Shri M. Karukkuvel on behalf of the Appellant – SECI. The Authorization Letter

dated 27.01.2020 duly authorizes Shri M. Karukkuvel to sign Affidavits on behalf of the Appellant – SECI. The Authorization Letter has been issued with the approval of Managing Director (SECI). The Managing Director (SECI), in turn, had been authorized by the Board of the Appellant vide Minutes of Meeting dated 21.01.2019 to take all necessary action regarding, inter alia, the Appeal to be filed by the Appellant against the Impugned Judgment passed by the CERC.

The Appellant has specifically stated in its communication dated 05.02.2019 that it had filed a Review Petition seeking review and recall of the Impugned Judgment dated 17.12.2018 and the amount of Rs. 6.48 crores has been kept in abeyance pending outcome of the proceedings emanating from the Impugned Judgment dated 17.12.2018. The allegations that the Appellant has approbated and reprobated are of malicious/malafide.

According to Appellant, Respondent No.1 had sought to overreach the Central Commission by going behind the repeated assurances given by it that it possesses adequate funds to complete the Project on its own. As soon as the Impugned Judgment was passed on 17.12.2018, Respondent No.1 reversed its stand and started asking the Appellant - SECI to give a

“confirmation letter” so as to enable Respondent No.1 to borrow external funds. On the basis of this new plea, Respondent No.1 filed Petition No. 125/MP/2019 to pray for further extension of time beyond 90 days before the Central Commission, however, the same has been rejected by the Central Commission by its letter dated 13.01.2020. The termination letter dated 11.04.2019 has also been issued entirely in accordance with law, and the same has been upheld by the Central Commission by its order dated 13.01.2020.

Proceedings shows the contradictory stands adopted by Respondent No.1 before different judicial forums, as a means of committing abuse of process and forum shopping. It is in this background, on the basis of legal advice received, that Appellant – SECI had raised the preliminary objection to the maintainability of the Petition before the Central Commission. The Appellant has selectively quoted its own submissions made in Appeal No. 402 / 2017 and sought to portray as if they are observations made by this Tribunal. This is clearly another attempt to mislead this Tribunal is the stand of the Appellant.

ANALYSIS & CONCLUSION:

The present Appeal is filed challenging impugned order wherein CERC has allowed certain relief to the first Respondent generator. The delay in commissioning the solar project seems to be on account of force majeure event pertaining to clearance of title and possession of the land in question.

We are not concerned with the merits of the appeal at this stage. The fact remains that subsequent to the impugned order dated 17.12.2018 a Review Petition was filed on 30.01.2019. Meanwhile on 11.04.2019, the Appellant SECI terminated the PPA without prejudice to its stand in the Review Petition. In that context, the Central Commission, entertained the petition of the 1st Respondent seeking extension and allowed. The fact remains, the Review Petition was dismissed. After dismissal of the Review Petition alone, the Appellant could approach this Court in the Appeal.

It is well settled that a party cannot simultaneously pursue its right before the appellate jurisdiction and so also in the review proceedings. Therefore, the Appellant decided to file the Appeal only after disposal of the Review Petition. After that it must have taken some time to take a decision to file the Appeal after obtaining necessary consent/sanction and legal opinion.

We are not opining anything on the merits of the Appeal. We are of the opinion that after dismissal of the Review Petition, there is delay of 43 days. Even if such delay is condoned, no prejudice would be caused to the Respondents, since the Appeal would be decided on merits. Accordingly, the IA is allowed and 365 days of delay in filing the Appeal is condoned. The application is disposed of.

Admit. Reply to the main matter shall be filed by the Respondents within six weeks from today with advance copy to the other side. Thereafter, the Appellant shall file rejoinder, if any within two weeks with advance copy to the other side.

Registry is directed to number the Appeal, and list the matter on **15.09.2021**.

Pronounced in the Virtual Court on this the 26th day of July, 2021.

**Ravindra Kumar Verma
(Technical Member)**

**Justice Manjula Chellur
(Chairperson)**

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