

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

ORDER ON

IA Nos. 1402 & 1005 of 2019 IN DFR No. 2114 of 2019
IA Nos. 1444 & 1017 of 2019 IN DFR No. 2116 of 2019
IA Nos. 1477 & 1019 of 2019 IN DFR No. 2117 of 2019
IA Nos. 1520 & 1030 of 2019 IN DFR No. 2119 of 2019
IA Nos. 1605 & 1032 of 2019 IN DFR No. 2120 of 2019

Dated : 2nd December, 2019

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member**

In the matter of:

- 1. Uttar Pradesh Power Corporation Ltd.
Shakti Bhawan, 14, Ashok Marg,
Lucknow – 226001
through its Chief Engineer, PPA**
- 2. Paschimanchal Vidyut Nigam Ltd.
D.L.W. Bhikharipur, Varanasi – 221004
through its Managing Director**
- 3. Poorvanchal Vidyut Vitran Nigam Ltd.
D.L.W. Bhikharipur, Varanasi – 221004
through its Managing Director**
- 4. Madhyanchal Vidyut Vitran Nigam Ltd.
4-A, Gokhale Marg, Lucknow – 226001
through its Managing Director**
- 5. Dakshinanchal Vidyut Vitran Nigam Ltd.
Bhawan, 220KV U.P. Sansthan – 282007
Bypass Road, Agra,
through its Managing DirectorApplicant/Appellant(s)**

Vs.

1. **Uttar Pradesh Electricity Regulatory Commission
Vidyut Niyamak Bhawan, Vibhuti Khand,
Gomti Nagar, Lucknow – 226010
through its Secretary**

2. **M/s. Bajaj Energy Limited
(Formerly known as M/s. Bajaj Energy Private Limited)
Having its registered office at B-10, Sector – 3,
Bajaj Bhawan, Jamnalal Bajaj Marg,
Noida – 201301
through its Managing Director Respondent(s)**

Counsel for the Appellant (s) : Mr. Raghvendra Singh, Sr. Adv.
Mr. Sunil Kumar Rai
Mr. Md. Altaf Mansoor

Counsel for the Respondent(s) : Mr. C. K. Rai
Mr. Samir
Mr. Sachin Dubey for R-1

Mr. Amit Kapur
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Upendra Prasad
Mr. Akshat Jain
Mr. Sanjeev Kumar Singh
Mr. Utkarsh Singh
Mr. Brij Mohan
Mr. Rajpal Singh for R-2

ORDER

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The instant Applications have been filed by the Appellant along with the present Appeals for condoning the delay of 60 to 89 days in removing objection/re-filing and delay in filing the Appeals of 451 to 454 days of DFR Nos. 2114, 2116, 2117, 2119 & 2120 of 2019 under Rule 30 of the Appellate Tribunal Rules, 2007 against the Impugned Order dated 03.01.2018 passed by Uttar Pradesh Electricity

Regulatory Commission in Petition Nos. 1258, 1259, 1260, 1261 & 1262 of 2017 and the order dated 08.03.2019 passed by Uttar Pradesh Electricity Regulatory Commission in Review Petition No. 1347/2018, Respondent No. 1 herein.

2. The present appeals were filed by the Appellant on 15.05.2019. The Appeals relate to five power plants namely Barkhera (Pilibhit), Khambarkhera (Lakhimpur Kheri), Maqsudapur (Shahjahanpur), Kundarkhi (Gonda) & Utraula (Balramur) being operated by Respondent No. 2.

The gist of submissions made by the Applicant/Appellant is as under:

3. The impugned order dated 03.01.2018 was communicated to the Appellant on 08.01.2018. The Appellant after receiving the aforesaid order found that learned UPERC while deciding the petition of the Respondent no. 2 has decided the matter on the merits of the case apart from the negotiated tariff arrived at between the parties through the process of conciliation. However, in the order dated 03.01.2018 there was confusion with respect to payment of fixed charges for the intervening period.
4. The Appellant after receiving the aforesaid order to show bonafide and its commitment to adhere to its submission, vide order dated 15.01.2018 directed the scheduling of the energy from the Respondent's power plant which was resumed from 17.01.2018. The question of payment of fixed charges for the intervening period was again put for further discussions and negotiation between the parties under Clause 13(1)(b) UPERC Terms & Conditions of Generation Tariff) Regulation 2014, which permitted deviation in operating norms and certain conditions.

5. For one and half month, a series of negotiations took place in the office of the Director Corporate Planning, UPPCL and Chief Engineer PPA, UPPCL for resolving the issue with respect to the intervening period through settlement. It may be pertinent to note here that the Appellant in all fairness had already started scheduling the energy of the Respondent no. 2, which clearly showed the Appellant's fairness and commitment of having settled the matter as per the negotiations arrived at.
6. The Respondent no. 2 despite having participated in numerous meetings and negotiations having taken place with respect to the intervening period, ultimately backed out from resolving the matter with respect to the intervening period fixed charges. It is relevant to state that Chief Engineer PPA vide letter dated 27.04.18 had also intimated that the matter with respect to the payment of fixed charges of intervening period is under discussion between the parties.
7. The office of the Appellants during the discussions and on the advice were clearly under an impression that after the successful negotiations with the Respondent no. 2 they would be able to seek necessary clarification of the order of the learned UPERC, which under its direction has a huge liability on the Appellant for its no fault. Thereafter the negotiations having failed, the matter was accordingly intimated to the Managing Director of the Appellant who vide internal memo dated 11.05.18 issued instruction/directions that limited review may be filed with respect to intervening period fixed charges on 12.05.2018. It may be relevant to state that earlier the matter was being pursued by different lawyers and after the direction of the Managing Director on 12.05.2018 it was decided to engage Dr. L.P. Mishra, Advocate, was also associated with the matter when the

same was being contested by the Appellant before Hon'ble Allahabad High Court, Lucknow Bench, Lucknow.

8. Further, the officers of the Appellants approached Dr. L.P. Mishra, Advocate along with his assisting Counsel, Mr. Vikrant Raghuwanshi, Advocate for drafting and filing the review petition before the learned UPERC in lines with the direction of the Managing Director, UPPCL. After initial negotiations with Dr. L.P. Mishra, Advocate, officers of the Appellants were required to provide all the records of the matter including applications filed before the learned UPERC. Accordingly, officials of the Appellants approached assisting counsel of Mr. Raghvendra Singh, Senior Advocate, who was contesting the matter before the UPERC, for records in last week of May, who also sought 2 to 3 days' time to provide records because of the busy schedule in the Hon'ble High Court during the last working days prior to the long summer vacation. Due to this very reason Dr. L.P. Mishra, Advocate had also given time in the first week of June to the officials of the Appellant for drafting and preparing the review petition to be filed before learned UPERC.
9. Dr. L.P. Mishra, Advocate and Mr. Vikrant Raghuwanshi, Advocate were handed over all the necessary documents of the matter for preparation of review petition. The review petition was drafted by the aforesaid counsel on 25.06.2018 and a draft copy of the same was given to the officials of the Appellant on 26.06.2018. The official of the Appellant placed draft of the review petition for approval from the Chairman of the Appellant and the approval for the same was given on 26.06.2018. After taking necessary approval on 26.06.2018, the officials of the Appellants communicated necessary instructions to Mr.

Vikrant Raghuwanshi for finalizing the review petition to be immediately filed before the learned UPERC.

10. The aforesaid matter was a bunch matter with respect to 5 different units and accordingly, 5 review petitions were to be filed before learned UPERC therefore, after finally preparing the draft, Mr. Vikrant Raghuwanshi, Advocate filed the same on 03.07.18 along with the application for condonation of delay of 93 days in filing the review petition before learned UPERC. The matter, thereafter, was heard by the learned UPERC on a number of dates. Since, objection was raised by Respondent no. 2 with respect to the fact that review petition was filed beyond the period of 90 days as provided under Regulation 150 of UPERC Conduct of Business Regulations 2004 and there was no provision for condoning the same.
11. The UPERC heard the matter on 11.09.2018, 11.12.2018, 18.01.2019 and 22.01.2019 on the objections of the maintainability of review petition on the ground of delay. The matter was finally heard on 22.01.2019 on the issue of condonation of delay in filing the review petition. The learned UPERC passed the judgement and order with respect to the final hearing having taken place on **22.01.2019 on 08.03.2019** wherein review petition was dismissed on the ground of delay. The aforesaid order dated 08.03.2019 was communicated to the Appellant on 13.03.2019.
12. It is a settled principle of law that any order merges with the subsequent order therefore, limitation for filing the appeal has to be calculated w.e.f. the date, the order of review was communicated to the Appellant which is 13.03.2019, from which date the period of 45 days within which the Appellant could have filed the appeal.

13. It may be relevant to state that the Appellant is a Govt. of U.P. undertaking and therefore, any decision to challenge any order have to go through various approvals and permissions before which the challenge can be made to any order or judgement. Accordingly, the Chief Engineer PPA, after receiving the communication of the judgement and order dated 08.03.2019 on 13.03.2019 through email dated 22.03.2019 referred the matter to M/s PWC which is regulatory consultant of UPPCL for advising the future course of action in the matter. On 12.04.2019 M/s PWC, the regulatory consultant of Appellant advised for taking legal opinion in the matter.
14. After receiving advice from M/s PWC, the matter was communicated to Managing Director and accordingly necessary notings were done for taking advice of the learned Advocate General of the State of U.P., Mr. Raghvendra Singh in the matter, the approval for which was given by Managing Director on 18.04.2019. After receiving the aforesaid approval, the Chief Engineer PPA approached office of the learned Advocate General along with assisting counsel Mr. Altaf Mansoor for briefing the matter to the learned Advocate General, who consented to give time for conference on 18.04.19 itself considering the urgency in the matter.
15. The officials of the Appellant along with assisting counsel met the Learned Advocate General in the evening of 18 April 2019, who after looking into the matter in detail advised the officer of the Appellant to file appeal not only against the order dated 08.03.2019 but also against the impugned order by which the Appellant was aggrieved i.e. 03.01.2018. Accordingly, the assisting counsel, Mr. Altaf Mansoor was advised for immediately preparing 5 appeals in the matter to be

filed before the Hon'ble APTEL. However, Mr. Mansoor was held up in some other court proceedings from 18-26 April 2019.

16. After having regard to the numerous and voluminous documents involved in the matter as well as translation of Hindi documents which took some time, accordingly the appeal has been filed on 15.05.2019 in accordance with the rules prescribed by this Tribunal, which has resulted in an inadvertent delay of approximately 451 to 454 days from the original order dated 03.01.2018 however, considering the fact that the same also merges with the subsequent order dated 08.03.2019 the actual delay may be calculated as 60 to 89 days, which was neither intentional nor willful on the part of the Appellant to cause such a delay.
17. The appeal filed by the Appellant otherwise raises substantial question of law and the Appellant has a good case on merits. Hon'ble Tribunal is requested to condone the delay and admit the appeal. The present application has been made bonafide, and it will be in the interest of justice for this Hon'ble Tribunal to consider the same. Under the given circumstances, if the above stated application seeking condonation of delay is not allowed, the Applicant will suffer irreparable loss and injury, giving undue advantage to the Respondent No. 2.

REJOINDER SUBMISSION BY THE APPELLANT

18. As has already been mentioned by the appellants in the preceding paragraphs as well as in the application for condonation of delay, the appellant has been bonafidely pursuing the remedy of review before the learned UPERC which is the statutory remedy already available to the appellant and therefore, it cannot be said that the appellant has

deliberately delayed the filing of the appeals. After the filing of the appeals, which being voluminous in nature, a large number of defects were pointed out by the registry of this Hon'ble Tribunal. Therefore, the counsel for the appellant not only had to seek clarification from the registry with respect to various defects being mentioned but in order to clear those defects sufficient time was required.

19. The order dated 03.01.2018 and the order of review dated 08.03.2019 are challenged by the appellant in the present appeals. It may be relevant to further state that this being background of litigation in the aforesaid matter especially due to the fact that the numerous and voluminous documents already having been filed before the learned UPERC, therefore the same were required to be annexed alongwith the appeal for adjudication and appreciation of the facts of the matter. It may be relevant to further state that a bare perusal of the defects mentioned clearly shows that the defects not only related to changing in pagination of the main appeal due to certain contents being illegible as well as certain re-typing also required to be done with re-paging of the pages of the appeals. It may also be relevant to state that the matter having emanated from the State of U.P., a large number of documents were in Hindi, which also required translation. Apart from the above, the appellant was also required to furnish additional court fees in all the connected appeals. The counsel for the appellants, therefore, had to seek certain clarification with regard to the defects so raised. A large number of documents were required to be procured again from the office of the UPPCL. The payment of additional court fees, required official procedures to be followed seeking approval and permissions having financial aspect. The counsel for the appellants was also out of station for some period of time in the month of June, however, it may

be relevant to further state that the appellant diligently had put their best efforts to ensure that all the defects as pointed out by the registry were removed and their clear, legible and translated copy as required is available with the Hon'ble Tribunal for hearing of the matter.

20. It may also be relevant to state that appellants have not adopted the practice of seeking waiver or exemption of filing translated copies etc. Therefore, the delay in re-filing is neither intentional nor deliberate but was only due to the fact that the appellants diligently put in their best efforts to ensure that all the defects were properly and effectively removed to the satisfaction of the Hon'ble Tribunal. Here it may also be relevant to state that in order to cure a number of defects, certain documents were required from the office of UPPCL which being a Government Corporation also took time in furnishing the same. Therefore, the Hon'ble Tribunal may also consider the fact that the procedural delays also took place in case of Government Corporations where a number of approval and permission are required.
21. In view of the fact that the learned UPERC has dismissed the review merely on the ground of latches therefore, the appellant has also challenged the same before this Hon'ble Tribunal on the ground that the learned UPERC ought to have heard the matter on merits. The appellant therefore, was diligently and earnestly pursuing the statutory remedy of review as such the appeal could not be filed within the prescribed period against the impugned order dated 03.01.2018. However, the appellant has challenged the order dated 03.01.2018 immediately after the decision of review and a short delay of 37 days in challenging the order of review has been sufficiently

explained by the appellant. It may be relevant to state that the appellant Corporation is a Government Corporation, therefore, in order to prefer an appeal or petition before the Tribunal, necessary approvals and permissions are taken, which takes up a considerable period of time.

22. As stated in the preceding paras, after the order dated 03.01.2018, the appellant in order to amicably settle the dispute with regard to payment of fixed charges for the intervening period, started negotiating process with the Respondent no.2, however it was only after the Respondent no.2 backed out from the said negotiations, that the appellants decided to file the Review Petition before the learned UPERC and therefore, there was bonafide delay of 93 days in filing of the Review Petition. It may be relevant to state that the appellant and Respondent no. 2 are the contracting parties to the PPA who on persuasion of the learned State Commission had decided to settle the matter amicably keeping in mind both public interest as well as to ensure that the Respondent no. 2 is also not adversely impacted, therefore, it was in this background that the matter was being settled amicably and through conciliatory process, without adversial litigation, therefore it was in continuation to the same that the appellants were of the strong belief with the contention of the learned UPERC with respect to the intervening period having been wrongly incorporated against the terms of the settlement so offered, the Respondent no. 2 would be forthcoming in settling the matter. The appellant had sufficiently explained the reasons for the delay of 93 days in filing the review petition but the State Commission did not consider the same.
23. It is submitted that mere submission of the bills by the Respondent no.2 doesn't create its right to get the payment of the same that too

when the same are against what had been negotiated between the appellants and the Respondent no.2 and therefore, the appellant has filed the present appeals challenging the order dated 03.01.2018 passed by the Ld. UPERC whereby it was directed for payment of fixed charges for the intervening period.

24. The delay in filing the appeal and re-filing of the appeal is bonafide and the reasons for delay has already been explained in the preceding paras as well as in the applications for condonation of delay in filing and re-filing of the present appeal. The learned State Commission has clearly exceeded its mandate in passing the impugned order dated 03.01.2018 and therefore, the Respondent no. 2 are staying away from adjudication of the matter on merits.
25. The learned UPERC has declined to interfere in the Review Petition on the ground of delay in filing of the said Review Petition despite holding that the learned State Commission has the power to condone the delay. The learned UPERC therefore, ought to have decided the review on merits. It is submitted that both the order dated 03.01.2018 and 08.03.2019 are under challenge therefore, the appeal is maintainable.
26. It is further submitted that appellants are the Corporation/Company/Undertakings of the State of U.P. and therefore, any decision to challenge any orders have to go through various approvals and permissions before which the challenge can be made to any order or judgement. The delay in filing the present appeal has been sufficiently explained by the appellants in its application for condonation of delay, which has neither been denied

nor refuted by the Respondent no. 2, who in the para under reply has merely denied the same in a cursory manner.

27. The Respondent no. 2 is trying to avoid hearing on the merits of the matter. It is further submitted that the Respondent Company has already received more than Rs. 8000 crores since the year 2012 from the appellants against the sale of 11414 MU of electricity and this fact clearly establishes that the Respondent has already received more than it has invested.
28. The contents of preceding paras as well as the contentions made in the I.A. No. 1019 of 2019 and I.A. No. 1477 of 2019 are reiterated herein again and it also submitted that the delay was also attributable to backing out of the Respondent no. 2 from the negotiation process and hence, it is most respectfully submitted that that this Hon'ble Tribunal may kindly be pleased to condone the delay in filing and re-filing the present appeal in the interest of justice, fair play and equity and further be hear the matter on merit.

The gist of submissions made by the Respondent No. 2 is as under:

1. It is stated that by way of filing a belated appeal and thereafter keeping the same under defects, the Appellant – Uttar Pradesh Power Corporation Limited has acted to the severe prejudice of the Respondent No. 2 – Bajaj Energy Private Limited. By delaying the matter, the appellant has still not complied with the directions issued in the Order dated 03.01.2018 even after 20 months of passing of the said Order.

2. The IA No. 1017 of 2019 seeks condonation of delay is with regard to the challenge to an Order dated 03.01.2018 passed by the State Commission in Petition No. 1260 of 2017. The Appellant (UPPCL) has also sought to challenge another Order dated 08.03.2019 passed by the State Commission which had dismissed the review sought by the Appellant on the ground of inordinate delay in preferring the said petition.
3. At the outset it is stated, that UPPCL by its own conduct has created latches on seeking condonation of delay. Pursuant to the Order dated 03.01.2018, the Respondent No. 2 – raised five bills dated 05.01.2018. Without giving any reasons, UPPCL returned these bills to the Answering Respondent vide its letter dated 16.03.2018. This return was after expiry of the 30 days period of bill submission.
4. It is stated that by the order dated 03.01.2018 of the State Commission, a valuable right had already been vested in the Answering Respondent, which was in the nature of partially compensating it for exclusive fault of UPPCL. UPPCL kept wasting time and did not take suitable recourse and hence does not deserve any condonation of delay in the instant matter.
5. The action of UPPCL is tantamount to first accepting the order of the State Commission and thus recognizing the legal right of the Answering Respondent and then trying to avoid it by filing review, and when its review got rejected, it has come to the Hon'ble Tribunal just to deprive the Answering Respondent of its rights of getting legitimate payments.

6. The appeals insofar as the Order dated 08.03.2019 are not maintainable at all since the review stands dismissed by the fact that the State Commission has not condoned the delay of 93 days which had occurred in filing the petition for review for which absolutely no explanation had been given by the Appellant.

7. Under Order 47, Rule 7 of the Code of Civil Procedure, 1908, no appeal is maintainable with regard to an Order rejecting a review petition. Order 47, Rule 7 read as under –

“Rule 7 : The Order of rejection is not appealable objection to order granting application.”
 - (i) **The Order of the Court rejecting the application shall not be appealable. The Order granting application can be objected to at once by an Appeal or the Order granting application or in an appeal from the decree or Order finally passed or made in the suit.**

8. In terms of the above, the appeals insofar as the Order dated 08.03.2019 is concerned are not maintainable and deserve to be dismissed at the outset. The answering Respondent craves leave to refer to the various Judgements/Orders passed by this Hon’ble Tribunal on the aspect of maintainability of an appeal against an Order rejecting the review.

9. Even insofar as the Order dated 03.01.2018 is concerned, there are absolutely no justified reasons given by the Appellant as to why it delayed filing the review petition before the State Commission. Since

the Appellant filed a review petition, it was on the basis that there was an error apparent in the Order dated 03.01.2018 passed by the State Commission and an error apparent becomes known immediately upon perusing the Order concerned. Therefore, it is not understood as to why the Appellant took so long to file review petition.

10. The UPERC conduct of Business Regulations provides for a period of 90 days for filing a review petition. This is double the time as compared to even the period of 45 days, which is prescribed to file an appeal under Section 111 of the Electricity Act before this Hon'ble Tribunal. Further to this period of 90 days, there was a delay of 93 days and the only reasons cited for the same were the administrative approval and legal advice taken by the Appellant.
11. Event in the application for condonation of delay filed before this Hon'ble Tribunal, the very same administrative reasons have been reiterated. Further, after the communication of the review Order to the appellant which is on 13.03.2009, the advice of its regulatory consultant PwC to seek legal opinion has been received by the appellant only on 12.04.2019 i.e. more than one month when the Review Order had only rejected the matter on delay. Therefore, this matter was referred to the Learned Advocate General of the State who opined to file appeals both against the main Order dated 03.01.2018 and review Order dated 08.03.2019.
12. Finally, the appeal seems to have been filed only on 15.05.2019 and defects have been removed only in August 2019. This also exhibits

that there is no urgency in the matter insofar as the Appellant is concerned.

13. In fact, the Appellant has not complied with the directions for payment of fixed charges ordered by the State Commission in its Order dated 03.01.2018 to the Answering Respondent depriving the Answering Respondent of an amount of Rs. 206.36 crores along with interest thereon. Besides, payments against running bills of all the five plants upto September 2019 are kept outstanding causing acute financial stress on the 2nd Respondent.
14. Accordingly, this is a fit case even for this Hon'ble Tribunal to dismiss the Appeals at the stage of condonation of delay itself since the Appellant has not been serious in pursuing the matter and the conduct of the Appellant has caused severe prejudice to the Answering Respondent.
15. The entire matter arose because the Appellant took a unilateral decision to terminate the Power Purchase Agreement dated 10.12.2010 entered into between the Appellant and the Answering Respondent providing that the tariff of the electricity supply to the Appellant would be as determined by the State Commission. Despite there being no default on the part of the Answering Respondent, the Appellant simply issued notice of termination and sought to terminate the PPA.

16. The Answering Respondent first moved the Hon'ble High Court of Allahabad and thereafter the State Commission seeking a declaration that the said termination was incorrect and also claimed fixed charges since the PPA was in operation for the entire period of dispute. The State Commission has agreed with the Answering Respondent and directed the Appellant to pay the fixed costs for the period from 19.07.2017 to 16.01.2018 which amounts to Rs. 206.36 crores for all five plants.

17. Even till date, the above payment has not been made to the Answering Respondent by the Appellant despite the lapse of more than 20 months of the Order dated 03.01.2018 of the State Commission directing the Appellant to do so. Therefore, without prejudice to the submission that condonation of delay should not be allowed at all, the Appellant be directed to comply with the Order dated 03.01.2018 insofar as payment of fixed charges to the Answering Respondent is concerned (the principal amount) before allowing the application for condonation of delay. In addition to the fixed charges, the Appellant has also withheld the bulk of its running bills for the plants since December 2018. A detailed computation sheet of the outstanding amounts due from the Appellant to the Answering Respondent is attached hereto. It will be seen that an amount of Rs. 494.85 crores has become outstanding upto September, 2019 to this account which is in addition to the fixed charges of Rs. 206.36 crores.

18. The above would be fair and would put the Appellant to terms for simply delaying the matter for more than 20 months and putting the

Answering Respondent out of pocket for no default of the Answering Respondent.

OUR CONSIDERATION AND FINDINGS

1. We have carefully considered the submissions made by the Learned Counsel appearing for the Applicant/Appellant and Learned Counsel appearing for the Second Respondent. The only point that arises for our consideration is whether the Applicant/Appellant has explained the delay in filing the instant appeals 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.
2. As all the IAs in the instant appeals have identical issue i.e. condonation of delay in filing/re-filing of the respective appeal, we therefore decide them together in this common order.
3. Learned Senior Counsel Mr. Raghvendra Singh appearing for the Applicant/Appellant submitted that delay in filing the appeals has been explained in the applications and due to the various unavoidable reasons, the delay of 451 to 454 days delay in filing the Appeals and 60 to 89 days delay in re-filing the appeals have occurred which is unintentional and bonafide and deserves to be condoned in the interest of justice. Learned Senior Counsel was quick to submit that after receiving the Impugned Order dated 03.01.2018 on 08.01.2018, the Appellant found that the Learned UP State Electricity Commission while deciding the petition of the Respondent No. 2 has decided the matter on merits of the case vide apart from the negotiation arrived between the parties. However, in the Order dated 03.01.2018 there was confusion with respect to payment of fixed charges for the intervening period and the same was found to be contrary to the approval of the Board of Directors of

Appellants Company that any fixed charges shall not be paid for the intervening period. Learned Counsel further submitted that after receiving the aforesaid order, the Appellant had to show bonafide and its commitment to adhere to its submission and vide order dated 15.01.2018 directed the scheduling of energy from Respondents power plants from 17.01.2018.

However, the question of payment of fixed charges for the intervening period was again put for further negotiations and discussions between the parties but even after several rounds of meetings, the matter could not be resolved and the Applicant/Appellant decided to go ahead for limited review before the Commission on 12.05.2018 and started to consult advocates.

4. Learned Counsel further contended that all records and documents were handed over to Learned Senior Advocate who after considering the necessary review approved the draft appeals on 26.06.2018 and the Review Petitions were filed before the UP Electricity Regulatory Commission on 03.07.2018 alongwith application for condonation of delay of 93 days in filing the Review Petition. The Review Petition was heard by the State Commission on a number of dates and the same was dismissed on ground of delay vide Order dated 08.03.2019.

5. Learned Counsel for the Applicant/Appellant submitted that being an Undertaking of the State Government any decision to challenge any statutory order has to go through various approvals and permissions before which the challenge can be made to any order or judgement. Accordingly, after receiving the advice of its regulatory consultant M/s. PWC and approval of the higher authorities of UPPCL the

appeals have been filed on 15.05.2019 in accordance with the rules prescribed by this Tribunal which has resulted in an inadvertent delay of 451 to 454 days from the original Order dated dated 03.01.2018 and considering the fact that the same has been merged with the subsequent order dated 08.03.2019 the actual delay may be calculated as approximately 68 days, which was neither intentional nor wilful act at the part of the Appellant to cause such a delay.

6. Learned Counsel emphasized that the Appeals filed by the Applicant/Appellant otherwise presses substantial question of law and the Appellant has a good case on merits. Accordingly this Tribunal may condone the delay and admit the appeals which would be in the interest of justice. Under the given circumstances if the applications seeking condonation of delay are not allowed the Applicant/Appellant will suffer irreparable loss and injury giving undue advantage to the Respondent Generator.

7. **Per Contra**, Learned Senior Counsel, Mr. Amit Kapur appearing for the Respondent No. 2 submitted that by way of filing belated appeal and thereafter keeping the same under defects, the Applicant/Appellant has acted to the severe prejudice of the Respondent No. 2. By delaying the matter, the Applicant/Appellant has still not complied with the directions issued by the State Commission in its Order dated 03.01.2018 even after 20 months of passing of the said order. The Applicant/Appellant has challenged both the orders of the State Commission dated 03.01.2018 as well as 08.03.2019 and UPPCL by its own conduct has created laches in condonation of delay.

Learned Counsel for the Respondent No. 2 further submitted that by order dated 03.01.2018 of the State Commission a valuable right had already been vested in the Answering Respondent which was in the nature of partially compensating it for fault of UPPCL.

8. On the perusal of explanations given by the Applicant/Appellant it evidences that UPPCL kept on wasting time and did not take suitable recourse and hence do not deserve any condonation of delay in the instant matter. In fact the action of UPPCL is tantamount to accepting the order of the State Commission and thus recognizing the legal right of the Answering Respondent and then deciding to avoid it by filing review petition and when its review got rejected it has come before this Tribunal to just deprive the Answering Respondent of its legal right. As such there is no merit in the Appeals filed by the Appellant and even the present application seeking condonation of delay deserves to be dismissed in view of the conduct of the Applicant/Appellant in dealing with the payments of legitimate dues of the Respondent No. 2.

9. Learned Counsel for the Respondent No. 2 cited reference to Order 47, Rule 7 of the CPC, 1908 as per which no appeal is maintainable with regard to an Order rejecting the Review Petition. In fact, the Review Petition was filed by the Applicant/Appellant knowing well that there was no error apparent on the face of Order dated 03.01.2018 passed by the State Commission and it is not understood as to why the Appellant took so long time to file Review Petition with a delay of 93 days over and above the limitation period of 90 days for filing a Review Petition. While looking at the dates of events leading to filing

of the appeals, the Applicant/Appellant could remove the defects in the appeals filed in this Tribunal in August 2019 and this also indicates that there was no urgency in the matter in so far as the Applicant is concerned.

10. Learned Counsel for the Second Respondent pointed out that as stated supra the entire matter arose because the Applicant took unilateral decision to terminate the PPA entered into between the applicant and the Second Respondent despite there being no default on the part of the Answering Respondent. The said termination was held unlawful and the State Commission directed the Applicant/Appellant to pay the fixed charges for the period from 19.07.2017 to 16.01.2018, which amounts to Rs. 206.36 crores of all the five plants.

11. Learned Counsel for the Answering Respondent submitted that without prejudice to the submission that condonation of delay should not be allowed, the Applicant/Appellant should be directed to comply with the Order dated 03.01.2018 in so far as payment of fixed charges is concerned. In addition to the fixed charges the Applicant/Appellant has also withheld the regular payment of the running bills of all the plants and since December 2018 to September 2019 an amount of Rs. 494.85 Crores is kept outstanding. Summing up his arguments, the Learned Counsel for the Answering Respondent reiterated that conduct of entering into the litigations to just avoid legitimate payments to other party as in the present case wherein the Applicant has not made payments after passing of statutory order by the State Commission even after delay of more

than 20 months needs to be warranted. Such action by the Applicant has resulted into utter disadvantage/hardship to the Respondent generator making it extremely difficult to run the power plants.

Our Findings

In the light of the submissions made by the Learned Counsel for the Applicant/Appellant and learned Counsel appearing for the Second Respondent, let us analyse the case in hand. It is a settled principle of law that for condonation of delay the same should be explained satisfactorily and in addition sufficient cause as implied by the legislator ought to be interpreted in the true spirit and philosophy of law. The Hon'ble Supreme Court in catena of judgements has laid down and reiterated the principles pertaining to the condonation of delay. Some of them reads as herein under :

(i) Collector, Land Acquisition, Anantnag & Anr. vs. Mst Katiki & Ors. (1987) 2 SCC 107, wherein it is held that the expression “sufficient cause” implied 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)

- (ii) 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)

- (iii) 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)

- (iv) 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)

- (v) Further, in the case of “State of Nagaland v. Lipok AO and Others as reported in “(2005) 3 SCC 752” in para 15 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)

The Applicant herein is a Corporation of Government of Uttar Pradesh looking after supply and distribution of electricity in the State and decisions are taken by the officers generally at a slow pace and cumbersome of transferring file from table to table is involved which, inter-alia causes sometimes considerable delays in the process of making decision specially in such cases of filing the petitions/appeals.

Also noted by the Hon'ble Supreme Court in one of its judgements that where the State agency is an Applicant praying for condonation of delay it is common knowledge that on account of impersonal machinery and inherited bureaucratic methodology imbued with the note making, file pushing and passing on the files from table to table, delays on the part of the State is less difficult to understand though more difficult to approve, but the State represents collective causes of the community.

Hence, we opine that the balance of convenience as far as condonation of delay is concerned lies in favour of the Applicant/Appellant. However, it will be in the interest of justice and equity that while the delay may be condoned with cost, at the same time, the Applicant/Appellant is made liable to make the legitimate payments to the Respondent Generator (R-2) without causing further hardships so as to enable generator to continue operation of plants satisfactorily and uninterruptedly.

In view of the above, we decide as under :

- (a) The instant Applications filed by the Applicant/Appellant are allowed, the delay in filing/re-filing the appeals are condoned and the IAs are disposed of.
- (b) The Applicant/Appellant is hereby directed to deposit a sum of Rs. 50,000/- in the Defence Organization 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 3 weeks from the date of receipt of copy of this Order.
- (c) The admitted amount of running bills kept outstanding from December 2018 to September 2019 amounting to Rs. 494.85 crores be paid by the Applicant/Appellant to the Second Respondent within a period of 60 days from the receipt of a copy of this order. The Applicant/Appellant is also directed to make regular payments for the future running bills so as to enable uninterrupted generation and supply of power in the larger interest of the consumers.
- (d) Subject to outcome of the instant Appeal(s), the Applicant/Appellant shall pay 75% of the claimed amount (Rs.

206.36 Crores) towards fixed charges for the intervening period from 19.07.2017 to 16.01.2018 within a period of 60 days from the receipt of a copy of this Order.

Pronounced in the Open Court on this 2nd Day of December, 2019.

Registry is directed to number the Appeals and list these matters on 22.01.2020.

**(S. D. Dubey)
Technical Member**

**(Justice Manjula Chellur)
Chairperson**

mkj