

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)**

I.A. NO.190 OF 2016 IN DFR NO.4224 OF 2016

Dated : 27th JULY, 2017.

**Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson
Hon'ble Shri I.J. Kapoor, Technical Member.**

In the matter of:

GRIDCO Ltd.

**... Appellants/
Applicants**

Vs.

NTPC Ltd. & Ors.

... Respondents

Counsel for the Appellant(s)

: Mr. Raj Kumar Mehta
Ms. Himanshi Andley

Counsel for the Respondent(s)

: Mr. M.G.Ramachandran
Ms. Poorva Saigal
Mr. Shubham Arya for R-1

Mr. Divyanshu Rai
Mr. Nikhil Nayyar for CERC

Mr. Pradeep Misra
Mr. Manoj Kr. Sharma for R.9

Mr. Vishal Anand
Mr. Rahul Kinra for R-15,16 & 17

Mr. S. Vallinayagam for R-22.

ORDER

1. There is a delay of 261 days in filing this appeal. Hence the Appellant has filed this application praying that the said delay may be condoned.

2. We have heard Mr. R.K. Mehta learned counsel appearing for the Appellant. We have also perused the written submissions filed by Mr. Mehta. We must state gist of the explanation offered by the Appellant for the delay in filing the appeal.

3. The issue involved in this appeal is with regard to the stage at which Gross Calorific Value ("**GCV**") of the Coal is to be taken for the purpose of calculation of Energy Charge Rate ("**ECR**"). It appears that Writ Petition (P) No.1641 of 2014 was filed by Respondent No.1 ("**NTPC**") before the Delhi High Court challenging some of the Regulations of CERC (Terms & Conditions of Tariff) Regulations, 2014 ("**the said Regulations**") including Regulations pertaining to GCV. It is the case of the Appellant that although the Appellant and other beneficiaries were necessary and proper parties to the said writ petition they were not impleaded as party Respondents in the writ petition.

4. By order dated 07/09/2015 the Delhi High Court while disposing of the interim application observed as under:

“Accordingly, without expressing any opinion on merits of the case, particularly, the rival submissions made by the parties with regard to the stage of collection of samples for measurement of GCV of coal on ‘as received’ basis, the application is disposed of with a direction to the Central Commission to decide the issue i.e. the stage at which the GCV of coal has to be measured on ‘as received’ basis and pass an appropriate order within four weeks from today.”

5. The impugned order was passed by the Central Electricity Regulatory Commission (“**the Central Commission**”) pursuant to the above interim order on 25/01/2016. According to the Appellant the copy of the impugned order was received by the Appellant from the Central Commission on 22/02/2016 vide letter dated 16/02/2016. Before the Central Commission a statement was made by the counsel for NTPC that the Coal Supply Agreement entered into between NTPC and Northern Coal Fields Ltd. provides for the measurement only at the secondary crusher stage. Pursuant to the directions issued by the Central Commission, NTPC had submitted Fuel Supply Agreement (“**FSA**”) pertaining to Kahalgaon and Farakka STPS to the Central Commission. According to the Appellant in view of the above observations made in the impugned order before deciding the future course of action the Appellant wanted to confirm whether the provision quoted by the Central Commission in regard to

sampling and determination of GCV at crusher stage is also the condition for FSAs for Kahalgaon and Farakka STPS and other NTPC generating stations in which the Appellant is a beneficiary. On 17/03/2016 the Appellant sent a letter to NTPC requesting it to furnish copies of aforesaid FSAs. On 05/04/2016 the Appellant issued a reminder to NTPC requesting for copies of FSAs. By letter dated 18/04/2016 NTPC replied that FSAs are commercially sensitive in nature. NTPC declined to supply copies of the FSAs. The Appellant had to, therefore, download copy of the FSAs entered into between NTPC and coal supplier only for Kahalgaon and Farakka STPS from the internet. According to the Appellant on analysis of the FSAs it was found that delivery point as per the FSAs is the Colliery Siding or Colliery Loading point and Property/Title/Risk in Coal passes to NTPC by delivery at the delivery point. According to the Appellant after analysing the above information a decision was taken to file an application for impleadment before the Delhi High Court in the abovementioned pending writ petition. The impleadment application was filed on 23/05/2016. On 26/08/2016 the Delhi High Court allowed the impleadment application filed by the Appellant. The Appellant

was therefore under a *bona fide* impression that the Delhi High Court would adjudicate upon the impugned order.

6. On 10/11/2016 the Appellant was advised by his counsel to file appeal against the impugned order before this Tribunal. After receipt of this advice the matter was processed through Asstt. General Manager (Electrical) on 16/11/2016 for obtaining approval of the competent authority for filing appeal and the matter was put up to the General Manager (Electrical). On the same day the General Manager (Electrical) forwarded the file to the Chief General Manager (Electrical). On 17/11/2016, Chief General Manager (Electrical) endorsed the file to the Director (Commercial). On 18/11/2016, Director (Commercial) forwarded the file to Chairman-cum-Managing Director for final approval. On 21/11/2016 approval for filing the appeal was granted. According to the Appellant, thereafter steps were taken for collection of relevant records for filing the appeal. A draft of the appeal memo was prepared. It was approved by the competent authority on 15/12/2016. The concerned officers rushed to Delhi on 17/12/2016 and the appeal was filed on that day.

7. Mr. Mehta learned counsel for the Appellant submitted that the above explanation is acceptable and makes out sufficient cause. He submitted that the delay may be condoned in public interest. Following paragraphs of the written submissions describe how public interest would be effected:

- (i) The following figures demonstrate the prejudicial effect of computation of ERC on the basis of GCV determined at the Unloading Point in the Generating Station:
 - (a) GCV of Coal as reflected in Form 15 submitted by NTPC is GCV of Domestic Coal as per Bill of Coal Company – 4024 kCal/Kg.
 - (b) GCV of Domestic coal as received at State on ‘ TM Basis’ – 2586 kCal/Kg.
 - (c) Reduction in GCV of Coal from Colliery of Generating State – 1438 kCal/Kg.
- (ii) Due to adoption of such reduced GCV, the quantity of extra domestic Coal Consumption is 292938.1 MT, the cost of which comes to Rs.76,77,84,889.01 and consequently the Energy Charge Rate (ECR) is increased from Rs.1.976/Kwh to Rs.3.075/Kwh i.e. by 55.62%, the Financial burden due to such energy cost is ultimately passed to the Consumers.
- (iii) The financial implication of the impugned order only for the period April,2015 to October,

2016 is Rs.576 crore which will ultimately have to be passed on to the consumers of the State of Odisha. It is, therefore also in public interest that the delay should be condoned.

8. Mr. Ramachandran learned counsel for the NTPC on the other hand submitted that the Appellant has failed to make out sufficient cause and hence the application deserves to be dismissed. Counsel drew our attention to the reply filed on behalf of NTPC. Gist of the submissions is as under:

- (a) The Appellant was represented in the proceedings before the Central Commission and hence was aware of the impugned order. The Appellant should have immediately filed the appeal or if the Appellant was under a *bona fide* belief that the impugned order needs to be challenged before the Delhi High Court, it should have taken immediate steps. The Appellant waited for 4 months.
- (b) When the impleadment application was heard the Appellant did not raise any issue with respect to the impugned order.

- (c) The only issue to be considered by the Central Commission after the matter was remanded was whether the stage of receipt of coal is the wagon top or after unloading, when the coal has passed through the crusher. There was no issue as to the measurement of the coal at the stage where the coal is mined by the Coal India or its subsidiaries. There was no hearing before the Central Commission on this issue. The issue being raised by the Appellant is outside the proceedings before the CERC or before the Delhi High Court.
- (d) The Appellant's claim is contrary to the said Regulations. The Appellant is virtually challenging the said Regulations which is not permissible (**PTC India Ltd v. Central Electricity Regulatory Commission**¹).
- (e) Before the Central Commission, the Appellant had only raised the issue relating to the stage at which the Regulation providing for 'as

¹ (2010) 4 SCC 603

received basis' could be implemented. The Appellant did not raise any issue on the measurement of GCV at the stage prior to stage of receiving, as now sought to be raised.

(f) Following judgments lay down principles which guide the courts while dealing with condonation of delay application:

- (i) **Brijesh Kumar & Ors. v. State of Haryana & Ors**²
- (ii) **Basawaraj & Ors. v. The Spl. Land Acquisition Officer**³
- (iii) **Pundlik Jalam Patil v. Executive Engineer, Jalgaon Medium Project & Anr.**⁴
- (iv) **Ajit Singh Thakur Singh & Anr. v. State of Gujarat**⁵
- (v) **Vellaithai, K. Thangavadivel and K. Valarmathi v. Duraisami**⁶
- (vi) **Shri Victor Albuquerque v. Saraswat Co-operative Bank Ltd. & Ors**⁷

² AIR 2014 SC 1612

³ AIR 2014 SC 746

⁴ 2008 (17) SCC 448

⁵ AIR 1981 SC 733

⁶ (2010) 1 MLJ 1092

⁷ AIR 1998 Bom

(g) If the delay is condoned it will be contrary to the above principles. The application therefore deserves to be dismissed.

8. Counsel for other contesting Respondents have adopted submissions of Mr. Ramachandran.

9. We have given anxious consideration to the submissions advanced by the counsel. We have also applied our mind to the judgments of the Supreme Court cited by Respondent No.1.

10. The exhaustive submissions filed by the parties virtually invite us to go into the merits of the case at this stage. We are unable to undertake the said exercise. The nature of submissions is such that a view can be taken on them only at the final hearing of the appeal.

11. It is true that if there is any negligence, inaction or lack of *bona fides* in the conduct of the Appellant delay ought not to be condoned. The Supreme Court has repeatedly said so. At the same time a liberal approach needs to be adopted whenever such conduct is not perceived. We are unable to come to a conclusion

that conduct of the Appellant shows any lack of *bona fides* or negligence. Hence, without expressing any opinion on the merits of the case, we deem it appropriate to condone the delay subject to payment of cost. Accordingly, the Appellant is directed to pay a sum of Rs.20,000/- (Rupees twenty thousand only) to a charitable organisation, namely, **National Association for the Blind, Delhi State Branch, Sector-5, R.K. Puram, New Delhi-110 022.**

12. Application is disposed of in the afore-stated terms. On such payment being made, the Registry is directed to number the appeal and list the matter for admission on **3rd August, 2017.**

13. Pronounced in the open court on this **27th day of July, 2017.**

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]