

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

I.A. No.135 of 2012
in
DFR No.706 of 2012

Dated: 03rd May, 2012

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

In the Matter of:

Balmukund Sponge & Iron Pvt. Ltd., & Ors.

...Appellant/Applicant

Versus

Damodar Valley Corporation & Anr.

...Respondent(s)

Counsel for the Appellant(s) : Mr.Ajit Kumar Sinha,Sr.Adv.
Mr. Ajit Kumar
Ms. Ashwarya Sinha
Mr. Dhanajay Kumar Pathak
Mr. K. Sundaram

Counsel for the Respondent(s): - Mr. M.G. Ramachandran
Mr.Anand K. Ganesan
Ms. Swagatika Sahoo
Ms. Swapna Seshadri for R-1
Mr. Nikhil Nayyar for R-2

ORDER

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

1. M/s Balmukund Sponge and Iron Private Ltd. and others are the Applicants/Appellants.
2. Damodar Valley Corporation, the 1st Respondent herein, being a Licensee is engaged in the business of generation and transmission of electricity.
3. The Appellants/Applicants are the high tension consumers of Damodar Valley Corporation having the supply of electricity between 33 and 132 KV through primary dedicated transmission lines.
4. On 26.3.2011 the Central Commission passed order determining the provisional tariff for Damodar Valley Corporation for the period from 2009 to 2014.
5. Having aggrieved over the same the Appellants/Applicants have filed an Appeal before this Tribunal as against the provisional tariff order dated

23.6.2011. Since there is a delay of 246 days in filing the Appeal, the Applicants/Appellants filed an Application i.e. I.A. No.135 of 2012 to condone the said delay in filing the Appeal. The explanation offered by the Applicants for condonation of delay is as follows:-

- (1) Though the impugned order was passed on 23.6.2011 by the Central Commission determining the provisional tariff on the strength of Central Electricity Regulatory Commission(Terms and Conditions of Tariff) Regulations,2009 the Applicants/Appellants did not approach the Tribunal challenging the said order directly. On the advice of lawyers, the Applicants preferred the writ petitions before the Jharkhand High Court on 4.8.2011 challenging the said Regulations as well as impugned tariff order dated 23.6.2011. The High Court after hearing all the parties, dismissed the writ petition. However, the High Court was pleased to grant liberty to the Applicants to approach the Tribunal by its order dated 20.3.2012. Thereupon, after making arrangements for filing an Appeal through the Counsel, the

Appeal was ultimately filed on 10.4.2012. That was how the delay was caused.

(2) Under Section 14 of limitation act , the time taken in prosecuting the matter in another forum in good faith, which has no jurisdiction shall be deducted while computing the period of limitation. Therefore, the period during the pendency of the writ petition before the Jharkhand High Court between 4.8.2011, the date of filing writ petition and 20.3.2012, the date of disposal of the writ petition shall be excluded. If the same is excluded there will be no delay in filing the Appeal.

6. On these grounds urged on behalf of the Applicants for condonation of delay, the Learned Counsel for Damodar Valley Corporation and Central Commission, Respondents were heard.
7. They vehemently opposed the application mainly contending that the Applicants/Appellants are not bonafide in approaching this Tribunal after a long delay since they approached the Tribunal for the same relief which had been rejected by the High Court on merits.
8. The questions that arise for consideration are these –(1) whether the delay of 246 days in filing the Appeal has

been properly explained? (2) whether in the facts and circumstances of the case, section 14 of limitation Act could be invoked for excluding the period of pendency of writ petition before the High Court?.

9. On going through the applications for condonation of delay as well as the reply filed by the Respondents we conclude that explanation offered by the Applicants is not satisfactory as it does not show sufficient cause and section 14 of limitation act would not apply to the present facts of the case. The reasons of the above conclusion are as follows:-

(1) According to the Applicants, the impugned order was passed on 23.6.2011; immediately thereafter, the Applicants and other consumers had preferred a writ petition before the High Court, Jharkhand challenging the impugned tariff and seeking for allied reliefs; after hearing the parties, the High Court dismissed the writ petition by order dated 20.3.2012 after giving liberty to the Applicants to approach this Tribunal and thereupon the Applicants filed the Appeal on 10.4.2012 and that was how the delay was caused. The perusal of the writ petitions filed by the Applicants before the High

Court Jharkhand would indicate the Applicants made specific prayers in the writ petition under Article 226 of the Constitution of India.

- i) The first prayer is to quash the validity of the clause-4 of Regulation 5 of the Central Commission's Tariff Regulations,2009.
- ii) The second prayer is to quash the impugned order dated 23.6.2011 passed by the Commission.

10. Admittedly, these issues relating to these prayers have been considered and dealt with by High Court and dismissed rejecting those prayers.

11. In the present memo of Appeal it is noticed that the principal ground raised by the Applicants is that the impugned order dated 23.6.2011 is not valid in law. It is noticed that the very same ground has been raised before the High Court which in turn dismissed the writ petition and rejected the above prayer.

12. Therefore, as against the High Court order the appropriate remedy for Applicants is to file Appeal before the Supreme Court and not before this Tribunal. As correctly pointed out by the Learned Counsel for the Respondents, the Applicants can not be permitted to

raise the very same ground challenging impugned order before this Tribunal under guise of the present Appeal particularly when this ground has been dealt with on merits and concluded as against the Applicants by the order dated 20.3.2012 by the High Court.

13. It is contended by the Appellant that High Court in its order dated 20.3.2012 gave the liberty to the Applicants to raise the issues by filing Appeal in this Tribunal.

14. Let us refer to the relevant observation made by the High while giving the liberty to the Applicants to approach the Tribunal on specific issues after rejecting the ground of challenge to the impugned order dated 23.6.2011. The same is as follows:-

“53. In view of the above reasons, we do not find any force in the challenge to order dated 23rd June, 2011 on any of the grounds.

54. Some of the petitioners also raised objection that bills are not in accordance with the order dated 23.6.2011. This Court is not entering into this controversy, so as to examine the factual aspect which was the component, could have been added in the bill which could not have been added. For such disputes, the appropriate remedy is before the Appellate forum and not before this Court under Article 226 of the Constitution of India.

55. Consequently, we find no merit in the writ petitions preferred by these writ petitioners, hence all the writ petitions are dismissed and the interim order passed by this Court is vacated.”

15. So, the above observation made by the High Court would make it clear the merits of the impugned order have been considered by the High Court and the grounds urged by the Applicants challenging the same impugned order have been turned down by the High Court. However, High Court granted liberty only to some petitions when they raised objection that the bills issued by the Damodar Valley Corporation were not in accordance with the impugned order dated 23.6.2011, directing them to approach the appropriate Appellate forum on that issue. Therefore, the liberty was not granted to the Applicants to raise the merits of the matter in the writ petition which has already been decided and on the other hand, the High Court gave the liberty only to raise with regard to the issue where the bills were issued in accordance with the impugned order or not.
16. In other words, the liberty granted by the High Court in its order dated 20.3.2012 was confined to the issue

that the bills raised by the Damodar Valley Corporation were not in accordance with the impugned order dated 23.6.2011 and not on other issues. This liberty can not be taken as licence by the Applicants to challenge the impugned order dated 23.6.2011 before this Tribunal on merits.

17. That apart, no ground has been raised in this Appeal with reference to the issue relating to the correctness of the bills as if it was not in accordance with the impugned order. The perusal of the memo of Appeal would squarely indicate their main grounds urged in this Appeal are with reference to the legality and the validity of the impugned order dated 23.6.2011 on merits, which had already been decided by the High Court as against the Applicant.
18. After having obtained liberty from the High Court to raise billing disputes above before the Appellate forum, the Applicants have filed this Appeal raising the ground challenging the impugned order, with reference to which already decision was arrived at by the High Court as against the Applicant.

19. That apart, the billing disputes in respect of which liberty was given to raise before the appropriate forum can not be raised before this Tribunal and this can be raised only before the consumer redressal forum and Ombudsman under section 42(5)(6) & (7) of Electricity Act,2003.
20. The main question raised before the High Court is that as to whether the impugned provisional order dated 23.6.2011 passed by Central Commission can be implemented by the Damodar Valley Corporation to recover the tariff from the Applicants and other consumers and whether the said order amounts to retrospective recovery.
21. In this Appeal the Applicants challenged the impugned order on the very same grounds without raising the billing disputes for which liberty was given and this will amount to re-agitating issues which have been considered by the High Court and decided on merits by the High Court in the order dated 20.3.2012. This can not be permitted.
22. Let us come to 2nd question. The Applicants have contended that the period spent for prosecuting the

writ petition before the High Court has to be deducted under section 14 of limitation act and if that is deducted the Appeal has to be construed to have been filed within time.

23. The learned Senior Counsel appearing for the Applicants in support of the said plea has cited the judgment of Hon'ble Supreme Court in Civil Appeal No.7315 of 208 decided on 16.12.2008 ((2009)1 SCC 786 – Skahti Tubes Limited Vs State of Bihar and others) and in Civil Appeal No.943-44 of 2009 decided on 12.2.2009 ((2009)12SCC175 – J. Kumaradasn Nair and Another Vs Iric Sohan and others).

24. Let us now look into the section 14 of the limitation act to find whether it would apply to the facts of the present case:-

“ 14. Exclusion of time of proceeding bona fide in court without jurisdiction.

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or

of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

- (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding whether in a court of first instance or of appeal or revision against the same party for the same relief shall be excluded, where such proceedings is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

25. The perusal of the above provision would make it clear that the time taken for prosecuting the proceedings which were pursued before the wrong forum with due diligence and good faith is to be excluded if the Court or Tribunal is satisfied of the bona fide on the part of the Applicants.

26. There are two aspects in the matter:-

- i) The proceedings must have been initiated by the Applicants before the wrong forum and ultimately the same must have been rejected by the forum on the ground of jurisdiction or other cause of like nature.
- ii) The proceedings were processed by the Applicants with bona fide impression that the said forum had the jurisdiction to entertain the proceedings.

27. Both these aspects are absent in this case. During the pendency of the writ petition before Jharkhand High Court, the specific objection was raised by the Damodar Valley Corporation with reference to the maintainability of the writ petition by raising the issue of availability of alternative remedy to the Appellant/Applicant namely the Appellate forum to the Appellant.

28. The above submissions made by the Damodar Valley Corporation were strongly opposed by the Applicants and others. In fact, they prayed the High Court to exercise the extraordinary jurisdiction under Article 226 of the Constitution of India to go into validity of the Regulations as well as the the merits of the case including on the legality and validity of the recovery of tariff as per the provisional order dated 23.6.2011. The

High Court of Jharkhand rejected the objection raised by the Damodar Valley Corporation and decided to proceed with the matter to deal with the validity of the Regulation and the merits of the issues. The High Court ultimately after hearing the parties on all the issues dismissed the writ petition rejecting all the grounds urged by the Applicants/Appellants on merits.

29. Thus, the Applicants after obtaining the order from the High Court on merits are now seeking to approach this Tribunal for the same relief. As such, there is no bona fide on the part of the Applicants in seeking the same relief and the condonation of delay in filing of the present Appeal before this Tribunal.

30. The appropriate remedy for the Applicants, as pointed by the Respondents, would be to file an Appeal before the Hon'ble Supreme Court as against the order of the High Court.

31. As a matter of fact, it is pointed out that some of the petitioners of the writ Petition filed the Appeal before the Hon'ble Supreme Court and Hon'ble Supreme Court entertained the said Appeal, but it dismissed

application filed by their seeking for the stay of the impugned provisional order of the Commission by the order dated 4.4.2012. Only after having known about the same, the Applicants have chosen to present Appeal raising the same issues as contained in the writ petition along with application to condone delay of 246 days.

32. The Application to condone delay does not disclose the sufficient cause or justification for permitting the Applicants to file the Appeal with the delay of 246 days.
33. It is true that the Hon'ble Supreme Court in the decision cited by the Learned Senior Counsel for the Applicants, observed that the liberal approach is to be adopted while considering the condonation of delay. In the very same decision, the Hon'ble Supreme Court held that when there is lack of bona fide and lack of diligence in prosecuting the matter then the delay can not be condoned.
34. In this case, as we observed earlier, we do not find any bona fide in prosecuting the matter before the High Court through writ petition and obtaining the interim relief till the disposal of the writ petition and after having

known that the stay was refused by the Hon'ble Supreme Court in the Appeal filed by others, the Applicants have chosen to approach this Tribunal raising the very same issues which have already been decided by the High Court.

35. That apart, it is to be stated that Hon'ble Supreme Court categorically held in the decision referred to by Learned Senior Counsel for Applicants/Appellants that Section 14 of the Limitation Act would be applicable only in such cases where the proceedings were initiated in the wrong forum i.e. forum having no jurisdiction to entertain it in consequence of the bona fide mistake of law on defect of procedure and not in cases where party has chosen to seek for altogether a different remedy before different Court having jurisdiction to grant relief. If this principle has been applied to the present case, the section 14 can not be invoked in this case.
36. As indicated above, the Applicants have specifically pleaded before the High Court that High Court alone had the jurisdiction and accordingly prayed the High Court to go into the issue and decide the matter on

merits and only on that basis, the merits have been decided by the High Court as against the Applicants/Appellants.

37. The Hon'ble Supreme Court in 1973 SSC 381 has specifically laid down the principle which as follows:-

“ The objection as to the maintainability of the suit was taken at the very initial stage but that was resisted and the appellant invited a decision by the District Munsif. Even at the stage of revision against that order in the High Court he took the risk of proceeding with the suit. This was, therefore, not a case of prosecuting the previous proceedings bona fide. But on the other hand, he deliberately did so may be for obvious reason that if he had to withdraw the suit he would have to give notice under Section 80, C.P.C to the Government; wait for the expiry of the period of notice of two months and thereafter file a fresh suit. To avoid this he though he would take a chance but that chance boomeranged against him. It is not a case where he prosecuted due to ignorance of law or bona fide mistake nor can it be said that he had misconceived the suit.

38. This observation made by the Hon'ble Supreme Court would squarely apply to the present case. The application to condone the delay of 246 days can not be allowed in the light of the facts narrated above which would clearly indicate that Section 14 of the limitation Act would not apply since there is no bona fide on the

part of the Applicants to file the Appeal with the long delay after exhausting the remedy before the High Court.

39. Thus, the Application is dismissed. Consequently, the Appeal is also rejected.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 03rd May, 2012

✓ ~~REPORTABLE/NON-REPORTABLE~~