

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

**IA No.490 OF 2016
IN
DFR NO.2718 OF 2016**

Dated : 18th October, 2016

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

In the matter of:-

- 1. JAIPUR VIDYUT VITRAN)
NIGAM LIMITED)
Through its Managing Director)
Vidyut Bhawan, Jyoti Nagar)
Jaipur – 302005)**
- 2. AJMER VIDYUT VITARAN)
NIGAM LIMITED)
Through its Managing Director)
Hathi Bhata, City Power House,)
Jaipur Road, Ajmer – 305001)**
- 3. JODHPUR VIDYUT VITARAN)
NIGAM LIMITED)
Through its Managing Director)
New Power House, Industrial Area)
Jodhpur - 342003)... **Appellants****

AND

- 1. M/S ADANI POWER RAJASTHAN)
LIMITED)
31-A, 6th Floor, Mahima Trinity,)
Plot No. 5, Swej Farm,)
New Sanganer Road, Sodala,)
Jaipur – 302019)**

2. **RAJASTHAN ELECTRICITY**)
REGULATORY COMMISSION)
Through its Secretary)
Vidyut Viniyamak Bhawan,)
Sahkar Marg, Near State Motor Garage,)
Jaipur – 302005) ... **Respondents**

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
Mr. Sandeep Rajpurohit
Ms. Neha Garg

Counsel for the Respondent(s) : Mr. Amit Kapur
Ms. Poonam Verma
Ms. Nishtha Kumar for **R.1**

Mr. R.K. Mehta
Mr. Abhishek Upadhyay
Ms. Himanshi Andley for **R.2**

ORDER

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI – CHAIRPERSON:

1. The Appellants have challenged in this appeal judgment and order dated 15/03/2016 passed by the Rajasthan Electricity Regulatory Commission (“**the State Commission**”). There is 93 days delay in filing the appeal. Hence, this application is filed by the Appellants praying that the delay be condoned.

2. The gist of the explanation offered by the Appellants for not filing the appeal in time is as under:

By the impugned order the State Commission has allowed the claim of Respondent No.1 seeking increase in tariff on account of Change in Law under the Power Purchase Agreement (“**PPA**”) dated 28/01/2010 of Respondent No.1 with the Appellants. The Appellants were initially of the view that a review petition may be filed before the State Commission. For that purpose the Appellants tried to contact their counsel in Delhi, however, the counsel was out of the country in view of the summer vacation and hence could not be contacted. In the meantime, upon verification of the claims of Respondent No.1, it was not clear as to whether the amounts claimed by Respondent No.1 also formed part of the escalation formula for energy charges and if so could not be claimed as a Change in Law. This was also supported by the fact that the Change in Law clause was restrictive in relation to tax. Hence, the Appellants decided to seek clarification of the same from the Government of India. The Appellants therefore approached the Ministry of Power. The Ministry of Power informed the Appellants that the necessary clarification could be issued only by the Ministry of Commerce and Industry. The said clarification was sought for and was obtained by the Appellants on 20/07/2016. It also came to the

notice of the Appellants that Respondent No.1 has also filed an appeal being Appeal No.119 of 2016 against the impugned order which is pending before this Tribunal. In the circumstances it was decided to file appeal before this Tribunal instead of a review petition. The Appellants were also advised to challenge the impugned order by way of an appeal which is comprehensive on all issues because review petition is maintainable only on very limited issues. Thereafter the matter was put up before the management of the Appellants along with the clarifications received from the Government of India. It was then decided to file the appeal in this Tribunal. Thereafter the Appellants' counsel sought certain documents and clarifications from the Appellants for the purpose of drafting the appeal particularly with regard to merit order issues. Upon receiving the clarifications, the appeal was drafted and forwarded to the Appellants on 28/07/2016. After verification and finalization the appeal came to be filed on 01/08/2016. The delay in filing the appeal is *bona fide* and not deliberate and deserves to be condoned.

3. Mr. Ganesan learned counsel for the Appellants has reiterated the above explanation. Counsel added that in June,

2016, he was not available in Delhi to examine the records as he was travelling. Counsel further submitted that initial view was to file a review petition before the State Commission, however, since Respondent No.1 has filed Appeal No.119 of 2016 before this Tribunal, the present appeal has been preferred. Counsel submitted that the Appellant has made out sufficient cause for condonation of delay, hence delay may be condoned. In support of his submissions counsel relied on **Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy & Ors**¹ and **State of Rajasthan & Anr. v. Balkishan Mathur**².

4. Mr. Amit Kapur learned counsel for Respondent No.1 has opposed the prayer for condonation of delay. Counsel has taken us through the reply filed by Respondent No.1. Counsel submitted that law of limitation equally binds the Government. In this connection he relied on **Postmaster General & Ors. v. Living Media India Ltd. & Anr.**³ and **Basawaraj & Anr. v. The Spl. Land Acquisition Officer**⁴. Counsel submitted that while challenging order dated 15/03/2016, the Appellants are indirectly trying to challenge order dated 29/12/2015 passed by

¹ (2013) 12 SCC 649

² (2014) 1 SSC 592

³ (2012) 3 SCC 563

⁴ (2013) 14 SCC 81

the State Commission which is abuse of process of law. The application for condonation of delay lacks *bona fides*. In this connection counsel relied on **Madhya Pradesh Matsya Mahasangh v. Sudheer Kumar & Anr.**⁵ and **Pundlik Jalam Patil v. Executive Engineer, Jalgaon Medium Project & Anr.**⁶. Counsel submitted that the Appellants have not come to this Tribunal with clean hands and therefore the instant application deserves to be dismissed on that ground. In this connection counsel relied on **MTNL v. State of Maharashtra & Ors.**⁷. Counsel submitted that the explanation offered by the Appellant is vague. No details are furnished in support of the statements made in the application. The application therefore be dismissed with exemplary costs.

5. It would be advantageous to begin with the judgment of the Supreme Court in **G. Ramegowda, Major & Ors. v. Special Land Acquisition Officer**⁸ where the Supreme Court discussed the contours of the area of discretion of the Courts in the matter of condonation of delay in filing appeals. The Supreme Court

⁵ (2010) 15 SCC 179

⁶ (2008) 17 SCC 448.

⁷ (2013) 9 SCC 92

⁸ (1988) 2 SCC 142

held that each case will have to be considered on the particularities of its own special facts. However, the expression 'sufficient cause' in Section 5 of the Limitation Act must receive a liberal construction so as to advance substantial justice and generally delays in preferring appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of *bona fides* is imputable to the party seeking condonation of delay.

6. What follows from **G. Ramegowda** is that facts and circumstances of each case will have to be considered to decide whether delay should be condoned or not. There are no hard or fast rules governing this field. It is also clear that to advance justice generally delay should be condoned. However, if there is gross negligence, deliberate inaction or lack of *bona fides* the court will not condone the delay.

7. It is urged by Mr. Amit Kapur, that the Government or Government companies are not entitled to special or separate treatment in the matters of condonation of delay because law of limitation equally applies to them. Counsel submitted that same parameters need to be applied to them while judging the

acceptability of the explanation offered by them for condonation of delay. Counsel submitted that merely because the Appellants are Government companies no latitude be shown to them as their conduct lacks *bona fides* and they are guilty of negligence. To deal with this submission we will have to refer to the judgements of the Supreme Court, particularly those cited by the counsel.

8. In the **State of Haryana v. Chandra Mani & Ors.**⁹ the Supreme Court observed as under:

“11. When the State is an applicant, praying for condonation of delay, it is common knowledge that on account of impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file-pushing and passing-on-the-buck ethos, delay on the part of the State is less difficult to understand though more difficult to approve, but the State represents collective cause of the community. 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 [the] 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-

⁹ (1996) 3 SCC 132

oriented approach rather than the technical detection of sufficient cause for explaining every day's delay.'

(9) This Hon'ble Court in Union of India v. Jain and Associates¹⁰ decided on 6-2-2001 has held that delay ought to be condoned when sufficiently explained particularly where party seeking condonation is the Government....."

It is clear therefore that the Supreme Court acknowledged the slow pace with which files move in Government departments and expressed that certain amount of latitude is permissible while examining the Government's explanation for delay because a rigid approach may defeat public interest.

9. In **State (NCT of Delhi) v. Ahmed Jaan¹⁰** the High Court had dismissed criminal revision petition filed by the State on the ground of inordinate delay in filing and re-filing it. The Supreme Court referred to its judgement in **G. Ramegowda** where it is held that while assessing what constitutes sufficient cause for purposes of Section 5 of the Limitation Act, it might perhaps be somewhat unrealistic to exclude from the considerations that go into judicial verdict factors which are peculiar to and characteristic of the functioning of the Government. The

¹⁰ (2008) 14 SCC 582

Supreme Court observed that the Government decisions are proverbially slow encumbered, as they are, by a considerable degree of procedural red tape in the process of their making. The Supreme Court further observed that certain amount of latitude is therefore not impermissible.

10. In **Esha Bhattacharjee** the Supreme Court was considering a situation where the Calcutta High Court had condoned delay of about seven years in filing appeal. While setting aside the High Court's order the Supreme Court referred to its previous judgements on the point and laid down the principles which should guide the courts while considering condonation of delay applications. One of the principles laid down by the Supreme Court is found in paragraph 21.13(xiii) of the judgement. It reads thus:

“21.13 (xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.”

11. We must also refer to **Commissioner of Wealth Tax, Bombay v. Amateur Riders Club**¹¹ which is referred to in the judgment of the Supreme Court in **Postmaster General** and on

¹¹ (1994) Supp(2) SCC 603

which reliance is placed by Mr. Kapur. In that case there was a delay of 264 days in filing the special leave petition by the Commissioner of Wealth Tax, Bombay. While refusing to condone the delay the Supreme Court acknowledged that the Government should not be treated as any other private litigant and further stated that in the case of the former the decisions to present and prosecute appeals are not individual but are institutional decisions necessarily bogged down by the proverbial red tape. The Supreme Court added a caveat that there are limits to this also. In the facts of the case before it the Supreme Court noted that even with all this latitude, the explanation offered for the delay merely served to aggravate the attitude of indifference because the affidavit was again one of the stereotyped affidavits susceptible to the criticism that no importance was attached to promptitude by the Government. This judgment acknowledges that latitude needs to be shown to the Government unless its conduct indicates complete inertia or indifference and its actions are not *bona fide*.

12. Pundalik Jalam Patil is also referred to in **Postmaster General**. In that case the High Court had condoned delay of

1724 days in filing appeal by Respondent No.1 therein – Executive Engineer, Jalgaon Medium Project against the award passed in land acquisition cases. Respondent No.1 therein had in the application made an incorrect statement that he was unaware of the stand taken by the Special Land Acquisition Officer as well as the impugned judgment and award. This statement was found to be incorrect. The Supreme Court observed that a party taking a false stand to get rid of the bar of limitation should not be encouraged to get premium on the falsehood. In those circumstances the Supreme Court held that the High Court wrongly exercised the jurisdiction to condone the delay. The Supreme Court acknowledged that the State and its instrumentalities may be entitled to certain amount of latitude but observed that the Limitation Act does not provide a different period of limitation to the Government. The observations of the Supreme Court must be understood in the background of huge delay of 1724 days and a wrong statement made by Respondent No.1.

13. In **Postmaster General** there was 427 days' delay in filing special leave petition. The Supreme Court noted that the order

impugned was dated 11/09/2009. The Appellant's counsel had applied for certified copy only on 08/01/2010 i.e. after about four months from the date of the order. The Supreme Court had afforded another opportunity to the Appellant to file a better affidavit but that opportunity was not used properly. There was delay at every stage. It is in those circumstances that the Supreme Court refused to condone the delay observing that the law of limitation binds everybody including the Government. It is pertinent to note that the Supreme Court expressed that it was conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of *bona fides* a liberal construction has to be adopted to advance substantial justice, taking into account the facts and circumstances of the case before it, it was observed that the Government cannot take advantage of various earlier decisions. Thus this judgment turns on its own peculiar facts.

14. It is necessary here to refer to **Balkishan Mathur** where the Supreme Court was considering whether the High Court had rightly refused to condone the delay of 98 days in filing appeal by the State. The Supreme Court found that there was no

negligence on the part of the State. While condoning the delay the Supreme Court observed that while it is true that the State cannot claim any preferential treatment unless there is gross negligence liberal view needs to be taken. The Supreme Court clarified that while it was not striking any discordant note, its observations in **Postmaster General** must be understood in the context of its facts. Following are the relevant observations of the Supreme Court.

*“8. It is correct that condonation of delay cannot be a matter of course; it is also correct that in seeking such condonation the State cannot claim any preferential or special treatment. However, in a situation where there has been no gross negligence or deliberate inaction or lack of bona fides this Court has always taken a broad and liberal view so as to advance substantial justice instead of terminating a proceeding on a technical ground like limitation. Unless the explanation furnished for the delay is wholly unacceptable or if no explanation whatsoever is offered or if the delay is inordinate and third-party rights had become embedded during the interregnum the courts should lean in favour of condonation. Our observations in *Postmaster General v. Living Media India Ltd.* and *Amalendu Kumar Bera v. State of W.B.* do not strike any discordant note and have to be understood in the context of facts of the respective cases:”*

15. Thus it is clear from the above judgments that the State cannot as a matter of right claim preferential treatment in matters of condonation of delay. The Law of Limitation binds the

State also. But a certain amount of latitude can be shown to the State in matters where there is no lack of *bona fides* or no evidence of dilatory tactics or conduct indicating abuse of process of law. The courts must generally lean in favour of condoning delay and hearing the matter on merit instead of terminating the *lis* on the ground of delay unless the delay is gross and the explanation offered is utterly worthless. Some amount of latitude can be shown to the Government in a deserving case where acceptable explanation is offered knowing how the procedural requirements in the Government offices sometimes introduce slow pace. However there should be no lack of *bona fides* or evidence of abuse of process of law. It must be noted that some latitude is shown by the Supreme Court to the Government in some cases as declining to condone the delay in matters filed by the Government is likely to affect public interest. However, the Government cannot take advantage of this in all cases to get over delays where there is no explanation to offer at all.

16. Having examined the legal position we can now go to the Appellants' explanation which we have reproduced hereinabove. We notice that the Appellants have spent some time on obtaining

legal advice as to whether review petition should be filed before the State Commission. Counsel appearing for the Appellants has made a statement before us and also in the affidavit in reply that during the relevant time he was not in Delhi. We have no reason to doubt the counsel's statement. It is also stated that upon verification of the claims of Respondent No.1 it was not clear as to whether the amounts claimed by Respondent No.1 also formed part of the escalation formula for energy charges and if so could not be claimed as a Change in Law. The Appellants had therefore to seek clarification from the Ministry. The Appellants first approached the Power Ministry. They were directed to approach the Ministry of Commerce. The clarification was obtained on 20/07/2016. In the meantime the Appellants came to know that Respondent No.1 has also filed an appeal being Appeal No.119 of 2016 challenging the impugned order. Hence, the Appellants took decision to file appeal and after furnishing required documents and information to the counsel the appeal was filed on 01/08/2016. We find this explanation to be acceptable. We are not in a position to come to a conclusion that the Appellants are guilty of any dilatory tactics or they have abused process of law. It is not possible for us to say that they have come to this

Tribunal with unclean hands. Besides the fact that Respondent No.1 has also challenged the impugned order and its appeal is pending before this Tribunal also persuades us to condone the delay. We find that the Appellants have made out sufficient cause. In any case in the circumstances of the case certain amount of latitude can be shown to the Appellants.

17. Mr. Kapur has made certain submissions involving merits of the case. At this stage we do not want to go into the merits of the case. In the circumstances the delay in filing the appeal is condoned. Interim Application No.490 of 2016 is disposed of.

18. Registry is directed to number the appeal and list the matter for admission on **24/10/2016.**

19. Pronounced in the Open Court on this **18th day of October, 2016.**

(I.J. Kapoor)
Technical Member

(Justice Ranjana P. Desai)
Chairperson

✓ **REPORTABLE / ~~NON-REPORTABLE~~**