

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 24 of 2009

Dated: 5th November 2009

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. H. L. Bajaj, Technical Member**

IN THE MATTER OF:

**Tamil Nadu Electricity Board
No. 144, Anna Salai,
Chennai-600002**

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Appellant

Versus

- 1. Central Electricity Regulatory Commission
6th Floor, Core-3, Scope Complex
Lodhi Road
New Delhi – 110003**
- 2. The Chairman cum Managing Director
Neyveli Lignite Corporation
Corporate Office
Block-1, Neyveli
Cuddalore District -607801**
- 3. Karnatak Power Transmission Corporation Ltd.
Cauvery Bhavan
Bangalore - 560009**
- 4. Transmission Corporation of Andhra Pradesh Ltd.
Vidyut Soudha
Hyderabad – 500049**
- 5. Kerala State Electricity Board
Vaidyuthi Bhavanam
Pattom, Thiruvananthapuram – 695004**

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Respondents

Counsel for the Appellant(s) : Shri Y. P. Adhyeru, Sr. Advocate
Mr. P.R. Kovillan Poongkuntran
Ms. Geetha Muthu Perumal
Mr. R. Krishnaswami

Counsel for the Respondent(s) : Mr. N.A.K. Sharma, Sr. Advocate
Mr. R. Suresh, GM (Comm.), NLC
Mr. R. Joseph
Mr. R. Chandrachud
Mr. R. S. Prabhu

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

JUDGMENT

1. Tamil Nadu Electricity Board (TNEB) is the Appellant herein. Neyveli Lignite Corporation is the Respondent No. 2.

2. On the Application filed by Respondent No. 2, the revised tariff of the power station of Neyveli Lignite Corporation (NLC for short) was passed by the Central Commission in Petition No. 5 of 2002 on 23/3/07. Seeking review of this Order dated 23.03.2007 the Appellant filed a Review Petition in R.P. No. 79 of 2007 raising six grounds. The said Review Petition was admitted by the State Commission on 28.09.2007 only on two grounds after rejecting the other four grounds raised in the Review Petition.

3. Thereupon, the Review Petition was heard on 22.11.2007. Finally, the State Commission dismissed the Review Petition by the Order dated 11.01.2008 rejecting those two grounds as well. On being aggrieved, the Appellant has filed this Appeal.

4. Even though the Order in the Review was passed on 11.01.2008, the Appellant has filed this Appeal only on 21.08.2008 i.e. after a considerable delay. Since there was a delay, the Appellant filed an application in I.A.No.35 of 2009 to condone the delay in filing the Appeal.

5. The matter came up before this Tribunal on 17.02.2009. Since the Tribunal felt that there were no clear details giving explanation for the considerable day's of delay, it directed the Appellant Petitioner to file a better Affidavit giving the detailed reasons for the said delay, besides directing issuance of notice in the condonation petition to the Respondents. Accordingly, on 17.03.2009 the detailed Affidavit has been filed by the Appellant giving those details.

6. In the earlier Affidavit, the Appellant had stated that there was only a delay of 154 days in filing the Appeal. But in the subsequent detailed

affidavit, the Appellant Petitioner correctly calculated the number of days of delay as 176 in filing the Appeal as against the impugned Order dated 11.01.2008 and explained the delay between the Order dated 11.01.2008 and 21.08.2008, which is the date of filing of the Appeal. On considering the explanation for the said delay and after hearing the learned counsel for both the parties the delay of 176 days was condoned by the order dated 18.03.2009. At that stage the learned counsel for the Respondent sought permission to raise the preliminary objection to the maintainability of this Appeal. Accordingly, this Tribunal permitted the learned counsel for the Respondent to raise the said objection on the date of Admission and posted the matter for Admission on 26.03.2009.

7. The matter was taken up on 26.03.2009 for Admission. On that day the learned Senior Counsel appearing for the R-2, NLC raised the preliminary objection with reference to the maintainability of the Appeal by opposing the Admission of the Appeal. In the light of the preliminary objection the Appeal was admitted only with regard to the maintainability of the Appeal and the Respondent was directed to file the Counter over the said question. Accordingly, the Respondent filed a counter on 10.08.2009. Then on the request of the learned Counsel for the

Appellant, the matter was adjourned and time was granted to file their rejoinder. On 22.09.2008, the Appellant has also filed a rejoinder.

8. Now the matter has come up before this Tribunal for deciding the question of maintainability of the Appeal. Both the learned Senior Counsel appearing for the parties argued at length.

9. Shri N. A. K. Sharma, Learned Senior Counsel appearing for the Neyveli Lignite Corporation, R-2 herein would make the following submissions:

“The specific prayer made by the Appellant in the Appeal is for setting aside the order dated 11/1/08 passed by the Central Commission in R.P. No. 79/07 seeking Review of the order passed in the main Petition No. 5/02. This is very clear from the reading of the Appeal as well as the affidavits filed by the Appellant before this Tribunal to condone the delay. It was prayed for condonation of delay for the period that was caused between the Order passed in the Review on 11/1/08 and the date of filing of the Appeal, i.e. 21/8/08 before this Tribunal. The said delay of 176 days as

mentioned in the detailed affidavit filed on 17/3/09 has alone been condoned by this Tribunal. Admittedly, there is no prayer to condone the delay for the period between 23/3/07 i.e. the date of the main Order and 21/08/08, i.e. the date of filing of the Appeal. Accordingly, the delay has been condoned by this Tribunal, by its order dated 18/3/09 only with reference to the Order passed in the Review on 11/1/08, and not with reference to the main Order passed on 23/3/07 passed by the by the Central Commission. It is evident that this Appeal has been filed by the Appellant not against the main Order dated 23/3/07 passed in Petition No. 5/02, but it was filed as against the Order passed by the Central Commission on 11/1/08. It is settled law as held in a number of cases by this Tribunal on the basis of Order 47 Rule 7 of the CPC, that the Order of the Commission rejecting the Review application shall not be appealable. Therefore, the present Appeal No. 24/09 being against the Order rejecting the Application for review is not maintainable and deserves to be rejected.”

10. In reply to the contentions urged by the Ld. Senior Counsel for the Respondents, Shri Y. P. Adhyeru, Ld. Senior Counsel for the TNEB would make the following submissions:

“The Appellant, both in the Appeal and in the two affidavits filed before this Tribunal has sought condonation of delay only from the main order dated 23/3/07 and not from the order dated 11/1/08 passed in the Review as claimed by the Senior Counsel for the Respondent and as such, this Appeal which has been filed has to be construed to be an Appeal challenging the main Order dated 23/3/07 and not against the Order passed in the Review Petition alone. The prayer by the Appellant in all its Petitions would reveal that it sought the setting aside both the Orders dated 11/1/08 passed in RP No. 79/07 as well as and the Order dated 23/3/07 passed in the main Petition No. 5/02. Besides this, the Order passed by this Tribunal dated 18/3/09 would clearly indicate that the Tribunal took into consideration, the delay for the period between 23/3/07, the date of the main Order and 21/8/08, the date of filing of the Appeal and condone the same. Therefore, the Appeal is maintainable.”

11. In the light of the rival contentions, the 1st question to be decided is as to whether this Tribunal has condoned the delay in filing the Appeal as against the Order in the Review Petition dated 11.01.2008 or as against the main Order dated 23.03.2007. If it is held that the delay was condoned only in respect of the order 11.01.2008 then next question would be as to whether this Appeal is maintainable or not.

12. Let us deal with the 1st question. To deal with this question, it is necessary to refer to the prayer made by the Appellant, both in the Appeal as well as in the Affidavits seeking for the condonation of delay filed by it. In the Appeal, under the heading 'Details of the Appeal', the Appellant has stated as follows:

"This Appeal has been preferred in the combined format, against the Order dated 11/1/08 passed by the CERC, New Delhi in the R.P. No. 79/07 in Petition No. 5/02 along with the Order of CERC dated 23/3/07 in the main Petition No. 5/02."

13. In para 6 of the Appeal the Appellant while referring to the limitation has stated as following:

“LIMITATION

The certified copy of the review order dated 11/01/08 sent vide cover of letter dated 15/01/2008 was received by this appellant on 18/01/2008. The time of 45 days prescribed by the regulations expires on 13/3/08. There is some delay, which may be condoned on the bona-fide grounds as urged in the Condonation of Delay Application.”

14. The above paragraphs contained in the Appeal would clearly indicate that the Appellant has himself admitted that the order which is sought to be set aside is dated 11.01.2008 order and for filing Appeal against the same, the period of limitation expires on 13.03.2008. This shows that this Appeal is only as against the Order dated 11.01.2008 passed in R.P. No. 79/07 and the condonation of delay, had been sought only for the period commencing from that date. There is no explanation in whole of the Appeal for the period of delay which was caused between the main order dated 23.03.2007 and the Review order dated 11.01.2008.

15. Now, let us look into the relevant statements made by the Appellant in its two the Affidavits to filed before this Tribunal condone the delay. The first affidavit for condonation of delay filed along with the Appeal in IA No. 35 of 2009 was filed on 21/8/08. The relevant statements in that affidavit is as follows:

- “1. That the present Appeal is preferred against the order dated 11/01/2008 passed by the Central Electricity Regulatory Commission in the review petition No. 79/2007in Petition No. 05/2002 along with the Order dated 23/3/07 in the main petition No. 05/2002.*

- 2. The Order was received by the Appellant on 20.01.2008 and the statutory period of 45 days expires on 09.03.2008 which has been provided under Section 111(2) of the Electricity Act, 2003 for filing of the Appeal before this Hon’ble Tribunal.....*

- 5. The Appellants were required to arrange for all the relevant records and documents and send the same to the counsel herein. After the receipt of the said documents, the counsels herein prepared a draft Appeal and sent the same to the Appellants to Chennai for vetting. The process of vetting by various authorities / departments of the Appellant took some more time and the vetted draft was received in the offices of*

thecounsels.....
.....

10(a) allow the present Application and condone the delay of 154 days in filing the Appeal against the impugned Order dated 11/01/2008 along with 23/03/07 passed by the Central Electricity Regulatory Commission in the review petition No. 79/2007 No. 05/2002 and in the main petition No. 05/2002.”

16. The above referred paragraphs clearly show that the delay was sought to be explained from the date of the Review Order passed on 11.01.2008 by stating that the Order dated 11/1/08 was received by the Appellant on 21.08.2008 and since the Appellant was required to collect all the relevant documents and records, and to send the same to its Ld. Counsel, who in turn had to prepare the draft Appeal and to send the same for approval, there was a delay of 154 days in filing the Appeal as against the said order dated 11.01.2008. In this affidavit admittedly there are no details as to the period for delay caused between 23/3/07, the date of the main Order and 11/1/08 the date of the review Order.

Now, let us see the second better affidavit filed on 17/3/09:

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7. *The certified copy of the impugned order dated 11/01/2008 of CERC was misplaced during the process and could be sent to the Counsel only on 17/07/08. Finally the complete set of appeal along with filing fees, etc. was filed with the ATE by the Counsel on 21/08/2008.*
8. *Thus, there is a delay of 176 days in filing the appeal before ATE.”*

17. As indicated above, in the earlier affidavit, the Appellant sought condonation of delay only in respect of 154 days, but in the present affidavit, it has sought condonation of delay for 176 days after a correct calculation. It is clear from a reading of the second affidavit that the said delay was only with reference to the period between 11/1/08 i.e. the date of the Order passed in the review, and 21/8/08, the date of filing the Appeal. In other words in both the affidavits, the Appellants sought to explain the delay in filing the Appeal only for the period between 11.01.2008 and

21.08.2008 and not for the period between the main order dated 23.03.2007 and the date of filing of the Appeal i.e. 21.08.2008.

18. It is brought to the notice by the Ld. Senior Counsel appearing for the Respondent that prior to this Order passed in the Review dated 11/1/08, the Central Commission passed two Orders earlier. The first Order is the main Order passed by the Central Commission on 23.03.2007. Seeking for a review, the Appellant filed a Review Petition in 79/07 raising six grounds. As mentioned above, by the Order dated 28/9/07, the Central Commission entertained the review only on two grounds and rejected the remaining four grounds by the detailed Order. This is the 2nd order.

19. According to the Ld. Counsel for the Respondent, the Appellant has neither chosen to file the Appeal as against the Order dated 23/3/07 wherein the main Order was passed, nor the Order dated 28/9/07 where the Central Commission rejected the four grounds in the Review Petition raised by the Appellant. These factual aspects pointed out by the Respondent have not been disputed by the Appellant.

20. However, it has been strenuously urged by the learned Senior Counsel appearing for the Appellant that it shall be presumed that the Appellant has sought condonation from the date of the main order dated 23.03.2007. Since, this Tribunal while condoning the delay of 176 days, by the order dated 18.03.2009, has specifically mentioned that the period between the date of the main order and the date of the filing of the Appeal was condoned. This submission in our view has no substance as it is not based on the correct facts. The careful reading of the entire Order dated 18.03.2009 would indicate that there was an explanation for the delay only for the period between the 11.01.2008, the date of the Review and 21/8/08, the date of filing of the Appeal and not for the earlier period prior to 11.01.2008 and consequently the Tribunal condoned the delay only for the period commencing from 11.01.2008 till the filing of the Appeal..

21. Merely because the Tribunal has mentioned incidently in the said order that the main Order had been passed on 23/3/07, it does not mean that this Tribunal has condoned the period of delay caused between the main Order dated 23/3/07 and the filing date i.e. 21/8/08. On the other hand it is pointed by the learned Senior Counsel for the Respondent that the delay of 176 days alone was condoned on the basis of the claim made

by the Appellant in the better affidavit filed on 17/3/08 in I.A. No. 35 of 2009 and the said delay of 176 days is related to the order dated 11.01.2008 only not related to the main order passed on 23.03.2007.

22. As correctly pointed by the learned Senior Counsel for the Respondent, neither the Appellant in their two affidavits had referred to the reasons for delay of more than one year from the date of the main Order i.e. 23/3/07, nor did the Tribunal consider the said long period of more than one year for condonation of delay and condone the same.

23. In view of the above, we are to conclude that this Tribunal issued the order dated 18.03.2009 has condoned the delay of 176 days only in filing the Appeal as against the order in the Review Petition dated 11.01.2008 and not condoned the delay in filing the Appeal as against the main Order dated 23.03.2007 which covers a delay of more than one year. Once we come to the conclusion that this Tribunal condoned the delay in filing the Appeal as against the Order dated 11.01.2008 only and not against the Order dated 23/3/07, the second question which arises for consideration is as to whether this Appeal, which has been filed as against the Order dated

11.01.2008 rejecting the Review Petition filed by the Appellant, is maintainable or not?

24. It is pointed out by the Ld. Senior Counsel for the Respondent NLC, that the Appeal as against the Review Order is not maintainable in the light of the principles of law enshrined in Order 47, Rule 7 of the CPC and also in the light of the ratio decided by this Tribunal on earlier occasions in Appeal No. 25/09 dated 5/5/09 and Appeal No. 58/08 dated 22.07.2009 holding to the effect that the Order dismissing the Review is not appealable.

25. Section 94 of the Electricity Act empowers the Central Commission for reviewing its own Orders, as prescribed under the Order 47 of Rule 7 of the CPC. The said Order 47, Rule 7 of CPC reads as under:

“Rule 7 Order or Rejection not appealable. Objection to Order granting Application”

(i) The Order of the Court rejecting the Application shall not be appealable, but an Order granting an Application may be objected to at once by an Appeal from the Order granting the Application or in an

Appeal from the decree or an Order finally passed or made in the Suit.”

26. A reading of the above rule would indicate that the Final Order alone can be appealed against, before the Appellate Authority and not the Order rejecting the Application for Review.

27. Let us now refer to the relevant observations made by this Tribunal on this point, in earlier cases, as pointed out by the learned Senior Counsel for the Respondent.

28. This Tribunal in Appeal No. 58 of 2008 dated 22.07.2009 has given a finding on the very same question which is as follows:

“The Appeal against the Order of dismissal of the Review is not maintainable under Order 47 Rule 7 CPC. The Appeal could be filed only against the main Order and not against the dismissal Order in the Review Petition. It is true that under Section 94 of the Electricity Act, the Central Commission has got its powers for reviewing its own Orders as well as under the powers

vested in Civil Court. But rejection of the Review Petition is not appealable as per Order 47, Rule 7. The said Order 47, Rule 7 of CPC reads as follows:

“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.”

A reading of this rule would indicate that the final Order alone can be appealed against before the appellate authority and not the order rejecting the application for review.

In this case, the original Order has been passed on 16.3.06 which is appealable. But this is not appealed. Instead of filing an Appeal against this Order, the Appellant filed a Review of the said Order before the Central Commission which was dismissed on 8.8.2007. This alone has been appealed though this is not appealable. What the Appellant should have done is

that it should have filed an Appeal against the main Order dated 16.3.06 along with an Application to condone the delay which was occurred due to the pendency of Review Petition before the Commission. In that event, the Appellate Tribunal would consider the said ground for delay and after condoning the delay, it would entertain the Appeal. The Appellant has neither filed an Appeal against the main Order passed earlier nor thought it fit to file the Appeal at least later i.e. after the disposal of the Review Petition as against the main Order along with the application to condone the delay. Therefore, this Appeal as against the Order passed in the Review Petition is not maintainable.”

29. Next decision is Appeal No. 25 of 2009 *reported as 2009 ELR (APTEL) 0445* in which this Tribunal has held as follows:

“As correctly pointed out by the Ld.Counsel for the Respondents that the Order dismissing the Review is not appealable as per the relevant provisions of the Act. Under Section 94 of the Electricity Act, the Central Commission has got the powers for reviewing its own orders under the powers vested with the Civil Court under the Order 47 of Rule 7. The Order of Review is not appealable under

Order 47 of Rule 7. The said Order 47, Rule 7 of the CPC reads as under:

“Rule 7 Order of Rejection not appealable. Objection to Order granting Application”

(i) The Order of the Court rejecting the Application shall not be appealable, but an Order granting an Application may be objected to at once by an Appeal from the Order granting the Application or in an Appeal from the decree or an Order finally passed or made in the Suit.”

A reading of this rule would indicate that the Final Order alone can be appealed against, before the Appellate Authority and not the Order rejecting the Application for Review. In other words, in this case, the Original Order has been passed on 22/9/06 which is appealable. The Application has been for seeking review of the said Order was dismissed on 10/6/08 and this is not appealable. The remedy available for the Appellants/Petitioners is to file an Appeal against the main Order dated 22/9/06 along with an Application to condone the delay explaining the delay by giving the appropriate reason. In that event, the Appellate Tribunal would consider the ground for delay and condone the same and entertain this Appeal. The Appellants have not adopted this Course.”

30. The reading of the observations referred to above in both these decisions would make it clear that this Tribunal has already decided the ratio on this point. The same is as follows:

- (i) Under Section 94 of the Electricity Act the Central Commission is vested with the powers for reviewing its own orders by invoking the powers of review vested in Civil Courts as per Order 47 Rules 7 CPC.
- (ii) Under Order 47 Rule 7 the final order alone can be appealed in the Appeal and not the order dismissing the application for review.
- (iii) The Appellant instead of filing of Appeal against the review order which is not appealable is at liberty to file an Appeal against the main order which was sought to be reviewed with an Application to condone the delay before the Appellate Authority which in turn is empowered to condone the said delay on the basis of the sufficient cause being shown and then to entertain the Appeal. Unless the delay was condoned for the period between the date of the main order and the date of the filing of the Appeal the Appeal cannot be entertained.

31. The above ratio which has been decided in these cases would squarely apply to the presents facts of the case as well.

32. In this case, the original Order had been passed as early as on 23/3/07. This is appealable. Admittedly, this was not appealed. Instead the application seeking for Review of the said Order has been filed by the Appellant before the Commission, which in turn was dismissed on 11.01.2008. This is not appealable. The remedy available to the Appellant is to file an Appeal as against the main Order dated 23/3/07, along with an application to condone the delay by explaining the delay from the date of the main Order, to the date of filing the Appeal. Admittedly, the Appellant has not adopted this course.

33. Therefore, this Tribunal is constrained to uphold the preliminary objection raised by the Ld.Counsel for R-2, NLC and to dismiss the Appeal as not maintainable. Accordingly, the Appeal is dismissed as not maintainable. No costs.

(H.L.Bajaj)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 5th November, 2009

REPORTABLE / NON-REPORTABLE