

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Interlocutory Application No. 138 of 2007

Dated this 25th day of February, 2008

Coram : Hon'ble Mr. A. A. Khan, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member

IN THE MATTER OF:

UP Power Corporation Ltd.

Shakti Bhawan,
14 Ashok Marg,
Lucknow – 226 007

... Applicant /Petitioner

Versus

1. Uttar Pradesh Electricity Regulatory Commission

Kisan mandi Bhawan,
2nd Floor, Gomti Nagar,
Lucknow – 226 010

2. M/s. Dwarikesh Sugar Industries Ltd.

Dwarikesh Nagar, Village Bundki
P.O. Medhpura Sultan, Tehsil Nagina,
District Bijnor – 246 762,
Uttar Pradesh

... Respondents

For the Appellant : Mr. D. D. Chopra, Advocate

For the Respondents: Mr. Sakya Singha Chaudhuri along with
Mr. Rajiv Yadav, Mr.Suresh Tripathy,
Mr. Azad Singh Chahal

Mr. Pranav Kumar Jha
Mr. A. K. Srivastav
Mr. N. K. Shad
Advocates

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

1) The present application seeks condonation of delay in presenting the appeal. The appeal is directed against orders of the Uttar Pradesh Electricity Regulatory Commission (the UPERC for short) dated 16.07.2004 and 24.02.2005. The date of filing of the appeal is 11.07.2007. The period of limitation for filing an appeal before this Tribunal, as provided by Section 111(2) of the Electricity Act 2003, is 45 days from the date on which a copy of the order of the appropriate Commission is received by the aggrieved person. The appellant/applicant has not disclosed the dates on which the orders dated 16.07.04 and 24.02.05 were communicated. Accordingly, we proceed to decide this application on the assumption that the two orders were communicated on the same day on which they were passed.

2) Before coming to the application, we give a brief resume of the facts leading to the appeal. The appellant entered into a Power Purchase Agreement (PPA) with the respondent No.2, M/s.Dwarikesh Sugar Industries Ltd., on 29.09.01. The

respondent No.2 had obtained permission to set up the two co-generation plants of 10.268 MW and 7.5 MW based on bagasse fuel. The PPA dated 29.09.01 was in respect of surplus power generated from the proposed 2 MW generating plant to be set up in Phase-I and another generating plant of 7.5 MW to be set up in Phase-II. The commercial operation date for Phase-I was to be 30th Nov.'01 and for Phase-II 01st March, 2003. The respondent No.2 was required to synchronise the co-generation facility with the appellant's grid by 28th February, 2003. However, there was also a clause that "*in exceptional circumstances UPERC may agree to extend the commissioning date at the request of mill (respondent No.2) or UPPCL*". The 2 MW co-generation plant was set up on time. However, the 7.5 MW plant got delayed. The respondent No.2 approached the appellant on two occasions requesting to extend the date of commercial operation. The appellant agreed to the proposal and the UPERC approved the proposed extension of the date of commercial operation to 30th June, 2004. The respondent No.2 again made a request for extension of date of commercial operation to 31st December, 2004. The UPPCL agreed to the proposal subject to the condition that the stipulated 5% annual escalation in tariff will not be provided. The UPERC then communicated vide a letter dated 16th July, 2004 that the UPERC had approved the extension of the commissioning date of 7.5 MW co-generation power plant upto 31st December, 2004. The appellant was further informed by

this letter that in case it wanted to contest the issue of price escalation it may file a separate petition as per the procedure prescribed in the business regulations of the Commission.

3) The Business Regulation stipulated a period of 90 days for making such a petition. The petitioner initially merely preferred a letter instead of resorting to the procedure mentioned in the “Conduct of Business Regulations” of the UPERC. Only after the petitioner was reminded of the instruction contained in the letter dated 16th July, 2004 that the petitioner presented the petition before the UPERC in respect of its plea that the 5% annual escalation in tariff should not be allowed if the date of commercial operation was extended. This petition was filed on 07.01.2005. As such this petition was delayed by 83 days. The commission instead of dismissing the petition, on the ground of delay, preferred to address the issue. It stated in the second impugned order dated 24th February, 2005, that extension to 30th June, 2004 was by way of an agreement of the parties, that an annual maintenance schedule was from 15th June to 15th November, that actual generation had started on 01st November, 2004, i.e. during the maintenance period, and that in this situation the appellant/petitioner had no case to contest the escalation in tariff.

4) The appellant challenged this order dated 24th February, 2005 before the UPERC in appeal FAFO No. 50 of 2005 before the High Court of Lucknow as per provisions of U.P. Electricity Reforms Act 1999. The appeal was admitted. The appellant obtained an interim order on 23.02.07 from the High Court. On 03.05.2007 the High Court taking note of the establishment of the present Appellate Tribunal dismissed the appeal with liberty to the appellant/petitioner to prefer an appeal before this Tribunal. The High Court, however, further said that it left it open to this Tribunal to consider the delay in presentation of the appeal if the appeal was filed along with an application for condonation of delay. The present appeal was thereafter filed on 11.07.07.

5) The appellant filed the appeal along with an application now under consideration. In this application the appellant gave no facts other than what has been mentioned above. The only addition is the prayer part in the application which is as under :

“In the event the limitation is for any reason reckoned from the date of the order dated 16.07.2004 and 24.02.2005 then in that event the appeal in respect thereof will be beyond forty five days which time has since elapsed as the appellant was pursuing appeal before Hon’ble High Court, Lucknow. The appellant

therefore is filing the present application for condonation of delay of 1045 days out of abundant caution.”

6) The appeal was filed without the requisite court fee. The court fee was paid later, in January, 2008. The respondents filed replies to the application. Thereafter the appellant wanted to file a supplementary affidavit to explain the delay. The appellant thereafter filed the additional affidavit dated 19.09.07.

7) The following facts are pleaded in the additional affidavit.

a) The appellant applied for a copy of the High Court’s order dated 03.05.05 on 05.05.07 as the new advocate who was to be engaged in the appeal insisted on getting a certified copy and certified copy was obtained on 17.05.07.

b) a note was put up before the competent authority on 22.05.07 for advice in the matter. On 24.05.07 the file was sent to Director(Commercial) who recommended filing of the appeal before the Tribunal on 25.05.07

- c) The Managing Director of the appellant corporation approved the filing of the appeal on 05.06.07
 - d) Meanwhile Mr.D.D.Chopra, advocate was contacted but when the papers were handed over to Mr.Chopra on 06.11.07 he could not attend to the matter as he was not coming regularly to his office as he was busy performing the last rites of his mother who had expired on 25.05.07
 - e) A note was put up before competent authority on 25.06.07 for permission to deposit the fee of the Appellate Tribunal and the permission was obtained on 26.06.07
 - f) The appeal was prepared and was sent through a messenger to the associate of Mr. Chopra on 07.07.07.
 - g) The associate filed the appeal on 11.07.07
- 8) The appellant/petitioner prays that the delay in filing the appeal to be treated as within six days because 45 days should be counted from 17.05.07 when the order of the High Court was received.
- 9) The respondent No.2 hotly contests the application of condonation of delay. According to the respondent No.2 the delay is

of 1090 days and that no sufficient reason for condonation of delay has been made out. The contention of the respondent No.2 can be enumerated as under:

- a) the order dated 16.07.04 was not challenged before the High Court at all and therefore the delay, counting from 16.07.04 till the filing of the appeal, is of 1090 days.
- b) no ground has been shown for condonation of delay of 1090 days
- c) a valuable right has vested on respondent No.2 on account of order dated 16.07.04 which became final on account of no appeal being filed against the order
- d) the right of the respondent No.2 arising out of order dated 16.07.04 cannot be disturbed after such a long time
- e) the appellant's/petitioner's concept that the order dated 16.07.04 merged in the order dated 24.02.05 is incorrect in law
- f) the two orders are subject matter of two separate appeals

- g) the appeal before the High Court, Lucknow bench, was not maintainable as an appeal against the order dated 24.02.05 lay before this Tribunal.
- h) the Electricity Act 2003 was brought into force on 02.06.2003 and the present Tribunal under the Act was established on 07.10.04
- i) Section 185(3) of the Electricity Act 2003 supersedes the provision of 36 of Uttar Pradesh Electricity Regulatory Commission 1999 Act and therefore only the appeal to this Tribunal was maintainable on the day the appeal No.50 of 2005 was preferred in the High Court. The appellant was fully aware of the situation when it itself filed an appeal before this Tribunal, being No. 187 of 2005, and appeared in several others as respondents, *inter alia*, in appeal Nos. 82, 83, 84, 85, 91 and 92, all of 2005.
- j) The appeal before this Tribunal should have been filed immediately after the order of the High Court dated 03.05.07. Instead the same has been filed after a gap of 69 days.

10) After the additional affidavit was filed by the appellant, the respondent filed a fresh reply to the affidavit. It is generally submitted on behalf of respondent No.2 that the facts mentioned in the additional affidavit do not improve things as no ground for condonation of delay is made out therein.

Decision with reasons:

11) The first issue to be decided herein is from which date the delay has to be counted. The order dated 16.07.04 was not challenged before the High Court. The period spent in the High Court cannot be excluded for counting the period of limitation from the order dated 16.07.04. Therefore, what the appellant is required to prove is this delay.

12) The appellant claims that there was a merger of the order dated 16.07.04 in the subsequent order passed in the application for modification which was passed on 24.02.05. The order dated 24.02.05 was passed in an application seeking modification of Commission's order. The application, therefore, was in the nature of a review petition. The appellant has not clarified on what basis he claims that this order dated 22.02.05 got merged in the order of 16.07.04. We had an earlier occasion of examining the question of merger when a review petition is filed and disposed of. In the case of 21st Century Infrastructure (India) Pvt. Ltd. Vs. Central Electricity

Regulatory Commission we decided an application for condonation of delay. Having carefully gone through the judgment of Supreme Court in the case of *Sushil Kumar Sen Vs. State of Bihar (1975) 1 SCC 774* and the judgment in the case of *Kunhayammed & Others Vs. State of Kerala & Another (2000) 6 SCC 359* we found that the order passed in the review petition merges in the original order only when the review was allowed. The Supreme Court in the case of *Kunhayammed & Others Vs. State of Kerala & Another (supra)* reiterated its earlier view as under:

“entertaining an application for review does not vacate the decree sought to be reviewed. It is only when the application for review has been allowed that a decree under review is vacated. Thereafter the matter is heard afresh and a decree passed therein, whatever be the nature of new decree, would be a decree superseding the earlier one”.

13) Only when the previous order is set aside and a new order is passed in review petition can the theory of merger be invoked. In the present case the application for modification of the order dated 16.07.04 is not allowed. The review petition is dismissed by reiterating an earlier order. Accordingly, the theory of merger cannot be invoked for counting the number of days of delay. Even

if the theory of merger is applied to the case, the period of limitation would start from 24.02.05. Before the High Court the order dated 24.02.05 alone was challenged. The order dated 16.07.04, which had not in anyway been affected by order dated 24.02.05, was not at all challenged. Therefore, the theory of merger, if applicable, will condone the delay only upto 24.02.05. We, however, say that the limitation for challenging the order dated 16.07.04 commences only on 16.07.04 itself.

14) In the case of 21st Century Infrastructure (India) Pvt. Ltd. we condoned the delay of the period spent in review on application of principles of section 14 of the Limitation Act which excludes time spent on proceedings undertaken bona fide in a forum “having no jurisdiction”. It will be difficult to extend the plea here because the application for review itself was highly delayed by 83 days. There is nothing in record in which the delay of 83 days could be explained. This naturally raises the doubt as to the bona fide of the proceedings in petition No. 220 of 2005 which is a necessary ingredient of a plea under section 14 of the Limitation Act.

15) Be that as it may, we now consider the other aspects of the delay. The appeal before the High Court was filed within the statutory period under the UP Electricity Reforms Act 1999. The question that is arising is whether the time spent in the High Court

can be excluded in computing the period of limitation. Admittedly, this Tribunal was in place when the appeal was filed. As per the record of this Tribunal the first appeal was received on 15.06.05. The Tribunal was constituted much earlier. But the arrangements to receive the appeals were made later. The appellant itself had occasions to file before this Tribunal shortly after the Tribunal started receiving appeals. The appellant also had occasions to defend appeals filed against it. The appellant therefore knew that the proper forum to challenge the appeal was this Tribunal and not the High Court of Allahabad, Lucknow Bench. It was for the appellant to withdraw the appeal and to present the same in this Tribunal. The respondent No.2 had brought it to the notice of High Court as well as of the appellant that the appeal could not be maintained in the High Court. It is not possible to accept that the appellant is entitled to the exclusion of the time spent in High Court under the principle enunciated under section 14 of the Limitation Act 1963.

16) The appellant made a forceful prayer before the High Court for condoning the delay in presenting the appeal before this Tribunal. The High Court has rightly left it to the discretion of this Tribunal.

17) The appellant did not come to the Tribunal soon after the disposal of the matter in the High Court. The well known principle

of limitation is that once limitation starts running nothing stops the same. Section 9 of the Limitation Act incorporates this principle and says that “*once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it*”. The appellant is not entitled to exclude the period spent in the High Court. Hence the appellant has to explain the entire delay from 16.07.04 till the date of filing of the present appeal.

18) The appellant has sought to explain on the time spent in the interregnum i.e. after the appeal was disposed of by High Court and present appeal was preferred by giving certain details as to how the appellant handled the matter. The sequence of things as they took place during this interregnum also shows lack of diligence on the part of appellant. The period spent in obtaining a copy of the order of the High Court cannot be excluded under any provision of Limitation Act. It is not an impugned order for which a certified copy is essential as the same is to be filed with the appeal. The allegation, that the lawyer demanding it is also half hearted, because the name of the lawyer who wanted it has not been stated. In any case, lawyer’s insistence for the certified copy cannot be taken as a ground for extension of limitation. The mere allegation that the lawyer wanted it does not improve the things for the petitioner.

19) Even after the approval was granted by the competent authority (an officer of the appellant) on 25.05.07, 45 days were taken to file the appeal.. Even if sometime can be excluded on the bereavement to Mr. Chopra, 05.06.07 and 11.07.07 cannot be explained.

20) From the above analysis the following things emerge as important findings:

- a) No appeal from the order dated 16.07.04 was ever filed before the appeal was presented before this Tribunal and therefore the delay has to be computed with reference to the order dated 16.07.04.
- b) There is no merger of the order dated 16.07.04 with the order dated 24.02.05.
- c) So far as the order dated 24.02.05 is concerned the period spent in the High Court cannot be excluded from computation in terms of section 14 of the Limitation Act 1967 because it cannot be said that the appellant was prosecuting the appeal in the High Court with due diligence under the bona fide mistake that the High Court had the jurisdiction to decide that appeal.

d) Lack of bona fide is apparent from the delay in presenting the application for modification of the order dated 16.07.04, in presenting and pursuing the appeal in High Court despite knowledge of the establishment of this Tribunal and from the long time taken to present this appeal even after the High Court had disposed of the matter.

21) The appellant has presented its case for condonation of delay on the assumption that the limitation of 45 days will be computed from the date the High Court disposed of the matter. We are unable to take such presentation as correct.

22) We are aware of the judgment of the Supreme Court in the *Collector, Land Acquisition, Anantnag & Another, Mst Katiji & Others (1987) 2 SCC 107* wherein the Supreme Court laid down the principles to be followed and generally advised that a liberal construction of “each day’s delay” has to be adopted. The same principle was earlier laid down in the case of *State of West Bengal Vs. The Administrator, Howrah Municipality & Others (1972) 1 SCC 366* where the Supreme Court said that when no negligence or inaction or want of bona fide is imputed to a party a sufficient cause can be said to be established. For the present case we have already noticed that the petitioner/appellant has not shown

diligence in pursuing his relief against either the order dated 16.07.04 or the order dated 22.02.05. No relief can be given to the appellant on the basis of these two judgments of the Supreme Court.

23) In view of the above, we find that the appeal is hopelessly barred by time. The application, Interlocutory Application 138 of 2007, is dismissed.

24) The appeal being barred by time is dismissed.

Pronounced in open court on this 25th ***day of February,***
2008.

(Ms. Justice Manju Goel)
Judicial Member

(Mr. A. A. Khan)
Technical Member

The End