

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APPEAL NO. 80 OF 2024 & IA NO. 323 OF 2024

Dated: 5th August, 2024

**Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)**

In the matter of:

DAMODAR VALLEY CORPORATION

Through its Executive Director (Commercial,
DVC Headquarters, DVC Towers,
VIP Road Kolkatta – 700054.

... Appellant(s)

VERSUS

**1. JHARKHAND STATE ELECTRICITY REGULATORY
COMMISSION**

Through its Secretary,
1st Floor, Jharkhand State Housing Board,
Old Building, Harmu Housing Colony,
Ranchi, Jharkhand - 834002

... Respondent No.1

**2. ASSOCIATION OF DVC HT CONSUMERS
OF JHARKHAND**

Through its Joint Secretary,
Kalyani Apartment, 1st Floor, Gandhi Chowk,
Giridih – 815301, Jharkhand

... Respondent No.2

Counsel on record for the Appellant(s) : Shri Venkatesh
Ashutosh Kumar Srivastava
Shryeshth Ramesh Sharma
Bharath Gangadharan
Nihal Bhardwaj
Abhishek Nangia
Siddharth Nigotia
Shivam Kumar
Kartikay Trivedi
Mohit Gupta
Manu Tiwari
Aashwyn Singh
Punyam Bhutani
Harsh Vardhan
Suhael Buttan
Priya Dhankar
Himangi Kapoor

Anant Singh
Vineet Kumar
Aditya Tiwari
Nehal Jain
Nikunj Bhatnagar
Kunal Veer Chopra
Vedant Choudhary

Counsel on record for the Respondent(s) : Aditya Kumar Choudhary for
Res.1

Rajiv Yadav for Res.2

J U D G M E N T

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

The present Appeal is filed against the order passed by the Jharkhand State Electricity Regulatory Commission ("JSERC" for short) in Case (Tariff) No. 01 of 2023 dated 22.01.2024. The Petition, in Case (Tariff) No. 01 of 2023, was filed by the Appellant herein seeking approval of true-up for FY 2021-22, Annual Performance Review for FY 2022-23, and Aggregate Revenue Requirement & Tariff for FY 2023-24 for distribution of electricity in the Appellant's licensed area in the State of Jharkhand.

I. CONTENTS OF THE IMPUGNED ORDER TO THE EXTENT IT RELATES TO DETERMINATION OF THE NON-TARIFF INCOME OF THE APPELLANT:

In the impugned order, the Commission recorded the summary of Aggregate Revenue Requirement for FY 2021-22 as approved in the MYT Tariff Order dated 30.01.2023 vis-à-vis the claim by the Petitioner wherein the non-tariff income under the MYT Order was shown as 26.84 crores and, in the Petition, as 48.47 crores. While considering the cost tariff income and noting that the petitioner had claimed Rs.48.47 crores towards non-tariff income for FY 2021-22, the Commission observed, among others, that no

adjustment of non-tariff income attributable to the Appellant's Generation and Transmission had been undertaken in the input cost for the FY 2019-24 as well as the period prior to it; such non-tariff income ultimately impacts the end consumers (i.e., Retail consumers of Jharkhand) as the cost for the Generation and Transmission business becomes the input cost which drives up the retail ARR/ Tariff; since Section 61 of the Electricity Act, inter alia, only mandates reasonable recovery of cost, it was necessary that the entire non-tariff income as per the audited accounts should be adjusted in the retail supply tariff of Jharkhand; thus consumer interest in terms of Section 61, needs to be safeguarded by providing for the legitimate deductions in the ARR as per the regulatory framework in place; and, accordingly, the entire non-tariff income as per the Audited Accounts was being approved.

With regards non-tariff income of the appellant, the impugned order records as under:-

Non-Tariff Income

Petitioner's Submission

5.40 The Petitioner has claimed Rs. 48.47 Crore towards Non-Tariff Income for FY 2021-22.

Commission's Analysis

5.41 The Commission has observed that the value claimed by the Petitioner as Non-Tariff Income is restricted to the Delayed Payment Surcharge (DPS) by firm consumers of DVC distribution licensee.

5.42 The Commission in its order on True-up from FY 2006-07 to FY 2013-14 and APR for FY 2014-15 dated 19.04.2017, has observed as shown below-

5.51 The Commission observed that the Petitioner has claimed non-tariff income only to the extent of the Delayed Payment Surcharge (DPS).

Further, the NTI, as reflected in the audited annual accounts, was in excess of the non-tariff income as claimed by the Petitioner. The Commission also notes that DVC, being a vertically integrated organisation, also carries out the business of generation and transmission of electricity besides distribution. Accordingly, the Commission directed the Petitioner to submit information on non-tariff income, as per audited accounts, segregated into generation, transmission and distribution business.

5.53 The Commission has taken note of the fact that entire capital expenditure of the Petitioner is attributable to the generation and transmission business as the Petitioner does not claim any capital expenditure for the distribution business. Accordingly, the non-tariff income, other than the Delayed Payment Surcharge, may be attributable to the generation and transmission business.

5.54 However, the Commission also notes that non-tariff income attributable to the generation and transmission business ultimately impacts the end-use consumer as the costs (net of any revenue) for generation and transmission business become the input costs for distribution business which drive the retail tariffs applicable for the end consumer. Hence, the Commission directs the Petitioner to submit, within one month of notification of this Order, whether such non-tariff income has been accounted for in costs for the generation and transmission business of the Petitioner. Based on the justification provided by the Petitioner, the Commission may take an appropriate view on the same and pass suitable Orders to the effect.

5.55 Accordingly, at the moment, the Commission approves the non-tariff income pertaining to delayed payment surcharge as Rs. 7.65 Cr., Ra 12.22 Cr., Rs. 24 26 Cr., Rs. 1.89 Cr., & Rs. 7.63 Cr. Respectively for the aforementioned years based on actuals.

6.46 As detailed in Paras 5.51 to 5.54 of this Order, the Commission, at present, approves the non-tariff income pertaining to delayed payment surcharge as Rs.28.54 Cr., Rs.231.60 Cr., Rs. 20.79 Cr. & Rs.71.57 Cr. respectively for the aforementioned years, as per audited annual accounts of the respective years." (FY 2011-12, FY 2012-13, FY 2013- 14, FY 2014-15)."

5.43 DVC in reply to the direction given by the Commission in Order dated 19.04.2017, vide Letter No. Comml/Tariff/JSERC/516 dated 17.05.2017 has reiterated the fact that it is a vertically integrated organization. The same is quoted below for immediate reference,

"...DVC is a vertically integrated organization and has got generation, transmission and distribution activity in the entire Damodar Valley Area spread over in the state of Jharkhand and West Bengal. Therefore, DVC maintains its accounts which is integrated and covers all the aforesaid activities and also some other activities as mandated in DVC Act 1948. The accounting procedure followed by DVC is also approved and audited by Comptroller & Auditor General of India.

It is, however, confirmed that other than Delay Payment Surcharge (DPS). there is no other Non-Tariff Income (NTI) under the distribution business of DVC and year-wise amount of DPS, as NTI has already been furnished to the Hon'ble Commission

So far as electricity business of DVC is concerned it is to submit that the capital expenditure is made in respect of its generation and deemed

unified inter-state transmission network only. As such DVC does not incur any capital expenditure for its distribution activity. Accordingly, non-tariff income for the distribution activity of DVC is only the delay payment surcharge. In the previous tariff orders of DVC dtd. 22.12.2012 & 04.09.2014 this Hon'ble Commission accepted the submission of DVC in this regard and considered only the delay payment surcharge (DPS) as non-tariff income after prudence check. In the instant tariff order dtd. 19.04.2017 also this Hon'ble Commission considered delay payment surcharge as non-tariff income as per the audited book of accounts of DVC.

DVC submits that since it is a vertically integrated organization, unified accounting for generation, transmission and distribution activity is maintained. DVC further submits that tariff regulation of the Hon'ble Central Commission for determination of generation and transmission tariff is based on some specific elements of fixed charges and energy charge. The said regulation does not have any provision to account for the non-tariff income. The only provision for late payment surcharge is available as per the tariff regulation of the Central Commission according to which late payment surcharge is levied as and when applicable. The entire DPS as non-tariff income considered by this Hon'ble Commission in the distribution tariff of DVC is inclusive of that late payment surcharge for its generation activity as well DVC therefore submits before this Hon'ble Commission to kindly consider the delay payment surcharge (DPS) as non-tariff income so far as the distribution activity of DVC is concerned."

5.44 It is evident that at this stage, no adjustment of Non-Tariff Income attributable to the DVC's Generation and Transmission has been undertaken in the input cost for the FY 2019-24 as well as the period prior to it. Such Non-Tariff Income ultimately impacts the end consumers (i.e., Retail consumers of Jharkhand) as the cost for the Generation and Transmission

business becomes the input cost which drives up the retail ARR/Tariff. Since, section 61 of EA, 2003, inter alia, only mandates reasonable recovery of cost, it is necessary that the entire Non-Tariff income as per the audited accounts shall be adjusted in the retail supply tariff of Jharkhand.

5.45 As such, the Commission is of the view that throughout the years, the Non-Tariff Income of the Petitioner has been left un-accounted in the retail supply tariff of Jharkhand. Thus, consumer interest in terms of Section 61, needs to be safeguarded by providing for the legitimate deductions in the ARR as per the regulatory framework in place. Accordingly, in this Order, the entire Non Tariff Income as per the Audited Accounts is being approved.

The Commission further observed that the treatment of unassessed non-tariff income from FY 2012-13 to FY 2021-22 was provided for in assessing the cumulative gap/ surplus upto FY 2023-24 in Para 7.4 to 7.8 of the instant order.

While determining the gap/ surplus in the existing tariff order, the Commission observed thus –

“ 7.2 The Commission has approved the Gap/(Surplus) for FY 2022-23 and FY 2023-24 based on the components approved in this Order. The following table summarises the Gap/(Surplus) for FY 2022-23 and FY 2023-24 at existing tariff.

TABLE 42: REVENUE (SURPLUS)/GAP AS APPROVED BY THE COMMISSION (RS. CR.)

Particulars	Approved	Approved
	FY 2022-23	FY 2023-24
Aggregate Revenue Requirement	5,154.76	5,574.03
Revenue at Existing Tariff	4,791.75	5,096.14
Gap/(Surplus) at existing tariff	363.01	477.89

Cumulative on Gap/(Surplus) upto FY 2023-24

Commission's Analysis

7.3 The Commission is of the view that in assessing the Cumulative Gap/(Surplus) upto FY 2023-24 also provides for the impact of the unassessed Non-tariff Income from FY 2012-13 to FY 2019-20, in line with the observation recorded in Para 5.41 to Para 5.45 in respect of admittance of Non-Tariff Income as per the audited books of accounts.

7.4 The Commission has viewed that the Non-Tariff Income as approved previously by the Commission from FY 2012-13 to FY 2019-20 has not been allowed as per the audited books of accounts. In order to reflect the impact of the unassessed Non-tariff Income from FY 2012-13 to FY 2019-20 on the Cumulative Gap/(Surplus) upto FY 2023-24, and in order to maintain parity with methodology adopted in the Order for True-up of FY 2020-21, and True- up of FY 2021-22 as approved earlier in this Order, the Commission has assessed the admissible Revenue Gap/(Surplus) from FY 2012-13 to FY 2020-21. The Commission has observed that the net Gap/(surplus) upto FY 2015- 16 has been nullified in the Order dated 18.05.2018 by reducing the tariffs by approximately 13% besides making changes in the tariff structure. Hence, in the instant Order, for the period FY 2012-13 to FY 2015-16, the Commission has only considered the impact of the unassessed admissible Non-Tariff Income as the Gap/(surplus) for the respective financial years.

7.5 For the period FY 2016-17 to FY 2019-20, since, there was no nullification of gap/surplus, the Commission has taken the impact of the unassessed admissible Non-Tariff Income on the approved Gap/(surplus) for the financial years.

TABLE 43: IMPACT OF ADMISSIBLE NON-TARIFF INCOME ON GAP/ (SURPLUS) FROM FY 2012-13 TO FY 2019-20 (RS. CR.)

Particulars	FY 12-13	FY 13-14	FY 14-15	FY 15-16
Non-Tariff Income (Allowed)	231.60	20.79	71.57	28.27
Non-Tariff Income (Audited)	347.47	343.25	192.97	167.29
Non-Tariff Income (Admissible)	115.87	322.46	121.40	139.02
Sales ratio in Jharkhand (%)	56.93%	57.13%	58.43%	58.58%
Non-Tariff Income (Admissible in Jharkhand)	65.96	184.21	70.93	81.44
Gap/ (Surplus) for the year (Admissible)	(65.96)	(184.21)	(70.93)	(81.44)

Particulars	Annotation	FY 16-17	FY 17-18	FY 18-19	FY 19-20
Non-Tariff Income (Allowed)	A	198.25	466.76	288.68	21.74
Non-Tariff Income (Audited)	B	938.93	1,123.25	432.09	504.29
Non-Tariff Income (Admissible)	C = B – A	740.68	656.49	143.41	482.55
Sales ratio in Jharkhand (%)	D	57.17%	57.71%	55.31%	44.82%
Non-Tariff Income (Admissible in Jharkhand)	E = C x D	423.45	378.86	79.32	216.28
ARR for the year (Allowed)	F	4,705.79	4,751.80	4,705.85	3,901.53
ARR for the year (Admissible)	G = F – E	4,282.34	4,372.94	4,626.53	3,685.25
Revenue Billed	H	5,017.09	5,285.19	4,202.83	2,959.03
Gap/ (Surplus) for the year (Admissible)	I = G – H	(734.75)	(912.25)	423.70	726.22

7.6 Consequently, the impact of the unaccounted Non-tariff Income based on the audited accounts has been considered upto FY 2023-24 with Carrying Cost on the Gap/(Surplus). For the calculation of Carrying Cost on the Gap/(Surplus), the Commission has considered the Rate of Interest equivalent to the rate of working capital approved by the Commission for the respective years, which is short-term Prime Lending Rate of State Bank of India as on 1st April for the respective year from FY 2012-13 to FY 2015-16. Further, the Base Rate of State Bank of India plus 350 basis points as on 1st April for the respective year has been considered from FY 2016-17 to FY 2020-21, and MCLR of State Bank of India plus 350 basis points as on 1st April for the respective year has been considered from FY 2021-22 to FY 2023-24.

TABLE 44: CUMULATIVE GAP/(SURPLUS) UPTO FY 2023-24 (RS. CR.)

Particulars	FY 06-07	FY 07-08	FY 08-09	FY 09-10	FY 10-11	FY 11-12
Revenue Realized	1,265.95	1,439.88	1,899.45	2,036.52	1,956.25	2,035.44
Expected Revenue from Sale of Power at approved Tariff	1,170.61	1,042.35	1,146.08	1,494.59	1,702.07	2,063.77
Opening Gap/(Surplus)	-	(100.22)	(534.38)	(1,399.36)	(2,145.90)	(2,667.15)
Gap/(Surplus) during the Year	(95.34)	(397.53)	(753.37)	(541.93)	(254.18)	28.33
Closing Gap/(Surplus)	(95.34)	(497.75)	(1,287.75)	(1,941.29)	(2,400.08)	(2,638.82)
Average Gap/(Surplus)	(47.67)	(298.99)	(911.06)	(1,670.32)	(2,272.99)	(2,652.99)
Interest Rate (%)	10.25%	12.25%	12.25%	12.25%	11.75%	13.00%
Carrying Cost	(4.89)	(36.63)	(111.61)	(204.61)	(267.08)	(344.89)
Closing Gap/(Surplus) with Carrying Cost	(100.22)	(534.38)	(1,399.36)	(2,145.90)	(2,667.15)	(2,983.71)

Particulars	FY 12-13	FY 13-14	FY 14-15	FY 15-16	FY 16-17	FY 17-18
Revenue Realized	-	-	-	-	-	-
Expected Revenue from Sale of Power at approved Tariff	-	-	-	-	-	-
Opening Gap/(Surplus)	(2,983.71)	(3,494.63)	(4,197.13)	(4,892.37)	(5,701.44)	(7,213.00)
Gap/(Surplus) during the year	(65.96)	(184.21)	(70.93)	(81.44)	(734.75)	(912.25)
Closing Gap/(Surplus)	(3,049.67)	(3,678.84)	(4,268.06)	(4,973.81)	(6,436.19)	(8,125.25)
Average Gap/(Surplus)	(3,016.69)	(3,586.74)	(4,232.60)	(4,933.09)	(6,068.81)	(7,669.12)
Interest Rate (%)	14.75%	14.45%	14.75%	14.75%	12.80%	12.60%
Carrying Cost	(444.96)	(518.28)	(624.31)	(727.63)	(776.81)	(966.31)
Closing Gap/(Surplus) with Carrying Cost	(3,494.63)	(4,197.13)	(4,892.37)	(5,701.44)	(7,213.00)	(9,091.55)

Particulars	FY 18-19	FY 19-20	FY 20-21	FY 21-22	FY 22-23	FY 23-24
Revenue Realized	-	-	-	-	-	-
Expected Revenue from Sale of Power at approved Tariff	-	-	-	-	-	-
Opening Gap/(Surplus)	(9,091.55)	(9,751.18)	(10,203.16)	(10,808.54)	(11,460.29)	(12,281.56)
Gap/(Surplus) during the year	423.70	726.22	551.19	459.04	363.01	477.89
Closing Gap/(Surplus)	(8,667.85)	(9,024.96)	(9,651.97)	(10,349.50)	(11,097.29)	(11,803.67)
Average Gap/(Surplus)	(8,879.70)	(9,388.07)	(9,927.57)	(10,579.02)	(11,278.79)	(12,042.61)
Interest Rate (%)	12.20%	12.55%	11.65%	10.50%	10.50%	12.00%
Carrying Cost	(1,083.32)	(1,178.20)	(1,156.56)	(1,110.80)	(1,184.27)	(1,445.11)
Closing Gap/(Surplus) with Carrying Cost	(9,751.18)	(10,203.16)	(10,808.54)	(11,460.29)	(12,281.56)	(13,248.78)

7.7 The Commission is of the view that the Petitioner has a Net Surplus

of Rs. 13,248.78 Cr. as of FY 2023-24, and as such no tariff hike is required in this instant Order.”

As against the Revenue gap approved by the JSERC for FY 2022-23 of Rs. 363.01 Crores and for FY 2023-24 of Rs. 477.89 Crores, the JSERC arrived at a net surplus of Rs.13,248.78 crores, from FY 2006-07 to 2023-24 and held that, as such, no tariff hike was required in the instant order.

Determination of non-tariff income, as referred to hereinabove, from FY 2006-07 onwards was in a Petition filed by the Appellant seeking approval of true-up for FY 2021-22, APR for FY 2022-23 and ARR and Tariff for FY 2023-24. Before determining the non-tariff income from FY 2006-07 onwards, and in arriving at a net surplus of Rs.13,248.78 crores, the Appellant was not even put on notice, much less given an opportunity of being heard.

II. RIVAL SUBMISSIONS:

Mr. Shri Venkatesh, learned Counsel for the Appellant, would submit that the JSERC undertook a determination of the appellant's non-tariff income from FY 2006-07 onwards without putting them on notice, and without giving them any opportunity of being heard in this regard; while the Appellant's actual cost of supply ranges between Rs. 6 to Rs.6.50 per unit, the effect of illegal determination of net surplus of Rs.13.248.78 crores by the impugned order, consequent on illegal determination of their non-tariff income from FY 2006-07 onwards, has resulted in their being extended a tariff of Rs.4.50 per unit which is far less than even their actual cost of supply, and they have suffered grave prejudice as a result.

Since the submission urged by both the Respondent was that no specific ground, regarding failure to put them on notice and their not being afforded an opportunity of being heard, had been taken by the appellant in

the Appeal, we had, by our order dated 22.07.2024, granted Mr. Aditya Kumar Choudhary, learned Counsel for the 1st Respondent – JERC, one week's time to ascertain whether the Appellant was put on notice regarding the Commission's intention to revise their non-tariff income from the years 2006-07 onwards, while undertaking the exercise of truing up for the year 2021-22 and ARR for the year 2023-24, and had posted the matter to 29.07.2024.

During the hearing held on 29.07.2027, Mr. Aditya Kumar Choudhary, learned Counsel for the 1st Respondent-JSERC, fairly stated that neither does the impugned Order reflect, nor is there any other material to show, the Appellant having been put on notice regarding the Commission's intention to revise their non-tariff income from the year 2006-07 onwards

As the impugned order, to the extent it related to unilateral determination of non-tariff income of the Appellant from the year 2006-07 onwards, was in violation of principles of natural justice, we had enquired from the Respondents as to why the said order should not be interdicted on this score.

Mr. Rajiv Yadav, learned Counsel for the 2nd Respondent, would submit that a mere allegation of violation of principles of natural justice would not suffice, and the Appellant must show that they had suffered prejudice on account of non-compliance of the principles of natural justice by the JSERC; and, as the Appellant cannot be said to have suffered any prejudice as a result of the impugned order, interference with the impugned order, on the ground of violation of principles of natural justice, is uncalled for. Learned Counsel would rely on **Haryana Financial Corporation and Another vs. Kailash Chandra Ahuja (2008 9 Supreme Court Cases 31)**, in this regard.

III. NON-COMPLIANCE WITH PRINCIPLES OF NATURAL JUSTICE: ITS CONSEQUENCES:

The dividing line between quasi-judicial functions and administrative or other functions (affecting the rights of a party) has become almost indistinguishable with respect to application of the principles of natural justice and providing a fair hearing. (**A.K. Kraipak v. Union of India:(1969) 2 SCC 262; Council of Civil Service Unions v. Minister for the Civil Service: (1984) 3 All ER 935 HL**). The objective of the principles of natural justice is to ensure a fair hearing, a fair deal, to the person whose rights are going to be affected. (**A.K. Roy v. Union of India [(1982) 1 SCC 271; Swadeshi Cotton Mills v. Union of India: (1981) 1 SCC 664; and State Bank of Patiala v. S.K. Sharma, (1996) 3 SCC 364**)

The first and foremost principle of natural justice is what is commonly known as the audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively of the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. It is essential that a party should be put on notice of the case before any adverse order is passed against him. (**Uma Nath Pandey v. State of UP: AIR 2009 SC 2375**).The core of the audi alteram partem rule, though not cast in a rigid mould and may suffer situational modifications, remains that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. (**Maneka Gandhi v. Union of India (1978) 1 SCC 248**).

A distinction ought to be made between violation of the principle of natural justice, *audi alteram partem*, as such and violation of a facet of the said principle. In other words, the distinction is between “no notice”/“no hearing” and “no *adequate* hearing” or to put it in different words, “no opportunity” and “no *adequate* opportunity”. To illustrate — take a case where the person is dismissed from service without hearing him altogether. It would be a case falling under the first category and the order of dismissal would be *invalid* or void. But where the person is dismissed from service, say, without supplying him a copy of the enquiry officer's report (**Managing Director, ECIL v. B. Karunakar: (1993) 4 SCC 727**), or without affording him a due opportunity of cross-examining a witness (**K.L. Tripathi [(1984) 1 SCC 43]**), it would be a case falling in the latter category — violation of a facet of the said rule of natural justice — in which case, the validity of the order has to be tested on the touchstone of prejudice, i.e., whether, all in all, the person concerned did or did not have a fair hearing. (**State Bank of Patiala v. S.K. Sharma, (1996) 3 SCC 364**).

Except cases falling under — “no notice”, “no opportunity” and “no hearing” categories, the complaint of violation of procedural provisions should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the person from defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the order. If no prejudice is established to have resulted therefrom, no interference is called for. (**State Bank of Patiala v. S.K. Sharma, (1996) 3 SCC 364**). The approach and test adopted in **Managing Director, ECIL v. B. Karunakar: (1993) 4 SCC 727** should govern all cases where the complaint is not that there was no hearing (no notice, no opportunity and no hearing) but one of not affording a *proper hearing* (i.e., adequate or a full

hearing) or of violation of a procedural rule, in which case the complaint should be examined on the touchstone of prejudice. (**State Bank of Patiala v. S.K. Sharma, (1996) 3 SCC 364**).

In **Haryana Financial Corpn. v. Kailash Chandra Ahuja, (2008) 9 SCC 31**, (on which reliance is placed on behalf of the 2nd Respondent), the respondent-writ petitioner had contended that the disciplinary authority i.e. Managing Director did not furnish a copy of the inquiry report before recording a finding that he had accepted the finding of guilt recorded by the inquiry officer in his inquiry report. On behalf of the Appellant-Corporation, it was contended that there was no whisper in the writ petition that any prejudice had been caused to the case of the writ petitioner; It was only in those cases where a court or tribunal comes to the conclusion that non-supply of the report of the inquiry officer had caused prejudice to the delinquent that it would vitiate the action; and if, on the other hand, non-supply of the report would have made “no difference” to the ultimate finding and punishment imposed, the order of punishment could not be interfered with.

It is in this context that the Supreme Court held that, one of the principles of natural justice is audi alteram partem (hear the other side), but the concept of “natural justice” is not a fixed one; Rules of natural justice are not embodied rules and they cannot be imprisoned within the straitjacket of a rigid formula; the recent trend is of “prejudice”; even in those cases where procedural requirements have not been complied with, the action has not been held ipso facto illegal, unlawful or void unless it is shown that non-observance had prejudicially affected the applicant; though supply of report of the inquiry officer is part and parcel of natural justice and must be furnished to the delinquent employee, failure to do so would not automatically result in quashing or setting aside of the order or the order

being declared null and void; for that, the delinquent employee has to show “prejudice”; unless he is able to show that non-supply of the report of the inquiry officer has resulted in prejudice or miscarriage of justice, an order of punishment cannot be held to be vitiated; and whether prejudice had been caused to the delinquent employee depends upon the facts and circumstances of each case, and no rule of universal application can be laid down.

A distinction lies between violation of the audi alteram partem rule of natural justice, and violation of a facet of the said principle. The distinction is between “no notice”/“no hearing” and “no *adequate* hearing” and “no *adequate* opportunity”. Where a person is dismissed from service without hearing him altogether, it would be a case of “no notice”/“no hearing” and the order of dismissal would be *invalid* or void. Where, however, the person is dismissed from service, without supplying him a copy of the enquiry officer's report, as in **Haryana Financial Corpn. v. Kailash Chandra Ahuja, (2008) 9 SCC 31**, it would be a case of “no *adequate* hearing” or “no *adequate* opportunity” ie violation of a facet of the Rules of natural justice and, therefore, the validity of the order has to be tested on the touchstone of prejudice.

As it is not in dispute that the appellant was neither put on notice nor given an opportunity of being heard, the impugned order, to the extent the appellant's non-tariff income was unilaterally determined from 2006-07 onwards, must, in the light of the law declared by the Supreme Court in **State Bank of Patiala v. S.K. Sharma, (1996) 3 SCC 364**, be held to be invalid or void, and non-compliance with the audi-alteram partem rule need not be examined from the point of view of prejudice.

Even otherwise, as rightly submitted by Mr. Sri Venkatesh, Learned Counsel, the appellant has undoubtedly suffered prejudice as they are said to be extended a tariff of Rs.4.50 per unit in terms of the the impugned order which they claim is far less than their actual cost of supply which is said to range between Rs. 6 to Rs.6.50 per unit; and, as against the Revenue gap approved for FY 2022-23 of Rs. 363.01 Crores and for FY 2023-24 of Rs. 477.89 Crores, the JSERC has, in the impugned order, arrived at a net surplus of Rs.13,248.78 crores, and has held that the appellant was not entitled to any tariff hike.

IV. CONCLUSION:

Viewed from any angle, the impugned order, to the extent the appellant's non-tariff income was unilaterally determined by the JSERC from FY 2006.07 onwards, necessitates interference, for failure of the JSERC to put the appellant on notice, and to give them an opportunity of being heard. As the appellant has raised other grounds in challenge to the impugned order, and as those issues are not being examined in the present order, we may not be justified in granting stay of the impugned order in its entirety.

Instead of keeping the Appeal pending on the file of this Tribunal on this score, we consider it appropriate to the set aside the impugned order to the limited extent the appellant's non-tariff income was determined from 2006-07 onwards without complying with the audi-alteram partem rule. The appellant is hereby granted liberty to subject the other grounds, raised in challenge to the validity of the impugned order in the present appeal, to challenge by way of a separate appeal. Needless to state that we have not examined the impugned order on its merits, and the JSERC shall, after putting the appellant on notice and after giving both parties (ie the appellant and the 2nd Respondent) a reasonable opportunity of being heard, pass

orders afresh, with respect to the appellant's non-tariff income, in accordance with law.

The Appeal stands disposed of accordingly. All pending IAs shall also stand disposed of.

Pronounced in the open court on this the **5th day of July, 2024.**

(Seema Gupta)
Technical Member (Electricity)

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~