

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION
No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052

Dated : 9th November, 2018

Present:

Shri M.K. Shankaralinge Gowda ..	Chairman
Shri H.D. Arun Kumar ..	Member
Shri D.B. Manival Raju ..	Member

OP No.120 / 2017

BETWEEN:

RNS Infrastructure Limited.,
Naveen Complex,
No.14, 7th Floor,
M.G. Road,
Bengaluru – 560 001

..

PETITIONER

[Represented by Shri Shivaprasad Shantanagoudar, Advocate]

AND:

- 1) Karnataka Power Transmission Corporation Limited,
Cauvery Bhavan,
Bengaluru – 560 009,
Represented by its
Deputy General Manager(Tech),
- 2) Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001, represented by its
General Manager (ElecI)- Power Purchase.

- 3) Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001, represented by its
Deputy General Manager (Power Purchase), ...

RESPONDENTS

[Respondents represented by Justlaw, Advocates]

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ORDERS

- 1) The Petitioner in the above Petition in effect has sought for the following reliefs:
- (a) To direct the Respondents to give full credit to the Petitioner for the energy injected by it from 24.06.2016 to 08.08.2016, as per ANNEXURE-18 and pay for the said energy at the rate of Rs.6.51 per unit, as per the Commission's generic tariff order dated 30.7.2015;
 - (b) Direct the Respondents to give interest for the delayed payment for the power already injected to the Grid by the Petitioner from 24.06.2016 to 08.08.2016, till the date of payment at the rate of 12% p.a., which for the delayed period i.e., 01.08.2016 to 30.06.2017 amount to Rs.10,13,906/- as per Annexure-22;
 - (c) Alternatively, direct the Respondents to refund Rs.3,20,666/- remitted by the Petitioner to the Bangalore Electricity Supply Company Limited (BESCOM) for the excess energy stated to have been drawn by the Petitioner during the month of March, 2017 by appropriating the accumulated energy already injected i.e., 15,86,400 units and account for the balance units of energy as stated in the Petitioner's letter Dated 26.04.2017 (ANNEXURE-21); and,
 - (d) Pass any other order in the interest of justice and equity.

- 2) The material facts submitted by the Petitioner may be stated as follows:
- (a) The Petitioner is a Company incorporated under the Companies Act, 1956. The Government of Karnataka, vide its Order No. EN 196 NCE 2015, dated 10.09.2015 granted approval to the Petitioner for establishment of a 9 Mega Watts (MW) capacity of Solar Power Project (Project) at Vaddrevu Village, Nagalamadike Hobli, Pavagada Taluk, Tumakuru District, under IPP category for third party sale, within the jurisdiction of the BESCOM..
- (b) The Petitioner, by its letter dated 11.01.2016 (ANNEXURE-3), requested the Chief Engineer (Elec), State Load Despatch Centre (SLDC) for arranging execution of a Wheeling and Banking Agreement (W&BA), for transmission of electricity from the Project which was planned to be commissioned by 15.02.2016.
- (c) Pursuant to the Petitioner's application (ANNEXURE-8) for execution of the W&BA, the BESCOM and the HESCOM gave consent to wheel the energy to the consumers in their jurisdiction (Annexures 4 & 5). The KPTCL gave consent for wheeling and banking of energy on 27.05.2016 (Annexure-9). The project was commissioned on 24.06.2016. The W&BA (ANNEXURE-13) was executed on 08.08.2016. In the W&BA, the following is shown as the Drawal Point, as specified by the Petitioner:

M/s. Naveen Hotels,
Tumkur Road,
Yeshwanthapur, Bengaluru.

.. RR No.N5HT494

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- (d) Upon commissioning of the Project, the energy was being injected into the State Grid and the same was being confirmed, by issuance of B-Forms every month by the 2nd Respondent.
- (e) The Respondents have accounted for the energy that has been injected into the State Grid, subsequent to the date of execution of the W&BA. The request of the Petitioner dated 07.09.2016 to pay the generic tariff for the energy (15,86,400 units) injected from the date of commissioning of project to the date execution of the W&BA (i.e., from 24.06.2016 to 08.08.2016), which was followed by a reminder on 02.12.2016, was not considered by the 2nd Respondent. In response to the request of the Petitioner for payment, the BESCOM informed vide letter dated 09.12.2016 that as per the Article 5.6 of the WBA, infirm energy injected from trial operation date after synchronization up to the commercial operation date shall be paid at the applicable APPC. The Petitioner, vide letter dated 31.12.2016, again requested the 2nd Respondent to give credit of the said energy.
- (f) In the meanwhile, the 2nd Respondent issued a bill dated 24.04.2017 (ANNEXURE-20), demanding the payment of Rs. 3,21,666/- for excess drawal of energy for the month of March, 2017.
- (g) The Petitioner, vide letter dated 26.04.2017, requested 2nd Respondent to adjust the said amount, to the amount payable for 15,86,400 units, from 24.06.2016 to 08.08.2016.

- (h) The Petitioner has filed the present Petition, as the Respondents have not considered the requests of the Petitioner, to pay for the energy or give credit of the same.
- 3) The grounds urged by the Petitioner, in support of its prayers may be stated , as follows:
- (i) The date of commercial operation of the Project is the date of issuance of the Commissioning Certificate by the concerned authority, and from the date of commissioning, the BESCO ought to have given full credit of the energy injected into the State Grid.
 - (ii) The Petitioner did not intend to generate and deliver energy into the State Grid gratuitously.
 - (iii) The 2nd Respondent had issued B-Forms every month for the injected energy. Therefore, the Respondents cannot deny to account, for the energy injected into the Grid.
 - (iv) There was an inordinate delay on the part of the Respondents, in the execution of the W&BA, for which the Petitioner should not be penalized.

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- (v) The execution of the W&BA should have coincided with the date of commissioning of the Project, and the signing of the W&BA after commissioning is only a formality.
 - (vi) As per Article 1.1 (e) of the W&BA, the billing period commences from 00.00 hours of the commercial operation date/date of commencement of wheeling in a calendar month and hence, the Petitioner is entitled to payment for the energy injected from the date of commissioning of the project.

For the above reasons, the Petitioner has submitted that it is entitled to payment for the energy and that bill dated 24.04.2017, for excess energy drawn in March, 2017 is bad in law.

- 4) Upon issuance of Notice, the Respondents appeared through their counsel and the 2nd and 3rd Respondents filed Statement of Objections. The gist of their contentions may be stated thus:
 - (a) The Petitioner, vide letter dated 11.01.2016, requested the Chief Engineer, SLDC to facilitate the execution of Wheeling and Banking Agreement. On 09.02.2016, the 2nd Respondent gave concurrence to the Petitioner, to wheel energy generated at its plant. On 23.02.2016, the HESCOM gave concurrence to the Petitioner to wheel energy generated at its plant. The Petitioner proposed to wheel power generated by it to three consumers, one located in the BESCO's jurisdiction and two in the HESCOM's jurisdiction.

On 27.05.2016, the 1st Respondent gave concurrence to the Petitioner to wheel energy generated at its plant, subject to fulfilment of conditions in Article 8 of the W&BA and the terms & conditions stipulated by the Commission.

- (b) On 22.06.2016, the 1st Respondent issued to the Petitioner provisional interconnection approval for the project. In the said communication, the 1st Respondent has clearly stipulated that *"KPTCL is not responsible for payments and consequences in case of pumping power in the absence of any contractual agreements. Provisional Interconnection Approval will only provide technical connectivity of the subject project with Grid and KPTCL is not liable to pay any money for any flow of power from this project."* Hence, it was made clear to the Petitioner that the grant of provisional interconnection was only to grant technical connectivity and that no payments were liable to be made for the injected power.
- (c) On 24.06.2016, the office of the Executive Engineer (Ele), KPTCL issued Commissioning Certificate certifying that the Petitioner has commissioned its plant on 24.06.2016. On 24.06.2016, a meeting was held by the Respondents with the Petitioner and it was noted in the minutes of the meeting that the Petitioner's billing meter does not conform to the required parameters, prescribed by the 2nd Respondent and hence, the Petitioner was informed that the said meter was required to be replaced at the earliest.

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- (d) On 08.08.2016, the W&BA was executed between the Petitioner, 1st Respondent and 2nd Respondent. The question of giving credit for energy supplied prior to the date, on which the W&BA was executed and making payment for it would not arise. The credit for energy injected by the Petitioner can only be given from the date of W&BA and not prior to the same, as there was no contract between the parties for banking of energy.
- (e) Section 17 of the KER Act 1999, requires an Agreement to be executed by a licensee with a generating company, for the purpose of purchase of electricity and in the matter approved by the Commission. Any agreement to purchase power, without the approval of the Commission, is a nullity. In the present case, the Respondents do not have an Agreement for purchase of power with the Petitioner. Hence, the question of payment for the same, at a particular rate, would not apply. It is settled law that no prayer, which would perpetuate an illegality, can be granted.
- (f) The Hon'ble Appellate Tribunal, in Appeal No.123/2010 in the matter of *M/s. Indo Rama Synthetics (I) Ltd Vs MSERC*, has held that the energy injected without intimation is to be considered to be unauthorized injection, for which no payment is to be made. The Hon'ble Appellate Tribunal, subsequently, in Appeal No.120/2016, in the matter for *Kamachi Sponge & Power Corporation Ltd Vs TANGEDCO and Others*, has held that no payment is liable to be made

for any energy injected, be it firm or infirm power, in the absence of a PPA or a schedule issued by the SLDC.

- (g) The Petitioner had neither a PPA nor a W&BA in force, during the period of injection. Further, the Petitioner had not made any requisition, for short term open access either. The Petitioner has not given any reason for not scheduling power on day ahead basis. The Petitioner has injected energy unauthorizedly and is not entitled to payment for the same. There can be no contract, without consensus ad idem. In the absence of a contract, no payment can be made to the Petitioner. There was no offer made by the Petitioner to supply the energy nor was there any acceptance of the same. In the absence of the two, the question of making any payment, would not arise.
- (h) There is no basis for claiming payment, for the energy injected at the rate of Rs.6.51 per unit. The tariff determined, in the Order dated 30.07.2015, is not payable to the Petitioner for the unauthorized injection of power. When a generator injects energy without a schedule, the utility is not in a state to make use of most of such energy, as the said energy is injected without intimation. If payment for such energy is directed to be made, it would adversely affect the interest of the ESCOMs, as all generators will resort to injection of unscheduled energy and claim payments for the same. The ESCOMs cannot be made to suffer for the benefit of unscrupulous private generators.

- (j) There was no delay in executing the W&BA, on the part of the Respondents as alleged. No documents have been placed on record, in support of this argument. Hence, the averments pertaining to delay are denied.
- (k) As the Petitioner has voluntarily made payment to the Respondents, towards excess energy, the question of adjusting the excess energy or the question of refunding the same, at this juncture would not arise. The question of adjusting the excess energy drawn, against the energy injected, during the period prior to execution of W&BA will also not arise. Banking cannot commence prior to the date of execution of W&BA and hence, the Petitioner is not entitled to credit of energy.
- (l) Issuing of a B form is to record the energy injected and drawn from the Grid, during a particular period. The said document does not create any right, insofar as payment is concerned as contended by the Petitioner.
- (m) The Petitioner is not entitled to payment, as the provisional interconnection approval dated 22.06.2016 mentioned, that the Respondent will not be responsible for payments for energy injected without a contract.
- (n) The averment of the Petitioner that the purpose of generating and delivering energy is for captive consumption is false as the Petitioner has in Article 8.1

of the W&BA clearly mentioned that energy will be wheeled to M/s Naveen Hotels for non-captive use.

- (p) The Petitioner had addressed a letter dated 05.07.2016, to the Chief Engineer, SLDC, KPTCL requesting for execution of the Wheeling and Banking Agreement after deletion of two customers.
- 5) The Petitioner filed rejoinder to the objections, filed by the Respondents which may be stated, as follows:
- (a) In the commissioning certificate it was not stated that it is a provisional inter connection approval and therefore, the contention of the Respondents that no payments were liable to be made is denied. The Respondents were aware that the solar power was being injected into the grid by the Petitioner and the BESCOM, Chitradurga has acknowledged the same by issuing Form-B to the Petitioner, for the period between 24.06.2016 and 08.08.2016. The solar power was injected to the grid, after issuance of commissioning certificate, pursuant to the tripartite meeting held on 24.06.2016.
- (b) The Petitioner had replaced the billing meter immediately and, therefore, the BESCOM, Chitradurga, issued Form-B from 24.06.2016 to 08.08.2016, indicating the meter reading of the power injected to the grid by the Petitioner.
- (c) The Petitioner is legally entitled to payment or the credit of energy injected for the period between 24.06.2016 to 08.08.2016, in accordance with

Article 1.1(f) of the W&BA dated 08.08.2016, the Commissioning Certificate dated 24.06.2016 and the minutes of the meeting dated 24.06.2016 which shows that the consent was given to inject the solar power, effectively from 24.06.2016. There is subsistence of contract, between the Petitioner and Respondents from the time when contract was awarded by the Government on 10.09.2015. The Petitioner had written a letter dated 11.01.2016 to the CE (Elec.), SLDC, KPTCL, Bangalore with a request to facilitate the execution of W&B Agreement at the earliest. However, the W&B Agreement was executed on 08.08.2016 i.e., after a delay of 8 months, caused by the Respondents.

- (d) The Order of the Hon'ble Appellate Tribunal has been wrongly interpreted by the Respondents. As the solar power injected by the Petitioner is neither unauthorized nor was the power injected without intimation, the Order of the Hon'ble Tribunal in Appeal No.123/2010 in the matter of M/s.Indo Rama Synthetics (I) Ltd Vs MSERC dated 16.05.2011, is not applicable in the present case.
- (e) The Petitioner did not voluntarily pay the amount demanded by the BESCOM in the letter/bill dated 24.04.2017. Even though the Petitioner requested to adjust the overdrawn energy during March, 2017, vide letter dated 26.04.2017, the BESCOM did not consider the same and also refused to issue 'B' form from April, 2017. Hence, the Petitioner was left with no other alternative but to pay the amount demanded by the BESCOM.

- (f) As per Section 70 of the Indian Contract Act, 1872, the claim of the Petitioner is valid. The Solar Power injected by the Petitioner, from 24.06.2016 to 08.08.2016, was not done gratuitously and the Respondents are legally bound to compensate the Petitioner at the tariff rates fixed by the Commission in its Order dated 30.07.2015.
- (g) This Commission's Order dated 28.04.2016, in OP No. 12/2015, is applicable to the case.
- 6) We have heard the oral submissions, made by the learned counsel for the parties and perused the respective pleadings and documents on record.
- 7) The following Issues would arise, for our consideration:
- (1) Whether the energy injected into the Grid, by the Project of the Petitioner, from 24.06.2016 to 08.08.2016, or any part of it, requires to be credited to the account of the Petitioner or paid for, by the 2nd Respondent?
 - (2) Whether the penalty imposed on the Petitioner, under the bill dated 24.04.2017 is valid?
 - (3) What Order?

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- 8) Our findings on the above Issues are as follows:
- 9) **ISSUE No.(1)**: *Whether the energy injected into the Grid, by the Project of the Petitioner, from 24.06.2016 to 08.08.2016, or any part of it, requires to be credited to the account of the Petitioner, or paid for, by the 2nd Respondent?*
- (a) The Petitioner has contended that there was an inordinate delay, on the part of the Respondents, in the execution of the W&BA, because of which the Petitioner should not be penalized. The Respondents have contended that there was no inordinate delay and the W&BA was executed, within the reasonable time.
- (b) The Petitioner had requested the SLDC vide letter dated 11.01.2016, to facilitate execution of W&BA for wheeling the energy to Petitioner's captive units, stating that the solar plant would be commissioned by 15th February 2016. On 09.02.2016, the BESCO in its letter to the SLDC conveyed its concurrence for wheeling the energy from the Petitioner's plant to Naveen Hotels, Bangalore, with RR No. N 5 HT-494 and also noted that the HT consumers with RR Nos.3EHT-23 and AKLHT-305 are not eligible to avail the wheeled energy, as their contract demand was less than 1 MW. On 23.02.2016, the HESCO in its letter to the SLDC intimated its concurrence for wheeling of the power to Murudeshwar Ceramics Ltd., (RR No. HT-45) and Murudeshwar Ceramics Ltd., (RR No.CHHT-04). On 27.05.2016, the KPTCL conveyed its consent to the SLDC for wheeling of the energy to the above

three consumers subject to fulfilment of Article 8 of the W&BA and in accordance with the terms & conditions stipulated by this Commission. On 09.06.2016, the SLDC granted approval for wheeling power to the 3 consumers mentioned above and requested the Petitioner to submit draft W&BA for signature of the parties and to pay the security deposit and other charges. On 13.06.2016, the Petitioner paid the said deposit and charges. On 22.06.2016, the Petitioner submitted the draft W&BA to the BESCO. On 04.07.2016, the BESCO addressed a letter to the SLDC, with a copy marked to the Petitioner, stating that on verifying the draft W&BA, it was found that non-captive consumers bearing RR Nos.HT-45 and CHHT-4, have contract demand of less than 1 MW and are not eligible to avail the wheeled energy. On 05.07.2016, the Petitioner requested SLDC to delete the said two consumers and direct BESCO to execute the W&BA. The Petitioner's project was commissioned on 24.06.2016. However, admittedly, the billing meters were required to be replaced by the Petitioner, as mentioned in the minutes of the meeting held on 24.06.2016. During arguments, the Counsel for the Petitioner submitted that they were immediately rectified/ replaced. We note that, the BESCO had intimated to the SLDC on 09.02.2016 (ANNEXURE-4) that two consumers were not eligible to avail the wheeled energy, as their contract demand was less than 1 MW each. The Petitioner admittedly being aware of such criteria for grant of open access, chose to submit two other consumers with RR Nos.HT-45 and CHHT-4, in the HESCO's jurisdiction, both with contract demand of 400 kVA, and chose to delete

them only on 05.07.2016, after another letter dated 04.07.2016 of the BESCO, intimating the ineligibility. The Petitioner's claim that it was made aware of two consumers' ineligibility only on 04.07.2016 is not tenable when it has produced the BESCO's letter dated 09.02.2016 as ANNEXURE-4 to its Petition, which pointed out similar ineligibility in respect of the other two consumers.

- (c) The KERC (Terms and Conditions for Open Access) (Third amendment) Regulations, 2015 are applicable to the case. The procedure for grant of open access and the time schedule are mentioned in Regulation 9 of the said Regulations. Regulation 9(6) of the said Regulations, casts a duty on the licensees to communicate the capacity available or otherwise for open access to the applicant, within fifteen working days from the date of receipt of the application from the Nodal agency, in case of long-term open access.
- (d) In the absence of any special circumstances, the reasonable period for grant of open access can be taken as the period allowed under Regulation 9 of the said Regulations. As noted above, within fifteen days from the date of receipt of the application for grant of open access, the licensee is required to intimate the granting of open access or otherwise to the long-term open access applicant. On receiving the information of grant of open access, the open access applicant should furnish the W&BA, duly signed by him, for execution of the same by the other parties concerned. The W&BA should be

executed by the transmission licensee, the injecting ESCOM and the drawal ESCOM. Thereafter, the Nodal Agency should intimate the date from which the open access would be available. If no communication is received by the applicant about the grant or denial of open access, within the time specified, the open access is deemed to have been granted. When deemed open access is granted, the applicant has to execute the W&BA in duplicate / triplicate and send the same, separately, to the Nodal Agency and the Licensees, within five working days, following the date of receipt of communication of the grant of open access or from the date of the deemed open access, failing which, the open access shall stand cancelled. The effective date of commencement of wheeling would be 5 days from the date of grant of open access or from the date of deemed grant of open access. It is also provided in the Regulations that during the pendency of the application for grant of open access, the applicant shall not inject energy and the licensee is not liable to pay charges for the energy injected during the period. Therefore, the Petitioner - the open access applicant, had to act as per the provisions of Regulations 9 (7) and 9(8) of the said Regulations.

- (e) In this backdrop, we need to examine the facts of this case. The SLDC granted approval for wheeling and banking of energy to the Petitioner, vide letter dated 09.06.2016, to the three consumers. The letter also mentioned that, the Petitioner has to submit a draft W&BA to the concerned Officers of the BESCO, HESCO and KPTCL. The Petitioner submitted the draft W&BA

on 22.06.2016 to the BESCO, with a request to execute the same, at the earliest. The draft W&BA contained the names of one Drawal Point in the BESCO area and two in the HESCO area. It is not known, whether on the same day (22.06.2016) the draft W&BA was submitted by the Petitioner to the HESCO also. The BESCO had earlier, in the letter dated 09.02.2016, acting on the letter of the Petitioner seeking permission for open access, had mentioned that, two consumers, to whom wheeling of energy was sought, had a contract demand of less than one MW and were not eligible for the open access. Despite being aware of this position, the Petitioner, in the draft W&BA, mentioned two other consumers in the HESCO area, with a contract demand of less than one MW. This mistake was rectified by the Petitioner only on 05.07.2016, when it requested the SLDC to address a letter to the BESCO, to delete the two ineligible consumers and execute the W&BA. This letter was received by the SLDC on 11.07.2016.

- (f) From the above, it can be said that, the Petitioner has not acted within the time frame mentioned in the Regulations. The Petitioner ought to have executed the W&BA, within five working days from 09.06.2016. As per the Regulation, upon failing to do so, the open access, granted or deemed to have been granted, is cancelled.
- (g) Any benefit of credit of the wheeled energy or payment for the same can be sought for, only if the Regulations, a subordinate legislation having the force of law are followed, in letter and spirit. In fact, the amendments to the

Regulations, fixing the timeline for each activity and the grant of the deemed open access, was made to ensure that the parties to the transaction act in all earnestness and the interests of the generator, especially is not affected. There were allegations that, the SLDC and the ESCOMs delayed the execution of the W&BAs, causing loss to the generators. To overcome this situation, the Regulations were amended. Now, after the amendment, we note with regret, that the parties, especially the generator like the Petitioner, are not adhering to the timeline fixed. This amounts to violation of the Regulations and the offending party cannot seek to benefit from its own folly.

- (h) We note that, as per the provisos to Regulation 9 (7) of the Regulations, the energy injected during the period when the application was pending, is not liable for payment and the energy injected, from the date of grant of open access (deemed or otherwise) to the date of submission of the signed W&BA, by the applicant, payment for energy injected shall be at the APPC rate. The Petitioner has not submitted the W&BA, within time. As per the Regulations, the open access, deemed or granted, should be taken as cancelled, as per Regulation 9(8) of the Regulations. An ill-informed communication that infirm power injected during the trial operation, is entitled for the APPC rate, needs to be ignored, as obviously such a situation of trial operation would not arise in the case of a Solar Power Project. Thus, the question of payment/credit of energy does not arise in this case.

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- (j) All other contentions of the parties, like compensation under Section 70 of the Contract Act, 1872, do not merit consideration, as the Open Access Regulations have not been followed.
- (k) Therefore, we answer Issue No.(1), accordingly.
- 10) **ISSUE No.(2)** : *Whether the penalty imposed on the Petitioner, under the bill dated 24.04.2017 (ANNEXURE - 20) is valid?*
- (a) The BESCO has issued a bill dated 24.4.2017 to the Petitioner for the month of March, 2017 towards the excess energy drawn to the extent of 18720 units at Rs. 3,20,666/-. The Petitioner has not disputed the drawal of excess energy but has requested to adjust the amount towards the amount payable to the Petitioner by the Respondent for the energy injected by it from 24.06.2016 to 8.8.2016. The Respondent has contended that such adjustment for the period prior to execution of W&BA does not arise.
- (b) As we have held that, the Petitioner is neither entitled to the credit of energy nor payment, for the energy injected between 24.06.2016 and 08.08.2016, the question of adjustment does not arise.
- (c) For the above reasons, we answer Issue No.(2), in the affirmative.

11) **ISSUE No.(3)** : *What order ?*

For the foregoing reasons, we pass the following:

ORDER

The Petition is dismissed.

Sd/-
(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-
(H.D. ARUN KUMAR)
MEMBER

Sd/-
(D.B. MANIVAL RAJU)
MEMBER