



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th & 5th Floors, Singareni Bhavan, Red Hills, Hyderabad 500 004

O.P. No.86 of 2012

Dated 22.04.2013

Present

Sri A.Raghotham Rao, Chairman
Sri C.R.Sekhar Reddy, Member
Sri R.Ashoka Chari, Member

Between:

Eastern Power Distribution Company of Andhra Pradesh Limited (APEPDCL),
Visakhapatnam.

... Petitioner

AND

M/s. Blue Ocean Biotech Pvt. Ltd
D.No.4-325, P.B.No.27, G. Ragampet, Peddapuram,
EG Dist.

...Respondent

This petition has come up for hearing on 05.01.2013 in the presence of Sri O.Manohar Reddy, Advocate for the petitioner and Sri B.Adinarayana Rao, Advocate for the respondent, the Commission passed the following:

O R D E R

The Petitioner has filed the above petition u/s 86(1)(f) of the Electricity Act, 2003.

2. The case of the petitioner is briefly as follows:

- (i) M/s NEDCAP sanctioned 3.3 MW industrial waste based NCE project to M/s.Vensa Biotek Ltd on 31.01.2001. The company entered into PPA with APTransco on 17.02.2001 with a proposal of 2.1 MW for sale to APTransco and 1.2 MW for captive consumption from 3.3 MW sanctioned capacity. M/s.NEDCAP on 12.03.2001 issued revised proceedings enhancing the plant capacity to 4 MW from 3.3 MW with a proposal of 0.35 MW for auxiliary

consumption, 1.2 MW for captive consumption and the balance 2.45 MW for sale to APTransco. The Company entered into agreement with NEDCAP on 12.03.2001 in respect of 4 MW sanctioned capacity. Subsequently the company entered into PPA with APTransco on 20.02.2002 for a plant capacity of 4 MW with a proposal of 0.35 MW for auxiliary consumption, 1.2 MW for captive consumption of existing plant in the same premises and 2.45 MW for sale to APTransco for a period upto 30.06.2004. The Commercial Operation Date of the project is 20.11.2003. The PPA dt.20.02.2002 was subsequently amended on 12.11.2003 and 07.05.2004 extending the term of agreement for a period of 20 years from the date of COD i.e, 20.11.2003 and thus the PPA dt.20.02.2002 is in force till 19.11.2023.

- (ii) The APERC issued consent to the PPA dt.20.02.2002 between APEPDCL & M/s.Vensa Biotek Ltd.
- (iii) The Government of AP issued transfer scheme and the PPAs entered into between APTRANSCO and NCE projects have been vested with concerned Discoms in whose area of operation the respective project is located. As such, the PPA between APTransco & M/s. Vensa Biotek Ltd is vested with APEPDCL from 09.06.2005.
- (iv) M/s. Vensa Biotek Ltd had incurred an amount of Rs.43,96,750/- towards power evacuation facilities at 33 kV level from their plant to 132/33 kV Peddapuram SS. Further M/s. NEDCAP enhanced its capacity from 4 MW to 5 MW and entered into MoU on 19.11.2005 with them but to that effect the PPA dt.20.02.2002 was not amended till to date. M/s. Vensa Biotek Ltd had generated power from their 4 MW plant and pumped the units as agreed upon into grid till July 2007 and drawn the power from APEPDCL for maintenance of their plant from July 2007 to July 2011.
- (v) As M/s. Vensa Biotek Ltd failed to repay the loans to financial institutions, the institutions had exercised their powers under the provisions of SARFAESI Act 2002 and reassigned in favour of M/s. PARAS (Assignee) during September and November 2010 who in turn sold all its rights and the interests in the project including the rights over the land of the project in

favour of M/s.Blue Ocean Biotech Pvt Ltd on 24.02.2011 (respondent). M/s.PARAS had cleared the outstanding dues pending against M/s. Vensa Biotech Ltd to the tune of Rs.10,30,612/- on 12.09.2011 and further requested this company to pay the arrears if any that arises out of revision of tariff payable to NCE developers from 01.04.2004 to M/s. PARAS by virtue of the rights conferred on them through provisions of SARFAESI Act 2002. Still an amount of Rs.1,44,607/- is due from M/s. Vensa Biotech Ltd towards maintenance expenses for the period ending 31.03.2011.

- (vi) The respondent after purchasing the plant of M/s. Vensa Biotech Ltd had approached M/s. NEDCAP for transfer of agreements made between M/s.NEDCAP and M/s. Vensa Biotech Ltd in its favour by substituting M/s.Vensa Biotech Ltd, the second party to the agreements being the developer, by its name. In pursuance of the SARFAESI Act 2002, M/s.NEDCAP agreed for novation of the agreements made between M/s.Vensa Biotech Ltd and NEDCAP in favour of M/s. Blue Ocean Biotech Pvt Ltd and novated in favour of M/s. Blue Ocean Biotech Pvt Ltd on 14.07.2011. Accordingly, M/s. Blue Ocean Biotech Pvt Ltd shall be entitled to all the rights and interests granted in the agreements made with M/s. Vensa Biotech Ltd and also responsible to discharge all its obligations stipulated therein. And further M/s. NEDCAP stipulated that M/s. Blue Ocean Biotech Pvt Ltd shall enter into fresh PPA with APTransco if necessary and to furnish the same immediately to them. This clearly establishes that the novation of agreement made between M/s. NEDCAP and M/s. Blue Ocean Biotech Pvt Ltd is subject to execution of the PPA to be entered into between M/s. Blue Ocean Biotech Pvt Ltd and APEPDCL.
- (vii) The respondent had approached this company and requested to arrange for signing a fresh PPA with them incorporating exactly the same terms and conditions present in the PPA already entered with M/s. Vensa Biotech Ltd in their letter dt.21.07.2011. Further vide their letter dt.17.09.2011 it was informed that they have already submitted the novation agreement between M/s. NEDCAP and their company because of which the total rights and responsibilities of M/s. Vensa Biotech Ltd under the PPA stands transferred in their favour.

- (viii) After having examined the novation of agreement made between M/s. NREDCAP and M/s. Blue Ocean Biotech Pvt Ltd, this company offered M/s. Blue Ocean Biotech Pvt Ltd to submit a set of Rs.100/- bond papers for taking further action the matter. Soon on receipt M/s. Blue Ocean Biotech Pvt Ltd was requested to sign the draft amendment to the PPA dt.20.02.2002 duly handingover the copy of it on 14.02.2012. But the company did not turn up. In the mean time, at the request of the developer, the service connection towards startup power to the 4 MW industrial waste based NCE power project set up by M/s. Vensa Biotech Ltd, in the name of M/s. Blue Ocean Biotech Pvt Ltd under the existing 33 kV power evacuation line, was also released on 22.02.2012 so as to facilitate the new company i.e. M/s. Blue Ocean Biotech Pvt Ltd to generate power and sell the same to APEPDCL as per the existing PPA dt.20.02.2002 which is in force till 19.11.2023.
- (ix) But contrary to the above, the respondent had taken up u-turn soon on receipt of service connection for startup power to the existing 4 MW industrial waste based NCE project in his name and insisting this company to take surplus power in excess of their captive requirement at the rates as per terms and conditions of existing PPA without any prejudices to their right to challenge the matter before competent authority for which the stand of this company was already informed vide this office letter dt.13.03.12.
- (x) In view of the above position, the respondent was again requested to attend this office and sign the draft amendment to the PPA dt.20.02.2002 within a week days vide Lr.NoCGM/Comm& RA/EPDCL/VSP/GM/PP/D.No.678/12, dt.30.03.2012 for the following reasons:
- (a) M/s. NREDCAP agreed for novation of agreements already entered with M/s. Vensa Biotech Ltd in their name by virtue of purchasing the 4 MW industrial waste based NCE project under SARFAESI Act, 2002 from M/s. PARAS subject to entering into fresh PPA with this company if necessary and to furnish the copy of the same to NREDCAP.
 - (b) The law also says that “the displacing of one party to a contract by another and the assumption by the latter of all the rights and

obligations of the party displaced. This can be done only with the consent of the remaining party i.e., APEPDCL. The effect of a novation is to discharge completely the contract between the original parties and simultaneously to create a contract of the same content between the remaining party and the new one” i.e., M/s. Blue Ocean Biotech Pvt Ltd

- (c) The respondent has also agreed in their letters dt.21.07.2011, 12.09.2011 and 17.09.2011 that all rights under the PPA between M/s. Vensa Biotek Ltd and APTRANSCO have transferred in their favour and to change the name of M/s. Vensa Biotek Ltd in the PPA dt.20.02.2002 and all the rights and responsibilities of M/s. Vensa Biotek Ltd under the PPA dt.20.02.2002 stand transferred in their favour.
- (d) Based on the novation of the agreement made between respondent and M/s. NREDCAP, the service connection for startup power to the existing 4 MW industrial waste based NCE power project was given on 22.02.2012 over the existing 33 kV power evacuation line that was laid by M/s. Vensa Biotek Ltd in good faith though they have not turned up to sign the draft amendment to the PPA dt.20.02.2002.
- (e) In the preamble of PPA dt.20.02.2002 stipulates that M/s. Vensa Biotek Ltd a company incorporated under Indian Company's Act 1956, having its registered office at 4-325, G.Ragampet, Samalkot, EG Dist, Andhra Pradesh hereinafter referred to as the 'company'(which expression shall, unless repugnant to the context or meaning thereof to include its successors and assigns) as second party. As such i.e., M/s. Blue Ocean Biotech Pvt Ltd is the successor/assignee of M/s.Vensa Biotek Ltd.
- (f) The respondent has no right to say that the APEPDCL should purchase surplus power in excess of their captive consumption at the rates as per the terms and conditions of the PPA dt.20.02.2002 under interim PPA until the matter is resolved before competent authority, as long as the valid PPA dt. 20.02.2002 is in force i.e. upto 19.11.2023. Any

proposal that is made by their will be considered only after expiry of the term of valid PPA dt.20.02.2002.

- (g) M/s. PARAS have cleared the liability of M/s. Vensa Biotek Ltd to the tune of Rs.10,30,612/- and also requested this company to pay all the arrears if any that arises due to enhancement of NCE tariff to be paid w.e.f. 01.04.2004. This arises only due to the contractual obligation of power purchases made between M/s. Vensa Biotek Ltd and APEPDCL. As such the respondent is obligated to sell the power to APEPDCL under the existing PPA dt.20.02.2002 only.
- (h) This company i.e, APEPDCL made all its efforts to make the company i.e., M/s. Vensa Biotek Ltd to repay the loans that were availed by them in the form of fixed charges till 7/2007. As the said power project reached nearing completion of 9 years, this company should have the benefit of receiving power at lower rate which cannot be denied by anyone.

(xi) As the developer did not respond to the above notice, the developer was finally requested to attend this office along with the copy of your board's resolution to sign the draft amendment to the PPA dt.20.02.2002 within 7 days from the date of receipt of this notice failing which the Discom has no option except to initiate further course of action without further notice in the matter vide Lr. No.CGM / Comml & RA / EPDCL / VSP / GM / PP / F.No. 11/D.No.1211/12, dt.29.05.2012.

(xii) The above said final notice was acknowledged by the representative of M/s.Blue Ocean Biotech Pvt Ltd on 02.06.2012 but not turned up to sign the draft amendment to the PPA dt.20.02.2002 even after lapse of 15 days.

(xiii) The petitioner, therefore prays that the Commission may be pleased to

- (a) accept the petition on record
- (b) to issue necessary directions to the respondent to sign the amendment to the PPA dt.20.02.2002.
- (c) and/or pass such other order/orders as the Commission may deem fit.

3. The respondent filed its counter and the material averments of the counter are briefly as follows:

- (i) The respondent is a company registered under the Companies Act. The respondent company had acquired plant and machinery of M/s. Vensa Biotek Ltd in the auction conducted by M/s. Pruthvi Asset Reconstruction & Securitisation Company (hereinafter called as 'PARAS'). M/s. PARAS had acquired secured financial assets of the financial institutions viz. IREDA, IFCI Limited, SASF, Standard Chartered Bank, State Bank of India, etc and action was initiated u/s 13(3) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act' for short). In the said proceedings, the respondent company acquired part of the assets of M/s. Vensa Biotek Ltd insofar as it relates to the plant and machinery which consisted of starch plant and generating plant for generation of electricity with industrial waste. The company paid entire sale consideration amount to M/s.18.50 crs and the respondent company was issued a Certificate of Sale in accordance with the provisions of SARFAESI Act. In terms of the said Sale certificate, the respondent company became the owner of all that part and parcel of the factory situated in an extent of 17.13 cents of lands in G.Ragampet village, Peddapadu Mandal, E.G.Dist and also the part and parcel of the factory situated in an extent of Ac 4.71 cents in the same village. The respondent company paid total sum of Rs.18.50 crs towards sale consideration and had spent considerable amounts to bring the unit into operation that were non-operational since year 2006. When once the sale is conducted by the Asset Reconstruction company in accordance with the provisions of SARFAESI Act, the purchaser acquires right, title and interest of the owner of the property in view of S.13(1) of the Act.

Thus, the transferee had acquired all the rights in respect of the property purchased, free from all encumbrances, and the same is not subject to the obligations of the owner of the assets. Suffice to state that M/s. Vensa Biotek Ltd is still an existing company, owning further immovable properties and it is only a part of the assets of the said company that were sold by the Assets Reconstruction company and purchased by the respondent. The said company still owes its legal existence. Whereas the respondent company had only acquired a portion of the property belonging to M/s. Vensa Biotek

Ltd. Thus, the respondent, by no stretch of imagination, can be called as either successor-in-interest or an assignee or representative-in-interest of M/s. Vensa Biotek Ltd. A transfer of an asset cannot be called either a merger or reorganisation of the company.

- (ii) There is no requirement either in law or otherwise for the respondent company to approach M/s. NEDCAP for the purpose of substituting it, in the place of M/s. Vensa Biotek Ltd. The respondent company was under the impression that for the establishment of non-conventional energy plant, permission from M/s. NEDCAP is essential requirement. But, however, in law there is no such requirement since Section 7 of the Electricity Act, 2003 unequivocally authorises any person to set up a generating station without obtaining any licence. Thus, no credence can be given to the action of the respondent company in approaching M/s. NEDCAP and entering into an agreement with M/s. NEDCAP. Further, the agreement which the respondent company has entered into with M/s. NEDCAP cannot be called a novation of contract, since a contract implies performance of obligations by the parties to the agreement. As far as the respondent company is concerned, it has no legal obligations to fulfil vis-à-vis M/s. NEDCAP. So, also M/s. NEDCAP cannot insist the respondent company to perform any of the obligations. Thus, the very proceedings resulting in entering into agreement with M/s. NEDCAP have no legal sanctity.
- (iii) Instead of entering into a fresh PPA and submitting the same before the APERC for its concurrence, the petitioner insisted that the respondent company to sign an amendment to the existing PPA dt.20.02.2002 entered into by M/s. Vensa Biotek Ltd with it. As already submitted, the respondent company is neither a successor-in-interest nor an assignee of M/s. Vensa Biotek Ltd, but is a new company which had acquired a part of the assets of M/s. Vensa Biotek Ltd and as such the question of respondent company entered into an amendment to the existing PPA does not arise.
- (iv) When the respondent company made an application for grant of a HT connection with a CMD of 450 kVA under HT cat-I, the petitioner treated it as a fresh application and called upon the respondent company to pay

consumption deposit and enter into a fresh agreement with it and on the completion with the same, the petitioner released power supply treating it as a new consumer. Had the petitioner treated the respondent as successor-in-interest, the petitioner would have resumed supply from the existing power connection to the respondent company since admittedly its dues were paid by M/s. PARAS. But, on the other hand the petitioner itself treated the respondent company as a new entity and released HT supply under a fresh agreement. Infact, the petitioner company is charging tariff applicable to HT cat-I consumers, but not at the tariff applicable to non-conventional plant who are availing power under a PPA.

- (v) It is, on the other hand, it is the petitioner that has taken a u-turn. Having sanctioned the service connection treating the respondent company as a new company, it is not open to the petitioner now to contend otherwise. Thus, the contentions of the petitioner are totally untenable.
- (vi) The petitioner calling upon the respondent to sign draft amendment, is untenable and the reasons assigned therefore are incorrect. As regards the reasons stated, it is submitted as under:
 - (a) In the scheme of things, there is no requirement of obtaining permission from M/s. NEDCAP for the purpose of setting up a power plant. Section 7 of the EA 2003, enables any person to set up a power plant without obtaining any licence. Further, the respondent company approached M/s. NEDCAP under a misapprehension and as such the same is illegal and has no sanctity in law. As far as the direction of M/s. NEDCAP that the respondent should enter into a fresh PPA with petitioner, it is submitted that the respondent company is prepared to enter into a PPA assuming that M/s. NEDCAP had necessary authority to insist that the respondent company should enter into such agreement.
 - (b) When M/s. Vensa Biotek Ltd is existing, the question of respondent company becoming either successor-in-interest or assignee or otherwise does not arise.
 - (c) The PPA with M/s. Vensa Biotek Ltd and the petitioner is an independent agreement and it cannot be novated without the

consent of the respondent. The service connection for start up power is an independent one, without reference to the existing PPA and treating the respondent company as a new consumer granted after the respondent company fulfilling all the requirements for grant of such service connection.

- (d) The contention that preamble to the PPA dated 20.02.2002 has no relevance, since M/s. Vensa Biotek Ltd is still legally existing and it is open to the petitioner to enforce its rights under the PPA against the said company. As already stated, the respondent company is neither a successor-in-interest nor an assignee.
 - (e) There is no obligation for the respondent company to supply power at such rates, but, since it is generating surplus power, it wanted to supply the same to the petitioner, so that it can be used for public purpose. A voluntary act on the part of the respondent company cannot be termed as a illegal act.
 - (f) The respondent company being unconnected with either M/s. Vensa Biotek Ltd or M/s. PARAS had no obligation to sell power to the petitioner company under the PPA dated 20.02.2002.
 - (g) The respondent company purchased assets at a considerable cost and as such it cannot be compelled to sell the energy to the petitioner on the terms of the PPA dated 20.02.2002. The respondent company is entitled to enter into a fresh PPA or it is free to sell the power in accordance with law over which the petitioner cannot have any grievance. Further M/s. Vensa Biotek Ltd supplied power to the petitioner only for a period of less than two years. The plant was shut down in the year 2006.
- (vii) The respondent company apart from acquiring a part of the assets of M/s.Vensa Biotek Ltd at a cost of Rs.18.50crs had also spent considerable sum of Rs.34crs for the purpose of updating, refurbishing and again making the plant operational. The starch plant commenced its operations in February 2012. With the industrial waste from the said plant, power plant also became operational and after meeting its captive needs, the respondent company had excess energy at its disposal. When the State is

reeling under power cuts and there is shortage of electrical power, the petitioner instead of purchasing power from the respondent company, by approaching this Commission, had resorted to refuse the said offer thereby forcing this respondent company to limit generation of the electricity and thereby incur huge costs, which is neither beneficial to the respondent company nor to the petitioner company nor the public at large. The respondent company is not seeking payment of any sum in excess of the tariff fixed by this Commission to similar kind of plants. Instead, to tide over crisis of power shortage, the petitioner company is purchasing power in open market at a considerable cost and the persons who are responsible for such state of events should be severely dealt with by this Commission.

(viii) Hence, it is prayed that the Commission may be pleased to

- (a) to direct the petitioner company to enter into a fresh PPA with the respondent company upon such terms as this Commission would deem fit and proper;
- (b) pending adjudication of the claim of the petitioner, direct it to purchase excess energy from the respondent company at such applicable rates and pay for the same to the respondent company, or in the alternative direct the petitioner to issue No Objection Certificate to enable it to obtain open access permission from the competent authority;
- (c) the petition is liable to be dismissed.

4. The learned advocate for the petitioner argued projecting mainly the following grounds:

- (i) M/s. Vensa Biotek Ltd entered into PPA with APTransco on 17.02.2001 with a proposal of 2.1 MW for sale to APTransco and the same was enhanced to 4 MW with a proposal of 0.35 MW for auxiliary consumption, 1.2 MW for captive consumption and the balance 2.45 MW for sale to APTransco. The PPA was subsequently amended on 12.11.2003 and 07.05.2004 extending the term of agreement for a period of 20 years from the date of COD i.e., 20.11.2003 and the PPA is in force till 19.11.2023.

- (ii) The PPA between APTransco and M/s. Vensa Biotek Ltd is vested with APEPDCL from 09.06.2005.
- (iii) M/s. Vensa Biotek Ltd incurred Rs.43,96,750/- towards power evacuation facilities at 33 kV level from their plant to 132/33 kV Peddapuram SS. The capacity was enhanced and entered into MOU on 19.11.2005 under PPA showing amendment to that effect. The plant started generating power from their 4 MW unit and pumped the units as agreed upon into grid till July 2007 and drawn power from APEPDCL for maintenance of the plant.
- (iv) When M/s. Vensa Biotek Ltd failed to repay the loans to the institutions, in exercise of their powers under the provisions of SARFAESI Act 2002 reassigned in favour of M/s. PARAS (Assignee) during September and November 2010 who inturn sold all its rights and the interests in the project including the rights over the land of the project in favour of M/s. Blue Ocean Biotech Pvt Ltd (hereinafter called as respondent) on 24.02.2011. M/s. PARAS had cleared the outstanding dues pending against M/s. Vensa Biotek Ltd and still an amount of Rs.1,44,607/- is due from M/s. Vensa Biotek Ltd towards maintenance expenses for the period ending 31.03.2011.
- (v) In pursuance of the Act, M/s. NEDCAP agreed for novation of the agreements made between M/s. Vensa Biotek Ltd and M/s.NEDCAP in favour of M/s. Blue Ocean Biotech Pvt Ltd and novated in favour of M/s. Blue Ocean Biotech Pvt Ltd on 14.07.2011. The respondent is entitled to all the rights and interests granted in the agreements made with M/s. Vensa Biotek Ltd. M/s. NEDCAP stipulated that the respondent shall enter into fresh PPA with APTRANSCO if necessary and to furnish the same immediately to them. This itself shows that the novation of agreement made between M/s.NREDCAP and respondent is subject to execution of the PPA to be entered into between the petitioner and the respondent.
- (vi) The letter dt.17.09.2011 clearly shows that the agreement between M/s. NREDCAP and their company since the total rights and responsibilities of M/s. Vensa Biotek Ltd under the PPA stands transferred in favour of the respondent. The company offered the respondent to submit a set of

Rs.100/- bond papers for taking further action in the matter. Soon on receipt, the petitioner requested to sign the draft agreement to the PPA dt.20.02.2002 duly handing over the copy but the respondent did not turn up.

- (vii) The respondent requested for service connection towards start-up power to the 4 MW industrial waste based NCE power project under the existing 33 kV power evacuation line and the same was released on 20.02.2012 so as to facilitate the new company i.e., respondent to generate power and to sell the same to APEPDCL as per the existing PPA dt.20.02.2002.
- (viii) The respondent by taking a u-turn on receipt of the service connection insisting the petitioner to take surplus power in excess of their captive consumption at the rates as per terms and conditions of existing PPA without any prejudices to their rights.
- (ix) The respondent has no right to take such a turn as the respondents shows all the rights and obligations of the party of Vensa Biotek transferred to the respondent.
- (x) The effect of a novation is to discharge completely the contract between original parties and to create a contract of the same content between the remaining party i.e., the respondent.
- (xi) The respondent also agreed to transfer their name in place of M/s. Vensa Biotek in the PPA dt.20.02.2002 soon all the rights and responsibilities are transferred in their favour.
- (xii) The service connection was given with a good faith that they would turn up and sign the draft PPA.
- (xiii) Hence, the respondent is obligated to sell the power to APEPDCL under the existing PPA dt.20.02.2002. Having purchased all the machinery and the land and stepping into the shoes of M/s. Vensa Biotek, the respondent cannot take a different stand to supply at present rate. They have to enter into the amended PPA at the rate fixed in the PPA dt.20.02.2002.

(xiv) Hence, the Commission may be pleased to direct the respondents to sign the amendment to the PPA dt.20.02.2002 and the petition is to be allowed as prayed for.

5. The counsel for the respondent argued mainly on the following grounds:
- (i) The respondent paid the entire sale consideration of Rs.18.50 crs when the same was brought to sale under SARFAESI Act 2002 and when M/s. Vensa Biotek failed to discharge the loans and that the respondent also invested Rs.33 crs for bringing the plant into operation.
 - (ii) M/s. Vensa Biotek Ltd is still an existing company owning immovable properties and it is only a part of the assets of the said company that were sold by the Assets and Reconstruction Company and purchased by the respondent. When the company itself has got its own legal existence, the question of stepping into shoes of M/s. Vensa Biotek does not arise.
 - (iii) The transfer of an asset cannot be called as a merger or reorganization of the company. There is no requirement to approach M/s. NEDCAP for substituting the same by virtue of the Section 7 of the EA 2003 and the very proceedings resulting in entering into agreement with M/s. NEDCAP has no legal sanctity.
 - (iv) The respondent company is neither a successor-in-interest nor an assignee of M/s. Vensa Biotek but is a new company which acquired a part of the assets of M/s. Vensa Biotek Ltd and a such the question of respondent company entering into an amendment to the existing PPA does not arise.
 - (v) The respondent has applied for HT service connection with a CMD of 450 kVA under HT Cat-I and the same was treated as a fresh application and the respondent called upon to pay consumption deposit and enter into a fresh agreement and on completion of the same, the petitioner released the power treating as a new consumer.
 - (vi) The petitioner cannot now take a u-turn that the respondent is a successor-in-interest or assignee of the assets of the M/s. Vensa Biotek.
 - (vii) The respondent never stepped into the shoes of M/s. Vensa Biotek and that the service connection for start up power is an independent one without

reference to the existing PPA and the petitioner cannot now ask for a direction from the Commission to sign the amendment to the PPA dt.20.02.2002 and the petition filed by the petitioner is liable to be dismissed.

- (viii) There is no novation of the agreement between the respondent and M/s.NEDCAP. Even if it is assumed that there is novation of agreement between the respondent company and M/s. NEDCAP the same does not have the effect of novation of agreement between petitioner and respondent. The PPA with M/s. Vensa Biotek Ltd is an independent agreement, it cannot be novated with out the consent of the respondent.
- (ix) He has also further argued that the Commission may be pleased to direct the petitioner company to enter into fresh PPA upon such terms as the Commission would deem fit and proper and the petition filed by the petitioner is liable to be dismissed.

6. The matter has been examined in the light of the rival contentions. It is clear from the record that M/s. Vensa Biotek Ltd has failed to repay the loans to the institutions and in exercise of the powers vested under provisions of SARFAESI Act, 2002 the same was re-assigned in the favour of M/s. PARAS (Assignee) during September and November 2010 who inturn sold all its rights and the interests in the project including the rights over the land of the project in favour of respondent on 24.02.2011. M/s. PARAS cleared all the outstanding dues pending against M/s. Vensa Biotek Ltd except Rs.1,44,607/- towards maintenance charges.

7. It is the contention of the petitioner that the respondents addressed a letter to M/s. NEDCAP and agreed for novation of the agreement between M/s. Vensa Biotek Ltd in favour of respondents on 14.07.2011. It is also claimed by the petitioner that the novation of the agreement made between M/s. NEDCAP and the respondent is subject only to the execution of the PPA to be entered in between the petitioner and the respondent.

8. The word 'Novation' means the extinguishment of the terms of earlier contract and the creation of another between new persons at least one of whom is

a stranger to the original contract and there must be a mutual consent of all the parties concerned. In the present case, all the three parties are not parties to the novation of the agreement. In the present case, it cannot be said that there is novation of agreement between NEDCAP and respondent or in between the petitioner, NEDCAP and the respondent or in between NEDCAP, Vensa Biotech Ltd and the respondent, since all the above are not parties to the said novation.

9. It is clear from the record that M/s. Vensa Biotech Ltd is still in existence and it has not sold all its assets and no equity transfer has taken place. As M/s.Vensa Biotech Ltd has failed to clear its debts, part of the assets of M/s.Vensa Biotech Ltd were sold by M/s. PARAS under SARFAESI Act, 2002. Merely because part of the property of M/s. Vensa Biotech Ltd was transferred to the respondent, it cannot be said that the respondent has stepped into the shoes of M/s. Vensa Biotech Ltd. Mere novation of the agreement with NEDCAP cannot be the ground for treating that the respondent has stepped into the shoes of M/s. Vensa Biotech Ltd, or that the liabilities of M/s. Vensa Biotech Ltd have been transferred to the respondent. The letter dated 17.09.2011 of the Respondent was addressed by them in the context of their request for start-up power but such a request was not accepted by DISCOM who treated it as a “new connection” for payment of start-up power.

10. When the respondent applied for a separate HT line to bring the plant into operation, the petitioner treated the respondent as an independent entity and collected all the amounts payable by a fresh consumer. Hence, the petitioner is estopped from contending that the respondent has stepped into the shoes of the said M/s. Vensa Biotech Ltd.

11. Mere addressing of a letter by the respondent to M/s. NEDCAP to transfer his name in the place of M/s. Vensa Biotech Ltd cannot be a basis for the petitioner to ask for specific performance by the respondent of the earlier PPA between M/s.Vensa Biotech Ltd., and the petitioner, by insisting on the respondent to sign the amended agreement, as the respondent is neither a party to the original PPA nor has he stepped into the shoes of M/s. Vensa Biotech Ltd. As between the petitioner and respondent, there has been no agreement for novation of the PPA.

12. The petitioner, if he so chooses can move for damages against the said M/s. Vensa Biotek Ltd for breach of its agreement with the petitioner but cannot insist on a different legal entity like the respondent to honour the Commitments of a different entity like M/s. Vensa Biotek Ltd.

13. The respondent has requested the Commission to direct the petitioner to enter into PPA upon such terms as the Commission would deem fit and proper. This cannot be considered by the Commission as the respondent cannot ask for such a relief in a petition filed by the petitioner. It is to be borne in mind that this is a petition filed by the petitioner to issue necessary directions to the respondent to sign the amendment to the PPA dt.20.02.2002. The respondents cannot ask a relief in the petition filed by the petitioner, since it is not a counter claim as envisaged under Order 8 Rule 6 of CPC. Hence, the request made by the respondent is liable to be rejected.

14. The respondent himself is claiming to be a different entity and that he has not stepped into the shoes of the original PPA party, namely M/s. Vensa Biotek Ltd. The respondent claims that he is not bound by the PPA with M/s. Vensa Biotek Ltd on the ground that he has not stepped into the shoes of M/s. Vensa Biotek Ltd. When the respondent is taking such a stand, he cannot seek the Commission to issue a direction to the petitioner to enforce the PPA between the petitioners and M/s. Vensa Biotek Ltd., in favour of the respondent with new rates. Having taken a stand that he has not stepped into the shoes of M/s. Vensa Biotek Ltd., the respondent is precluded from claiming the said relief against the petitioner. Hence, the request of the respondent for operation of the PPA with higher rates is liable to be rejected.

15. In view of the above said discussion, we are of the considered opinion that

- (a) The respondent has not stepped into the shoes of M/s. Vensa Biotek Ltd., and hence the petitioner cannot ask the Commission to issue a direction to the respondent to sign on the PPA dt.20.02.2002. Hence, the request of the petitioner to issue necessary directions to the respondent to sign the amendment to the PPA dt.20.02.2002 cannot be accepted.

- (b) The request of the respondent to direct the petitioner to enter into a fresh PPA with the respondent to purchase excess energy from the respondent and to pay for the same to the respondent cannot be accepted. Since the respondent is claiming that he has not stepped into the shoes of M/s. Vensa Biotek Ltd., his transactions with the petitioner have to be regulated independent of the original PPA between the petitioner and M/s. Vensa Biotek Ltd.
- (c) Regarding the request of the respondent to direct the petitioner to issue No Objection Certificate to enable it to obtain open access permission, the Commission's observation is that the request of the respondent for NOC for open access, has to be examined by the competent authority as per the rules governing open access. It is for the respondent to work out his relief with the competent authority.

16. In the result, the petition is dismissed.

This order is corrected and signed on this 22nd day of April, 2013.

Sd/-
(R.Ashoka Chari)
Member

Sd/-
(C.R.Sekhar Reddy)
Member

Sd/-
(A.Raghotham Rao)
Chairman