

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH
KOCHI**

**IA(IBC)/180/KOB/2022
IN
IBA/04/KOB/2020**

(Under Section 60(5) of IBC, 2016 read with Rule 11 of the NCLT Rules, 2016)

In the matter of:

1. Havvas Power Corp., 19/84T, CH Bye Pass Road, Manjeri, Malappuram, Kerala- 676 123. Represented by its Proprietor, Mr. Muhammed Sinan;
2. Connect Plus Technologies, TC 9/1438, Padma Sree, TRRWA D-12, Moolayil Lane, Sasthamangalam, Thiruvananthapuram, Kerala- 695 010. Represented by its Managing Partner, Mr. Sreekumar M;
3. Srivari Automotives Pvt. Ltd., 27/1/11 A, Karunakaran Nambiar Road, Thrissur, Kerala- 680 020. Represented by its Managing Director, Mr. Venkitachal Gopinath;
4. Melamparampil Agencies, Melamparambil Chambers, Podiyadi P.O., Thiruvalla, Pathanamthitta, Kerala- 689 110. Represented by its Managing Partner, Mr. George F. Oommen;

... Applicants

-Versus-

1. K. Easwara Pillai, Liquidator of Mathstraman Manufacturers and Traders Pvt. Ltd., 6th Floor, Amrita Trade Towers, S.A. Road, Pallimukku, Kochi, Kerala- 682 016;
2. Whispower Generator Sales and Services Pvt. Ltd., Plot No. 71, Major Industrial Estate, South Kalamassery, Ernakulam- 683 104.

... Respondents

-And-

In the matter of:

Union Bank of India, (Erstwhile Corporation Bank)

... Financial Creditor

-Versus-

Mathstraman Manufacturers and Traders Private Limited

... Corporate Debtor

Coram:

Shri. P. Mohan Raj : Member (Judicial)

Shri. Satya Ranjan Prasad : Member (Technical)

Appearance through Video Conferencing

For Applicant : M/s. A.V. Thomas Associates,
Advocates

For Respondent No.1 : Mr. K. Easwara Pillai, Liquidator (in
person).

For Respondent Nos.2 : Mr. Harikumar G. Nair,
Mr. Akhil Suresh, Advocates

Order reserved on: 26.10.2022

Order pronounced on: 01.12.2022

ORDER

1. This application is filed by the Applicants under Section 60(5) of IBC, 2016 read with Rule 11 of the NCLT Rules, 2016 to direct Respondent No. 1 to release the Generators and Alternators of the Applicants described in Annexure A1 to the Application.
2. The facts as narrated in the application and explained by the Applicants are summarized hereunder:
 - i. Applicants herein are all business entities engaged as wholesale dealers of Generators and Alternators, among other activities. 1st Respondent is the Liquidator of Mathstraman Manufacturers and Traders Pvt Ltd which is under CIRP. The 2nd Respondent herein is a manufacturer of Generators and Alternators used and operate as the Original Equipment Manufacturer for companies like TATA, Stamford etc.
 - ii. It is submitted that as part of their business, The Applicants placed orders on the 2nd Respondent to supply Generators or Alternators of specific engine makes, capacity etc. These orders are used to be placed remitting

an advance amount or, in the case of a long-standing relationship, by simply placing a purchase order and remitting payment as and when the machines are ready. It is further submitted that The 1st Applicant had booked a Generator from the 2nd Respondent by remitting an advance amount of Rs. 2,65,000/- by issuing a written purchase order dated 20.11.2021 for the purchase of a Generator having 50 KVA capacity (1 Phase) for Rs. 5,15,000/-. The 1st Applicant also issued another purchase order dated 20.11.2021 to the 2nd Respondent, for an Alternator having 20 KVA capacity (1 Phase) for Rs. 63,803/-. The 1st Applicant had also remitted an amount of Rs. 2,80,000/- on 04.12.2021. A further payment of Rs. 1,35,000/- was made on 06.12.2021 as balance payment and towards advance for another Generator. The 2nd Respondent issued a receipt for the completed payments as per purchase orders.

- iii. It is further submitted that The 2nd Applicant had also booked a Generator and Alternator from the 2nd Respondent by remitting an advance amount of Rs. 2,00,000/- on 15.09.2021. They have remitted an additional amount of Rs. 5,00,000/- on 16.10.2021 which included the balance payment requested by the 2nd Respondent and advance for an additional Generator. After final negotiations, two written purchase orders dated 20.12.2021 were issued by the 2nd Applicant to the 2nd Respondent, for the purchase of a Generator having 45 KVA capacity for Rs. 4,35,000/- and an Alternator having 35 KVA capacity for Rs. 1,23,720/-. The 2nd Respondent accepted both orders and issued a receipt for the payment.
- iv. Similarly, the 3rd Applicant had issued four purchase orders to the 2nd Respondent, for the purchase of five Generators of various capacities. They have remitted an amount of Rs.24,05,929/- on 05.02.2022, as part payment, based on the assurance of the 2nd Respondent that the Generators were ready. The 3rd Applicant had also remitted an amount of Rs. 15,04,956 on 28.02.2022 as balance payment and towards advance

for another Generator. The 2nd Respondent accepted the orders and issued a receipt for the payment.

- v. The 4th Applicant had also issued a purchase order dated 28.02.2022 to the 2nd Respondent, for the purchase of a Generator having 62.5 KVA capacity. They have remitted the entire purchase amount of Rs. 5,13,000/- by Cheque No.684319 drawn on the 2nd Respondent. The 2nd Respondent accepted the order and issued a receipt for the payment.
- vi. The 2nd Respondent has failed to deliver the Generators and alternators within time. The Applicants had reached out to the 2nd Respondent on multiple occasions and in March and April, 2022 they were assured by the 2nd Respondent that the machines were lying ready at the factory premises in Kalamassery and that it would be delivered soon. The 2nd Respondent also submitted that there were some minor legal issues with regard to the factory premises which was being addressed.
- vii. Since, there was no concrete assurance for delivery, the Applicants had lost all patience with the 2nd Respondent and were forced to send a legal notice to the 2nd Respondent. The notice was also sent by e-mail. The 2nd Respondent replied to the e-mail on 20.06.2022, claiming that it could not deliver the machines since it was no longer in possession of the same.
- viii. It is submitted that the Applicants learnt that the 1st Respondent Liquidator had taken possession of all their Generators and Alternators on 15th March, 2022 based on an order from this Tribunal. The 2nd Respondent submitted that the assets were taken over by the 1st Respondent under the guise that they belonged to another company called Mathstraman Manufacturers and Traders Pvt Ltd. It is submitted that none of the machines and alternators ordered by the Applicants from the 2nd Respondent belong to Mathstraman Manufacturers and Traders Pvt Ltd and that the 1st Respondent has no right over the same. These

Generators and Alternators have been manufactured and assembled by the 2nd Respondent as per detailed specifications contained in the purchase orders. Moreover, the entire payment has also been made by the Applicants and, hence they have first charge over these assets. It is understood by the Applicants that the 1st Respondent had filed IA(IBC)/38/KOB/2021 under Section 66 of the IBC and obtained an order dated 09.07.2021, which reads as follows:

"13. In view of what is stated above, this application is allowed declaring the transactions as fraudulent transactions and directing the Respondents to make good the losses caused to the creditors of the Corporate Debtor holding that Respondents are person available for such deliberate and wilful default. The Respondents are directed to furnish all documents requested for by the Resolution Professional for smooth conduct of Corporate Insolvency Resolution Process."

3. On 26.08.2022 the 1st Respondent filed his reply statement and submitted that after the pronouncement of Order dated 09.07.2021 by this Tribunal all the transactions alleged between applicants and 2nd Respondent had been pursuant to the said Order, except the settling of the purchase order or a few of the slender transactions which itself speaks volumes about the intention to wriggle out from the orders passed by this Tribunal under Section 66 and other ancillary orders. It is further submitted that the 2nd respondent in the present application along with two others had filed an application i.e. IA(IBC)/82/KOB/2022 for the same purpose to release the subject matter goods alleged as belonging to the 2nd applicant wherein the contentions which are raised were not revealed at all and the same was dismissed by this Tribunal vide Order dated 02.06.2022. The inconsistencies between the averments in the present application and in the said application filed by the 2nd respondent, through whom the applicants herein are claiming rights in relation to the goods specified are glaring.

4. It is also submitted that the claim of the Applicants through the former Applicant in IA(IBC)/82/KOB/2022, which was dismissed vide Order dated 02.06.2022 operates *res judicata* for the Applicants who are claiming through the 2nd Respondent. The present application had been filed by the applicants conspicuously for the same reliefs and with respect to the same subject matter in IA(IBC)/82/KOB/2022, which was dismissed by this Tribunal. Further the present claim is unsustainable since the orders under Section 66, 67 and order in IA(IBC)/82/KOB/2022 had become final without any proper challenge at all before the Appellate Authority.
5. It is further submitted that the Generators and Alternators have been claimed to be manufactured by 2nd respondent and applicants claim over those goods, even if sustainable, could be after concluding a transfer as per law which admittedly did not happen in the case on hand and the goods were with 2nd respondent who claimed for it and failed to get it released as per law. It is also submitted that alleged payments by the applicants could have been for different and various purposes and cannot be tagged to the subject matter properties claimed to be released in the application. The 2nd Respondent and the Corporate Debtor M/s. Mathstraman Manufacturers and Traders Private Limited are held by the same persons namely the suspended directors of Corporate Debtor.
6. The 1st Respondent also submitted that genuinely the third-party claims have not been made before the Liquidator in the proper format as per Liquidation Process Regulation. It is also submitted that the averment of applicants having first charge over the goods is beyond the scope of legal provisions. There cannot be a proposition as of creating first charge between a manufacturer and buyer where transaction is governed by independent contractual terms otherwise than by statutory provisions.
7. It is submitted that the alleged holding of the properties by 2nd respondent cannot be termed as held by a trustee of the said properties as there was

“no property” in existence for the creation of a trust. Admittedly a property as envisaged by law shall come to play or come into effect only after the completion of manufacturing. Therefore, the concept of the first charge or holding the property in trust are unsustainable.

8. On 31.08.2022 the 1st Applicant filed a rejoinder stating that on the basis of the order passed on 09.07.2021 in IA (IBC)/38/KOB/2021, the 1st Respondent took possession of the factory premises, but the goods of the 2nd Respondent were taken possession only on 15.03.2022. Had it not been for the delayed conduct of the 1st Respondent, the Applicants would not have been in the present position. The 1st Respondent permitted the 2nd Respondent to carry on business and he was aware that third parties like the Applicants would enter transactions with the 2nd Respondent. The 1st Respondent did not even bother to carry out a paper publication to warn persons like the Applicants who are unaware about the aforesaid Order.
9. It is further submitted that the 1st Respondent is attempting to get over his own faults and drawbacks in having failed to diligently carry out his duties. There is no explanation as to why the 1st Respondent delayed taking over of the premises of the 2nd Respondent until 15.03.2022. Having permitted the 2nd Respondent to carry on business from the factory premises until 15.03.2022, the 1st Respondent cannot prevent the Applicants from taking possession of the goods that were lawfully purchased by them.
10. It is also submitted that the Applicants are unaware about the contents of IA(IBC)/82/KOB/2022. In paragraph 13 of the Application, there is an admission by the 2nd Respondent that the machines have to be delivered to the customers. It is further submitted that the present Application is not barred by res judicata. The Applicants herein are not the parties in IA(IBC)/82/KOB/2022. Moreover, this Tribunal has allowed another similarly situated person to retrieve their goods vide Order dated 08.04.2022 in IA(IBC)/73/KOB/2022.

11. It is submitted that the 1st Respondent has no case that the Generators and Alternators were manufactured or procured with money belonging to the Corporate Debtor in liquidation. There is also no case that the Generators and Alternators belong to the Corporate Debtor. On the other hand, the documents produced by the Applicants would establish that they had given purchase orders and released payments for the machines. Hence the Applicants have the first charge over the materials mentioned in Annexure A1.

The Point for consideration is:

1. Whether this Application is hit by the principle of resjudicata in view of order dated 02.06.2022 passed in I.A(IBC)/.82/KOB/2022?

Pont No.1

12. The applicants filed this application seeking possession of Generators and Alternators from the 1st respondent/Liquidators claiming that the said properties are belongs to them and they were seized and possessed by the 1st respondent, when they were under the physical possession of second respondent. These applicants not filed any claim before the liquidator to release the attached property as provided in Rule 20 in form G of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016, instead directly filed this application.

13. The applicants stated that they placed purchase orders with second respondent for supply of Generators and Alternators and paid an advance amount. When the 2nd respondent failed to honor its commitment in delivering the goods then they came to know that the 1st respondent had taken possession of all the Generators and Alternators on 15.03.2022 in pursuance of order of this Authority. The 1st respondent is appointed as Liquidator in respect of corporate debtor Mathstraman Manufacturers and

Traders Pvt Ltd. These Generators and Alternators are not belonging to corporate debtor they were kept in the premises of corporate debtor by second respondent to effect delivery to the applicants. The 2nd respondent received consideration from the applicants and failed to deliver the machineries.

14. There is no dispute that these Generators and Alternators were seized from the premises of corporate debtor. The second respondent is related party to the corporate debtor. The second respondent herein already filed I.A.No.82/KOB/2022 for release of the same Generators and Alternators mentioned in this application, claiming that they are belongs to its customers. This Authority by order dated 02.06.2022 dismissed the said application holding that these properties are belongs to the corporate debtor and 1st respondent is having full control over these properties. The second respondent is related party to the corporate debtor. In I.A. No.38/KOB/2021 by order dated 09.07.2021, this Authority held that the second respondent and others indulged in fraudulent transactions and hold that they are personally liable for loss caused to the creditors of corporate debtor.
15. The earlier application I.A.82/KOB/2022 was filed by the second respondent claiming that the subject properties are belongs to its customer, when the said plea is negatived, now the applicants claiming themselves as customers of second respondent directly filed this application for possession of same subject properties seized and possessed by the 1st respondent. When this Authority already negatived this plea, the same plea raised by these applicants in round about manner is not acceptable.
16. On the Applicant side submitted that the order passed in I.A.No.82/KOB/2022 will operate as resjudicata. The pre-requisites which are necessary for Res Judicata are:
 1. There must be a final order;
 2. The order must be on the merits;
 3. The claims must be the same in the first and second petition; and

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4. The parties in the second petition must be the same as those in the first, or any person claiming right under party in previous petition.
17. This Authority already held in I.A.No.82/KOB/2022 that the properties mentioned in this application are belongs to the corporate debtor, against the said finding no appeal has been preferred and the said order became final. When it is already decided that the Generators and Alternators are belongs to the corporate debtor, then the plea of the applicants that the properties are belongs to them is not acceptable. Earlier the second respondent filed the application stating that the properties belong to its customers, now the applicants filed this application stating that they are customers of second respondent and seized properties belongs to them. In I.A.No.82/KOB/2022 it is held that the properties are not belongs to customers of second respondent and the properties are belongs to the corporate debtor, in such a situation the present application is not maintainable. All the elements to constitute resjudicata are available in this case also.
18. Another point is the applicants not exhausted the remedy available under regulation instead directly approached this Authority. Under Regulations 20 of IBBI (Resolution Process for Corporate Persons) Regs. 2016, Any third party can file claim before the Liquidator with relevant documents in Form G. if the person aggrieved by the order of liquidator, then he can approach this Authority.
19. In these circumstances it is concluded that the application filed by the applicants without exhausting the remedy available under the Regulation is not maintainable and also held that this application is hit by principle of resjudicata in view of the order passed in I.A.No.82/KOB/2022. This application is liable to be dismissed as not maintainable both on law and on merits.

In the result this Application is **DISMISSED**.

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH

IA(IBC)/180/KOB/2022

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20. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
21. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD
Date: 2022.12.01 14:32:09 +05'30'

Satya Ranjan Prasad
Member (Technical)

PANDIAN MOHAN RAJ Digitally signed by PANDIAN MOHAN RAJ
Date: 2022.12.01 15:28:24 +05'30'

P. Mohan Raj
Member (Judicial)

Signed on this 1st day of December, 2022.

Supriya-P. s_