

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI**

(APPELLATE JURISDICTION)

(Company Appeal (AT) (CH) (INS.) No. 272 of 2023)

**(Filed under Section 61(1) of the Insolvency &
Bankruptcy Code, 2016)**

**(Arising out of the Impugned Order dated 03.05.2023 in
CP (IB) / 45 / KOB / 2022, passed by the
'Adjudicating Authority', 'National Company Law Tribunal',
Kochi Bench)**

In the matter of:

Zhejiang Industrial Group Co. Ltd.
Represented by its Constituted Attorney:
Mr. Sahil Bhatia
No. 1, Xingye Road,
Ganlan Dinghai, Zhoushan,
Zhejiang, China

**..... Appellant/Petitioner/
Operational Creditor**

v

Al Badr Seafoods Private Limited
Registered office at:
Plot No. 34, Cochin Special
Economic Zone,
Kakkanad Kochi, Ernakulam,
Kerala – 682037

..... Respondent

Present :

For Appellant : Mr. Vishnu Mohan, Advocate

J U D G M E N T
(Virtual Mode)

Justice M. Venugopal, Member (Judicial):

(Company Appeal (AT) (CH) (INS.) No. 272 of 2023):

Preamble:

Heard the Learned Counsel for the Appellant in Comp. App (AT) (CH) (INS.) No. 272 of 2023, at the `Admission Stage` itself.

2. The `Appellant` / `Petitioner` / `Operational Creditor` (`Zhejiang Industrial Group Co. Ltd.`), has preferred the instant Comp. App (AT) (CH) (INS.) No. 272 of 2023, in respect of the `impugned order`, dated 03.05.2023, in CP (IB) / 45 / KOB / 2022 (Filed under Section 9 of the I & B Code, 2016 r/w. Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, passed by the `National Company Law Tribunal`, Kochi Bench, in `dismissing` the `Petition`.

3. While passing the `impugned order`, 03.05.2023, in CP (IB) / 45 / KOB / 2022 (Filed by the `Appellant / Petitioner`), the `Adjudicating Authority` (`National Company Law Tribunal`, Kochi Bench), at Paragraphs 18 to 20, had observed the following:

18. ``The corporate debtor is termed as "confirming party" in the agreement. The term confirming party is different from Guarantor. Even though the nomenclature is used as confirming party, in the settlement agreement the corporate debtor specifically guaranteed to pay the operational creditor if the second party default on loan obligation/instalment.

19. Thus, this petition is rest upon the settlement deed dated 16.07.2020. The second party Al Badar Sarl failed to pay 1st instalment within due date 31.07.2020, it follows default date on 01.08.2020. In the petition part IV (2) the default date is mentioned as 16.09.2019, 07.10.2019 & 14.10.2019 these dates are arrived on the basis failure to pay the amount within the due date mentioned in the invoices. All the transactions arose on the basis of Invoices were culminated into settlement agreement dated 16.07.2020. When this petition has been filed against the Guarantor of corporate debtor in pursuance of settlement deed dated 16.07.2020, the petitioner cannot fall back on invoices. The date of defaults mentioned in the petition were not existed as on the date of filing this petition they were already merged with the settlement. Thus, the date of default mentioned in the petition is incorrect. Here in this case the date default has very significant role as per the settlement deed the second party to settlement Al Badar Sarl committed default in payment of 1st instalment on 01.08.2020, this is the date falls between 25.03.2020 to 24.03.2021 the suspended period to initiate Corporate Insolvency Process. No petition under section 7,9, and 10 IBC 2016 can be filed for the defaults between 25.03.2020 to 24.03.2021 in view of specific bar provided in first proviso to Section 10A of IBC2016 read with Notification S.O.4638(E) dated 22.12.2020. In these circumstances it appears that to elude from the clutches of section 10A, the incorrect date is given. For the reasons stated above it is answered that the date of default mentioned in the petition is incorrect and the actual date of default fall on the suspended period to initiate CIRP.

Point No.4:

20. No doubt the amount payable by the Al Badar Sarl in pursuance of invoices for goods supplied by the petitioner is come under the definition of “operational debt” but after entered into settlement it lost its character of “operational debt”. The default committed to pay amount as per the settlement agreement is not an operational debt. In this regard NCLT-Delhi in Ahluwalia Contracts (India) Limited vs Logix Infratech Private Ltd C.P.(IB) No.882/ND /2022 dated 03.06.2022 held that default of payment of instalment amount as per settlement agreement do not come under the definition of operational debt. The NCLAT-Delhi also held in Trafigura India Private Limited Vs TDT Copper Limited, Company Appeal (AT)(Insolvency) No.742 of 2020 order dated 15.09.2022, that default of instalment of settlement Agreement does not come within the definition of ‘operational debt’ as provided under section 5(21) IBC 2016.’

and finally `dismissed` the `Petition.

Appellant's Submissions:

4. The Learned Counsel for the Appellant / Petitioner / Operational Creditor, contends that the Appellant / Petitioner, before the 'Adjudicating Authority' (National Company Law Tribunal', Kochi Bench), in CP (IB) / 45 / KOB / 2022, under Section 9 of the I & B Code, 2016 r/w. Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, had averred that the 'Debt', originated from the 'Purchase of Frozen Precooked Skip Jack Tuna Loins' ('Goods') by the 'Corporate Debtor' from the 'Appellant / Petitioner / Operational Creditor'.

5. It is represented on behalf of the Appellant / Petitioner / Operational Creditor that 'Sales Contracts', bearing Nos.XYDE19018 dated 24.05.2019 and XYLDE19023 dated 26.06.2019, between the 'Appellant / Operational Creditor', and the 'Corporate Debtor', were entered into, detailing the agreed conditions for sale of the said 'Goods', and the said 'Goods', were to be shipped by the 'Appellant / Operational Creditor', to the 'Corporate Debtor' to 'Tunisia' Address.

6. It is the version of the Appellant / Petitioner that, as an 'Operational Creditor', as per Specifications and requirements of the 'Corporate Debtor' sold the said 'Goods', by raising an 'Invoice' Bearing No.XYDPZ19E0526 dated 10.06.2019 for a Sum of USD 290,700/-, an

Invoice Bearing No.XYDPZ19E0587 dated 01.07.2019, for a Sum of USD 465,375/-, and an Invoice Bearing No.XYDPZ19E0623 dated 08.07.2019, for a Sum of USD 465,375/-.

7. The Learned Counsel for the Appellant / Petitioner / Operational Creditor points out that the `Appellant / Petitioner`, had supplied and delivered the said `Goods` to the `Corporate Debtor`, vide below listed `Bill of Ladings`, delivery whereof was accepted by the Corporate Debtor without protest or demur. Besides this, the details of Bill of Lading Bearing Nos. 582578820 dated 17.06.2019; (b) 576302860 dated 08.07.2019 and (c) MEDUN3468877 dated 15.07.2019.

8. The grievance of the Appellant is that, despite taking delivery of the said `Goods`, the `Corporate Debtor`, had failed to `adhere to the `Agreed Payment Terms` and make any `Payment`, to the `Operational Creditor`. Subsequently, the `Appellant / Petitioner / Operational Creditor`, had continuously followed up with the `Corporate Debtor`, making a request for `Payment of Outstanding Debt`, and that the `Corporate Debtor`, had extended only false promises and assurances, but not made any `payment`, to clear the `Outstanding Dues`.

9. At this juncture, the Learned Counsel for the Appellant, brings it to the notice of this `Tribunal`, that the `Corporate Debtor`, through its `Associate Enterprise` namely `Al Badr Sarl – a Tunisian Entity`,

proposed to `release` the `Outstanding Debt` in Instalments. Indeed, the `Appellant / Operational Creditor`, with a view to resolve the matter, in an amicable manner, accepted the `Proposal` of the `Corporate Debtor` and its `Associate Enterprise`, and a `Settlement Agreement`, dated 16.07.2020, was drawn between the `Operational Creditor`, `Al Badr Sarl` and the `Corporate Debtor`.

10. The Learned Counsel for the Appellant, points out that as per the `Settlement Agreement`, it was agreed that `Al Badr Sarl`, will release `payment of One Million USD, in respect of Full and Final Settlement of `Outstanding Debt`, to the `Operational Creditor`, in Ten Equal Instalments of USD 100,000.00 each, and that the `Corporate Debtor`, stood as `Guarantor`, to the `Performance of the Settlement Agreement`, by its `Associate Enterprise` Viz. `Al Badr Sarl`, in the event `Al Badr Sarl`, fails to adhere to the terms of the agreed payment schedule under the `Settlement Agreement`, the entire `Outstanding amount of USD 1,221,450.00`, less any amount paid under the `Settlement Agreement`, will immediately become due and payable jointly and severally by both the `Corporate Debtor`, and `Al Badr Sarl`.

11. According to the Learned Counsel for the Appellant / Petitioner / Operational Creditor, `Al Badr Sarl`, could not adhere to the `Agreed Payment Schedule`, and the first Instalment of USD 100,000.00 due and

payable on or before 31st July, 2020 was paid by `Al Badr Sarl` in parts where USD 60,000.00 was paid on 17th September 2020 and USD 40,000.00 was paid on 6th October 2020.

12. The Learned Counsel for the Appellant, points out that `Al Badr Sarl` and the `Corporate Debtor`, had extended only the false promises and assurances, to clear the `Overdue Instalments` and `Al Badr Sarl`, through its email dated 28.12.2020, among other things, had requested further time, to release payment, in respect of `Overdue Instalments`, on the pretext of Market situation.

13. In fact, the Appellant / Operational Creditor, through an Advocate, had issued a Demand Notice dated 30.04.2021, as per Section 8(1) of the Insolvency and Bankruptcy Code, 2016, at the Registered Office of the `Corporate Debtor`, demanding the `Operational Debt`. The `Corporate Debtor`, had sent a `Reply` dated 14.05.2021, disputing the `Payment of Operational Debt`, to the `Appellant / Operational Creditor`, alleging that the `Corporate Debtor`, was not signatory to the `Settlement Agreement` `Confirming Party`, which was done without `Authority` or `Information` of the `Corporate Debtor`, and the `Corporate Debtor`, has no relation with the `Al Badr Sadr` or has no Branch in `Tunisia`.

14. The Learned Counsel for the Appellant, points out that under the `Sales Contract`, the `Payment Terms` agreed, was DA 90 days from the date of Bill of Lading and the Invoice dated 10.06.2019 due at 90 days from Bill of Lading bearing No.582578820 was dated 17.06.2019, thus the `Debt` fell due on 15.09.2019. As per the Invoice dated 01.07.2019, the `Debt`, under this Invoice, fell due on 06.10.2019 and as per Invoice dated 08.07.2019, the debt fell due on 13.10.2019.

15. The Learned Counsel for the Appellant, points out that the `total Sum of Default`, was Rs.8,52,78,758.79 (USD 1,121,450.00), calculated at the exchange rate of 1 USD = Rs.76.0433, as on 15.12.2021.

Appellant's Citations:

16. The Learned Counsel for the Appellant, refers to the Judgment of this `Tribunal` in Comp. App (AT) (CH) (INS.) No. 124 of 2022 dated 08.08.2023, between Carissa Investments LLC v. Indu Techzone Pvt Ltd. and 2 Ors., wherein, at Paragraphs 15 to 17, it is observed as under:

15. `The Hon'ble Apex Court concluded that the embargo in Section 10-A must receive a purposive construction which will advance the contention of the Learned Senior Counsel for Respondent No.2 that though the date of default is on 31.03.2020, Section 10-A will not be applicable is unsustainable in the light of the observations made by the Hon'ble Apex Court in the aforementioned Judgment.

16. The object of the legislation was to suspend the operation of Sections 7, 9 and 10 in respect of defaults arising on or after March 25th 2020 when the lockdown was disrupting normal business operation. This Tribunal is of the considered view that the `Explanation` removes any doubt by clarifying that

the provisions of the Section shall not apply in respect of any default committed prior to 25.03.2020.

17. In the instant case, admittedly, the date of default is 31.03.2020 and the ratio of the Hon'ble Apex Court in 'Ramesh Kymal versus M/s. Siemens Gamesa Renewable Power Pvt. Ltd.' reported in Civil Appeal No.4050 of 2020 regarding Section 10-A of the Code the object of which was sought to be achieved by enacting the Provision, is squarely applicable to the facts of this case.

and ultimately, the 'Appeal', was 'allowed'.

17. The Learned Counsel for the Appellant, relies on the Order of the Principal Bench of the 'Appellate Tribunal' in Comp. App (AT) (INS.) No. 1423 of 2022 dated 01.02.2023, between Priyal Kantilal Patel v. IREP Credit Capital Pvt. Ltd. & Anr., wherein, at Paragraphs 13 to 15, it is observed as under:

13. "It is relevant to notice that in clause 9 of the consent terms there was clear stipulation that financial creditor shall be entitled to revive the company petition, the mere fact that instead of reviving company petition, a fresh company petition has been filed under section 7 shall not be reason to reject the company petition and not to entertain the said company petition.

14. No coming to the second submission of Learned Counsel for the appellant that the application could not have been filed under section 7 by the financial creditor, there is no dispute that financial creditor has extended financial benefits to the corporate debtor. The mere fact that the majority debenture holders have not initiated any section 7 application shall not preclude the financial creditor who was entitled to initiate section 7 application on its own right. We thus do not find any substance in the submission of learned counsel for the Appellant.

15. It shall be open for the appellant, in event, settlement is entered between the parties, to file Application under Section 12-A of the I & B Code, 2016.

In view of the aforesaid, we do not find any error in the impugned order, the Appeal is dismissed."

Reply of `Respondent / Corporate Debtor`:

18. Before the `Adjudicating Authority`/ `Tribunal`, the Respondent / Corporate Debtor in its `Reply`, to the main CP (IB) / 45 / KOB / 2022, had averred that the `Goods`, were also delivered to the `Buyer` (not the Respondent), which is evidenced through the `Bill of Lading` Bearing No. 582578820 dated 17.06.2019, as issued by the Shipping Company MAERSK LINE, Bill of Lading bearing No. 576302860 dated 08.07.2019 as issued by the Shipping Company MAERSK LINE and Bill of Lading bearing No. MEDUN3468877 dated 15.07.2019 as issued by the `MEDITERRANEAN SHIPPING COMPANY S.A.` on the name and address of the Buyer.

19. Moreover, the Respondent in its `Reply`, to main CP (IB) / 45 / KOB / 2022, had denied the `Execution of Settlement Agreement`, dated 16.07.2020, by it, in the capacity of `Confirming Party`, and in fact, the Respondent / Company, had no knowledge of any such `Agreement`, at the time, it was entered nor any `Board Resolution`, was ever passed, which gave the `Signatory` any `Authority`, to sign this `Agreement`. That apart, the `name of the Signatory`, was not mentioned in the Agreement, this `Agreement`, is not `binding` on the Respondent.

20. The Respondent / Corporate Debtor, in its 'Reply', before the 'Adjudicating Authority' / 'Tribunal', had mentioned that there is already a 'Pre-existing Dispute', among the 'Appellant / Petitioner', and the 'Respondent / Corporate Debtor', in the manner that it was a 'Disputed Matter', to be proved by the Appellant / Petitioner, as to who had actually received the 'Goods', from it and which entity was liable to make the 'Payments' thereof.

21. As a matter of fact, the Respondent / Corporate Debtor, took a stand in its 'Reply', before the 'Adjudicating Authority' / 'Tribunal', that an 'Application', under Section 9 of the I & B Code, 2016, can only be filed on the 'Occurrence of Default', and in the instant case, there is 'any Debt', which becomes 'due', towards the Appellant / Petitioner nor the other elements of making an 'Application', under Section 9 of the Code, were fulfilled.

22. Continuing further, the Respondent / Company, do possess 'Sufficient Evidence' on Record that the 'Goods', were never been delivered to the Respondent / Company, and that was communicated to the Appellant / Petitioner, through a Reply dated 14.05.2021 to the Demand Notice dated 30.04.2021, received on 05.05.2021, as issued by the Appellant / Petitioner.

23. It is the categorial stand of the Respondent / Corporate Debtor (before the `Adjudicating Authority / Tribunal`) that the Appellant / Petitioner, cannot be treated as `Creditor`, as `No Goods`, were delivered to Respondent / Company, and as such, the question of owing any `Debt` towards the Appellant / Petitioner, does not arise.

24. Besides this, because of the fact that `no Liability` or `Obligation`, is attached thereto in respect of the `Claim`, against the Respondent / Company which becomes `Due`, towards the `Appellant / Petitioner`, the `Sum`, alleged by the Appellant / Petitioner, cannot be called as `Debt`.

Appellant's Rejoinder:

25. In the `Rejoinder` of the Appellant / Petitioner, before the `Adjudicating Authority` / `Tribunal`, to the main CP (IB) / 45 / KOB / 2022, it is averred that the Respondent / Corporate Debtor, is a subsidiary Company of the said `Buyer` or the `Tunisian Entity`, and it can be `proved`, from the `List of Shareholders` of the `Corporate Debtor`, as on 31.03.2021.

26. According to the Appellant / Petitioner, the Corporate Debtor, required the `Goods`, to be delivered to `Tunisia`, and the `Operational Creditor`, had acted as per the `Specification`, of the `Sales Contract`, and delivered the `Goods`, to `Tunisia`, as per `Terms of the Sales Contract`.

As per the terms of the 'Sales Contract' (vide No. XYLDE19018 dated 24.05.2019, it was agreed that the 'Buyer' / 'Tunisian Entity', will be named as 'Consignee' (in whose name, 'Goods', were Shipped), and the Terms of Sales Contract', bearing No. XYLDE19023 dated 26.06.2019, specifies that payment will be done by both 'India' and 'Tunisia'.

27. According to the Appellant / Petitioner, the then 'Director' of the Respondent / Corporate Debtor, by its own representation, was authorised and was well within the 'Rights', to execute the 'Agreement', for and on behalf of the 'Respondent / Corporate Debtor'. Hence, the 'Settlement Agreement', is binding on the 'Respondent / Corporate Debtor'.

28. It is the version of the Appellant / Petitioner that the 'Liability' of the 'Guarantor' is 'co-extensive' with that of the 'Principal Borrower', and thus, enables the 'Creditor', to initiate 'Corporate Insolvency Resolution Process', against the 'Corporate Debtor'. Also that, the 'Appellant / Petitioner / Operational Creditor', sold and supplied the 'Goods', to the 'Respondent / Corporate Debtor', and delivered to its 'Holding Company', in terms of the 'Sales Contracts', and considering the internal arrangement, between the Respondent / Corporate Debtor and its 'Holding Company', through its Email dated 28.02.2020, the Respondent / Corporate Debtor, had even agreed to taken payment from the 'Holding Company' of the 'Respondent / Corporate Debtor', through

`Settlement Agreement' dated 16.07.2020, where the Respondent / Corporate Debtor stands as a `Confirming Party' / `Guarantor of Performance' of the Second Party (the `Buyer').

29. On behalf of the Appellant / Petitioner / Operational Creditor, it is pointed out before this `Tribunal', that there is no `Dispute', existing or otherwise, and the `Liability' of the `Corporate Debtor', as a `Guarantor', under the `Settlement Agreement', and the `Sales Contracts', is absolute. The purported defence of the Respondent / Corporate Debtor is a `frivolous', `spurious' and a `mere bluster' and only, to `avoid the payment of `admitted debts', the Respondent / Corporate Debtor, had taken a futile stance, which cannot stand scrutiny, in the `eye of Law'.

30. Proceeding further, it is pointed out on behalf of the Appellant / Petitioner that a `Circular' dated 09.06.2016 (vide F.1 / 998 / R.B / Div.Com/(HQ)/2014/1030), was issued by the Inspector General of Registration, Government of National Capital Territory of Delhi, (Registration & Stamp Branch), wherein, it is observed as under:

``It has been observed that applications for stamping of instruments executed outside of India are being sent to the undersigned. It is informed that such documents are to be stamped as per provisions under Section 18 of the Indian Stamp Act, 1899. In view of the above, it is clarified that for stamping of such documents, the holder of such an instrument may purchase the e-stamp paper of appropriate value from any authorized stamp vendor stating the information relevant to the instrument. There is no need to approach the Collector of Stamps in these cases if the e-Stamp paper of appropriate value is purchased within 3 months of the instrument being first brought to India.

Henceforth, holders of such instruments are requested to purchase e-stamp papers of appropriate value and enclose the same with the instrument, which shall then be deemed to be stamped with the said value. In case any authority refuses to accept any instrument duly stamped, as stated herein above, this clarification may be brought to its notice and the undersigned be informed. In case any difficulty is faced by public in this regard, the Collector of Stamp concerned may be contacted for intervention.’

Assessment:

31. In the present case on hand, it is brought to the fore that a ‘Tripartite Settlement’, was entered into on 16.07.2020, in and by which, the ‘Al Badr Sarl’, had agreed to pay the ‘Sum’ in ‘Instalments’, as per the undermentioned ‘Payment Schedule’:

<i>S.No.</i>	<i>Payment Date</i>	<i>Amount (USD)</i>
1	<i>On or before 31st July, 2020</i>	<i>100,000</i>
2	<i>On or before 31st August, 2020</i>	<i>100,000</i>
3	<i>On or before 30th September, 2020</i>	<i>100,000</i>
4	<i>On or before 31st October, 2020</i>	<i>100,000</i>
5	<i>On or before 30th November, 2020</i>	<i>100,000</i>
6	<i>On or before 31st December, 2020</i>	<i>100,000</i>
7	<i>On or before 31st January, 2021</i>	<i>100,000</i>
8	<i>On or before 28th February, 2021</i>	<i>100,000</i>
9	<i>On or before 31st March, 2021</i>	<i>100,000</i>
10	<i>On or before 30th April, 2021</i>	<i>100,000</i>

32. It comes to be known that in the ‘Settlement Agreement’, the Respondent / Corporate Debtor, is described as ‘Confirming Party’, and Second Party to the Settlement Viz. ‘Al Badr Sarl’, had failed to pay the First Instalment Sum of USD 100,000/- on or before 31.07.2020. In fact, the main CP (IB) / 45 / KOB / 2022, was filed by the Appellant /

Petitioner / Operational Creditor, before the 'Adjudicating Authority' / 'Tribunal', against the 'Respondent / Corporate Debtor' ('Guarantor', to the 'Second Party').

33. The Appellant / Petitioner's advocates (TCM & Associates), had issued a 'Demand Notice', dated 30.04.2021, to the Respondent / Corporate Debtor, whereby and whereunder, a request was made to the Respondent / Corporate Debtor, to unconditionally repay the 'unpaid Operational Debt' (in 'Default') in Full, within ten days from the date of receipt of the said Notice, etc.

34. The Respondent / Corporate Debtor, addressed to the Appellant / Petitioner / Operational Creditor's Advocates, has issued a 'Reply' (for the Notice dated 30.04.2021), inter alia mentioning that it had not entered into 'any Business with the Company', at the first instance and hence, the question of it being the 'Debtor', does not arise. Also that, the Respondent / Corporate Debtor, being the 'Confirming Party', in the 'Agreement', which is beyond the 'Authority' of the 'Signatory' / without any information of the 'Respondent', cannot establish it, as the 'Corporate Debtor', in the main 'Petition'.

35. Besides the above, the Respondent / Corporate Debtor, in its 'Reply', to the 'Demand Notice' dated 30.04.2021, issued by the

Appellant / Operational Creditor, through its Advocate (under Section 8(1) of the I & B Code, 2016), had proceeded to state that 'Invocation of Guarantee Agreements', for 'Operational Debt', was not 'allowed', under the I & B Code, 2016, and further that in terms of 'The Foreign Exchange Management Act, 1999', the 'Respondent / Corporate Debtor', cannot make any 'Foreign Exchange' payment, for 'Goods', not received in India, for which, there was no 'Bill of Ladings' / 'Endorsements'.

36. It is not out of place for this 'Tribunal', to pertinently point out the 'Order' dated 04.01.2016 in WP No. 33462 of 2014, in Asset Reconstruction Company (India) Limited, Mumbai, v. The Inspector General of Registration, Chennai, and 5 Ors. (vide India Kanoon from Pages 16 and 17), wherein, it is observed as under:

34. "In the instant case, Indra Kumar Halani executed the document on behalf of Shri N. L. Tantia under the terms of this power of attorney. He then presented it for registration at the Registration Office and it was registered. The plea taken by the Respondents that in order to enable him to present the document it was necessary that he should hold a power of attorney authenticated before the Sub-Registrar under the provisions of Section 33 is thus not supported by the language of Section 32. The provisions of Section 33 therefore only apply where the person presenting a document is the general attorney of the person executing it, and not where it is presented for registration by the actual executant, even though he may have executed it as agent for some one else. In this case, the presentation is by the actual executant himself and is hence is entitled under Section 32 (a) to present it for registration and to get it registered"

28. It is to be noted that in paragraph No.26 of the above decision, it has been specifically held that "a person holding a power of attorney, which authorise him to execute a document is an agent for some one else", which means valid

authorisation is the principal requisite, which in turn, has to be verified by the registering officer.

29. After all, the object of the provisions contained in Sections 32 to 35 of the Registration Act is to avoid acts of fraud by means of registration. This Court, in Sekar Mudaliar Vs. Shajathi Bi and another, (AIR 1987 Madras 239), while dealing with the case under Sections 32 and 33 of the Registration Act, 1908, was pleased to hold that a valid authorisation is a must and failure would result in lack of jurisdiction on the part of the registering authority. Similar view was also taken by this Court in a subsequent decision of G.Ayyakonar Vs. Inspector General of Registration, Chennai and Others, ((2006) 4 MLJ 1257) as well. The following would be the relevant passage in the case of Sekar Mudaliar (supra):

"8. In the instant case, according to the petitioner and the 5th respondent, the entire property is situated at Arasiarpatti Village. Whileso, the power of attorney was registered in the Office of the Sub Registrar Office, Kovilpatti, whereas the sale deed executed by the 6th Respondent in favour of 7th respondent was registered in the Office of the Sub Registrar, KellarajakulaRaman. It is not the case of the parties that the property is situated partly in one jurisdiction and others in another jurisdiction. Section 32 of the Act deals with persons to present documents for registration. It means that every document should be presented by a person who is claiming the property or executing the document. The Registration Act has imposed several conditions regulating the presentation of documents for registration and it is of great importance that those conditions framed with a view to meet the legal circumstances, should not be weakened or strained on the ground that it appears to be strict. The power and jurisdiction of the Registrar will come to play only when they are invoked by a person having a direct relation to the deed. The Registrar, after hearing the parties and after satisfying himself, gets it right to register. The words in Sections 32 and 33 of the Act are imperative for presentation of document for registration by a person who is entitled to do so. If a document is presented for registration by a person who is not entitled to do so, under Section 32 of the Registration Act, it is invalid. Improper presentation is not a mere defect in procedure falling under Section 18 of the Act, but this error is of more radical in nature. The provisions of the Act are very carefully designed to prevent forgeries and the procurement of conveyance by fraud or undue influence and though it may be somewhat technical, the Registering authority has to insist upon exact compliance with the provisions of the Act. It is necessary to do so.

9. In *Jambu Prasad Vs. M.A.Alikhan* reported in (28 IC 422), their Lordships of the Privy Council observed that executants of a deed who attend the Registrar's Office or Sub Registrar's Office are not merely to admit the execution and it cannot be treated as presentation for the purpose of Section 32 of the Act as presenting the deed for registration as they would exist to the registration but that could not be sufficient to come to the Registrar's jurisdiction. When the presentation itself is unauthorized, there cannot be any registration. It is also a case of the power of attorney holder presenting the document for registration."

37. As far as the present case is concerned, the 'Power of Attorney', was executed in 'China' and after the execution, was received in India. The ingredients of Section 18 (1) of the Indian Stamp Act, 1899, reads as under:

"Every Instruments other than bills and notes executed out of India.- (1) Every instrument chargeable with duty executed only out of ²[India], and not being a bill of exchange ³[] or promissory note, may be stamped within three months after it has been first received in ²[India]'".*

38. As a matter of fact, Section 18 (2) of the Indian Stamp Act, 1899, enjoins as under:

"Where any such instrument cannot, with reference to the description of stamp prescribed therefor, be duly stamped by a private person, it may be taken within the said period of three months to the Collector, who shall stamp the same, in such manner as the ¹[State Government] may by rule prescribe, with a stamp of such value as the person so taking such instrument may require and pay for'".

39. Therefore, it is quite clear that the 'Power of Attorney Document', was not executed in the Stamp Papers of the Law of the Land (India), but the said Stamp Paper, was purchased in 'India', and prefaced, with the document. Viewed in that perspective, this 'Tribunal', unhesitatingly, comes to a clear cut conclusion that the 'Power of Attorney Document', projected before the 'Adjudicating Authority' / 'Tribunal', by the 'Appellant / Petitioner / Operational Creditor', is an 'invalid' and 'unenforceable' one, keeping in view of 'Non-compliance' of the necessary ingredients of the Indian Stamp Act, 1899.

40. Dealing with the aspect of 'Sales Contracts' dated 24.05.2019, 26.06.2019 and the Settlement Agreement dated 16.07.2020, these were absorbed on an 'Unstamped Paper'. In this regard, Section 34 of the Kerala Stamp Act, 1959, enjoins that an '*Unstamped Instrument, cannot be pressed into Service for any purpose and an Individual is to pay Stamp Duty with ten times Penalty, with a view to validate an Unstamped Instrument*'.

41. It is to be remembered that an insufficiently stamped 'Original Document' or an 'Unstamped Document', can be 'impounded', and on behalf of the 'Appellant / Petitioner', before the 'Adjudicating Authority' / 'Tribunal', a photocopy of the 'Instrument / Document', was projected

and hence this 'Tribunal', safely and securely holds that the 'Non-compliance' of the ingredients of the 'Indian Stamp Act, 1899', the 'Kerala Stamp Act, 1959', result in these documents not to be enforceable in 'Law'.

42. One cannot brush aside, a 'primordial fact' that in the instant case, the main CP (IB) / 45 / KOB / 2022, before the 'Adjudicating Authority' / 'Tribunal' (filed by the 'Appellant / Petitioner') is founded upon the 'Non Payment', as per the 'Settlement Agreement' dated 16.07.2020. Although, in the 'Settlement Agreement', the Respondent / Corporate Debtor, was described as 'Confirming Party', the Respondent / Corporate Debtor, had specifically guaranteed to pay the 'Appellant / Petitioner / Operational Creditor', if the 'Second Party' commits 'Default' on the 'Loan Obligation' and 'Instalment'.

43. There is no second opinion of a candid fact that when the main Petition in CP (IB) / 45 / KOB / 2022, was filed by the Appellant / Petitioner / Operational Creditor, against the 'Guarantor' of the Respondent / Corporate Debtor, pursuant to the 'Settlement Document', the 'Date of Default', as mentioned in the Part – IV of the main CP (IB) / 45 / KOB / 2022, under Particulars of Debt (vide Page 63 of the Appellant Paper Book), is not a 'correct' one, especially, when the 'aspect of

Default', was committed by 'Al Badr Salr', in payment of 'First Instalment', on 01.08.2020 and it cannot be forgotten that 01.08.2020 occurs between 25.03.2020 to 24.03.2021, during the 'Suspended Period', in respect of the initiation of 'Corporate Insolvency Resolution Process', and that 'No Petition', can be preferred, under Section 7, 9 and 10 of the I & B Code, 2016, because of the 1st Proviso to Section 10A of the I & B Code, 2016, coupled with the Notification in S.O.4638(E) dated 22.12.2020. Only to escape from the ambit of the ingredients of Section 10A of the 'Code', the 'Appellant / Petitioner / Operational Creditor', had not given the real and correct date, as regards the 'Default'.

44. Suffice it for this 'Tribunal', to relevantly point out that the real 'Date of Default', fell during the 'Suspended Period', to initiate the 'CIRP Proceedings', against the concerned, under the 'I & B Code, 2016'.

45. It is significantly pointed out that 'I & B Code, 2016 Proceedings', are 'Summary in Character'. It must be borne in mind that in an 'Application', under Section 9 of the 'Code', 'no elaborate enquiry', like a regular 'Trial' of a 'Civil Suit', is conducted. No wonder, the I & B Code, 2016, is not a 'Debt Enforcement Procedure'.

46. At this juncture, this 'Tribunal', worth recalls and recollects the Judgment of this 'Tribunal', dated 15.09.2022, between Trafigura

India Private Limited Vs TDT Copper Limited (vide Company Appeal (AT) (INS.) No. 742 of 2020), wherein, at Paragraph 17, it is observed as under:

17. ``The Adjudicating Authority has considered the Settlement Agreement and rightly come to the conclusion that default of instalment of Settlement Agreement does not come within the definition of 'operational debt' as it does not fall within the definition of additional debt as per Section 5(21) of the IBC and further prayer made by the Corporate Debtor that the matter be referred to the Arbitration under Section 8 of the Arbitration and Conciliation Act, the Adjudicating Authority has also rightly held that the role of National Company Law Tribunal is very limited while exercising its power under Section 7, 9 and 10 of the IBC, 2016, it is beyond the scope of Section 9 of the IBC.'`

47. Be that as it may, in the light of the aforesaid detailed qualitative discussions, this 'Tribunal' on a careful consideration of contentions advanced on behalf of the 'Appellant', taking note of the facts and circumstances of the instant case, in an integral manner, comes to an 'inevitable', 'irresistible' and 'inescapable' conclusion that the 'impugned order', dated 03.05.2023 in CP (IB) / 45 / KOB / 2022, passed by the 'Adjudicating Authority' ('National Company Law Tribunal', Kochi Bench), in 'dismissing' the 'Section 9 Petition', preferred by the 'Appellant / Petitioner / Operational Creditor', does not suffer from any material irregularity or patent illegality in the 'eye of Law'. Consequently, the 'Appeal', is devoid of merits and it fails.

Result:

In fine, the instant Comp. App (AT) (CH) (INS.) No. 272 of 2023, for the reasons assigned by this `Tribunal`, is `Dismissed`. No costs.

[Justice M. Venugopal]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

28 / 08 / 2023
SR / TM