



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

**CP(IB)/45/KOB/2022**

*(Under Section 9 of Insolvency and Bankruptcy Code, 2016 read with Rule 6 Of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.*

***In the matter of:***

M/s. Zhejiang Industrial Group Co., Ltd, No. 1, Xingye Road, Ganlan Dinghai, Zhoushan, Zhejiang, China.

**... Operational Creditor.**

**-Versus-**

M/s. Al Badr Seafoods Private Limited, Plot No. 34, Cochin Special Economic Zone, Kakkanad, Kochi, Ernakulam- 682 037.

**... Corporate Debtor.**

***Coram:***

Shri. P. Mohan Raj  
Shri. Satya Ranjan Prasad

Member (Judicial)  
Member (Technical)

***Parties/ Counsel present (through video conference):***

For Operational Creditor	Mr. Ramesh Cherian John, Adv.
For Corporate Debtor	M/s. Sunil Jain & Co. LLP, CA

**Order reserved on: 12.04.2023  
Order pronounced on: 03.05.2023**

**ORDER**

1. Under consideration is Petition No. CP(IB)/45/KOB/2022 filed by Operational Creditor M/s. Zhejiang Industrial Group Co., Ltd against M/s. Al Badr Seafoods Private Limited invoking Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The relief sought is to initiate Corporate Insolvency Resolution Process (hereinafter referred as CIR Process) against M/s. Al Badr Seafoods Private Limited for the default amount of **Rs. 8,52,78,758.79/- (Rupees Eight Crore Fifty-Two Lakhs Seventy-Eight**



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**Thousand Seven Hundred Fifty-Eight and Seventy-Nine Paise Only)** in respect of credit facility availed from the Operational Creditor.

2. The facts as narrated in the application and explained by the Operational Creditor are summarized hereunder:

- i. The Operational Creditor is a company registered under the Company Laws of China engaged in the business of processing and distribution of seafood products. The Corporate Debtor is a company registered under the Companies Act, of 1956. The company is engaged in the business of processing and distribution of seafood. The Corporate Debtor approached the Operational Creditor for purchase of Frozen Precooked Skip Jack Tuna Loins. Thereafter, the Operational Creditor and the Corporate Debtor entered into Sales Contracts bearing no. XYDE19018 dated 24<sup>th</sup> May 2019 and XYLDE19023 dated 26<sup>th</sup> June 2019 detailing the agreed conditions for the sale of the said Goods. As per the specifications and requirements of the Corporate Debtor the Operational Creditor sold and supplied the aforesaid goods to the Corporate Debtor. The Operational Creditor had raised three invoices, that remained unpaid.
- ii. It is stated that despite continuous reminders and follow-ups the Corporate Debtor failed to make any payment as per the agreed payment terms. It was only upon much persuasion and follow-up by the Operational Creditor, the Corporate Debtor through its associate enterprise namely Al Badr Sarl- a Tunisian entity, proposed to release the outstanding debt in instalments. The Operational Creditor with the view to resolve the matter in an amicable manner accepted the proposal of the Corporate Debtor and its associate enterprise. Pursuant whereof a settlement agreement dated 16<sup>th</sup> July 2020 was drawn between the Operational Creditor, Al Badr Sarl, and the Corporate Debtor.
- iii. It is stated that in terms of the settlement agreement it was agreed that Al Badr Sarl will release payment of USD 1 Million towards the full and final settlement of outstanding debt to the Operational Creditor in 10 equal instalments of USD 100,000.00 each; the Corporate Debtor stood as guarantor



to this settlement agreement by its associate enterprise i.e. Al Badr Sarl. It is made clear that in the event, Al Badr Sarl failed 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 Corporate Debtor and Al Badr Sarl. However, despite agreeing as aforesaid Al Badr Sarl could not adhere to the payment terms, first instalment of USD 100,000.00 due and payable on or before 31<sup>st</sup> July 2020 was paid by Al Badr Sarl in parts where USD 60,000.00 was paid on 17<sup>th</sup> September 2020 and USD 40,000.00 was paid on 6<sup>th</sup> October 2020 and Al Badr Sarl vide its email dated 28<sup>th</sup> December 2020, inter-alia, requested further time to release payment towards the overdue instalments on the pretext of the market situation.

- iv. Thereafter, the Operational Creditor through its Advocate sent a Demand Notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 dated 30<sup>th</sup> April 2021 to the Corporate Debtor demanding the payment of the unpaid operational debt of USD 1,121,450.00 (United States Dollars One Million One Hundred Twenty-One Thousand Four Hundred Fifty Only) requesting the Corporate Debtor to unconditionally repay the unpaid operational debt in full within ten days on receipt of the Demand Notice under Section 8 of the Insolvency and Bankruptcy Code, 2016. The Corporate Debtor was also informed that on failing to repay the said amount the Operational Creditor shall initiate Corporate Insolvency Resolution Process under the provisions of the Insolvency and Bankruptcy Code, 2016.
- v. It is stated that on 14<sup>th</sup> May, 2021 the Corporate Debtor sent a letter to the Operational Creditor disputing the payment of the operational debt to the Operational Creditor, alleging that Corporate Debtor is not a signatory to the settlement agreement as a confirming party which was done without authority or information of the Corporate Debtor and the Corporate Debtor has no relation with the Al Badr Sarl or has any branch in Tunisia. It is stated that the disputes raised by the Corporate Debtor in its letter dated 14<sup>th</sup> May, 2021 were



IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOCHI BENCH

CP(IB)/45/KOB/2022

*In re: M/s. Zhejiang Industrial Group Co., Ltd Vs. M/s. Al Badr Seafoods Private Limited.*

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raised for the first time clearly with utter disregard and in contradiction to the correspondences and acknowledgments in this regard. It is further stated that the Corporate Debtor has miserably failed and defaulted in discharging the debt despite several reminders. The Corporate Debtor did not dispute the due amount prior to receipt of the Demand Notice dated 30th April. 2021 and had knowingly entered into the Settlement Agreement dated 16<sup>th</sup> July 2020. Therefore, the debt is an accepted fact and the Corporate Debtor is liable to pay the same to the Operational Creditor.

3. Reply of Respondent:- On 29.11.2022, the Corporate Debtor filed its reply statement and stated that the Petitioner and the Buyer entered into a Sales Contract Purchase of Frozen Precooked Skip Jack Tuna Loins by the respondent from the Petitioner, however, the deal was not made done in favour of the Respondent nor any goods have been shipped ever to the address of Respondent Company. It is stated that the sales contract mentioned in the application are not executed with the Respondent. In pursuance to the abovementioned sale Contract, Invoices bearing nos. XYDPZ19E0526 dated 10.06.2019, XYDPZ19E0587 dated 01.07.2019 and XYDPZ19E0623 dated 08.07.2019 as referred to in the Petition were made on the buyer by the petitioner, for the amount of USD 290,700.00, USD 465,375 and USD 465,375 respectively. The goods were also delivered to the Buyer which is also evidenced through the Bill of Lading bearing nos. 582578820 dated 17.06.2019 as issued by the Shipping Company MAERSK LINE, 576302860 dated 08.07.2019 as issued by the Shipping Company MAERSK LINE and MEDUN3468877 dated 15.07.2019 as issued by the MEDITERRANEAN SHIPPING COMPANY S.A.' on the name and address of the Buyer.

4. It is stated that the execution of the Settlement Agreement dated 16.07.2020 by the Respondent company in the capacity of Confirming Party is altogether denied due to the reason that 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



IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOCHI BENCH

CP(IB)/45/KOB/2022

*In re: M/s. Zhejiang Industrial Group Co., Ltd Vs. M/s. Al Badr Seafoods Private Limited.*

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agreement. Even the name of the signatory is not mentioned in the agreement and as such. this agreement is not valid.

5. It is stated that the Petitioner Company is claiming payment from the Respondent Company and making it liable to make the full and final amount of Outstanding Debt of USD 1,121,450.00, then why the Operational Creditor shipped another consignment of 100 Pallets of Frozen Precooked Tuna Loins amounting to USD 513,825.00 vide Invoice bearing No. XYDPZ19E0711 dated 29.07.2019 through the Bill of lading bearing no. MEDUN3746991 dated 06.08.2019 as issued by the MEDITERRANEAN SHIPPING COMPANY S.A.

6. It is stated that in the provisions of Section 9 (5) (iii) of the Insolvency and Bankruptcy Code, 2016, there are sufficient grounds for rejecting the application made under Section 9 (2), read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, which is that there is already a pre-existing dispute amongst the Petitioner and the Respondent in the manner that it is still a disputed matter to be proved by the petitioner regarding that who has actually received the goods from it and which entity is ultimately liable to make the payments thereof. Since the Respondent had sufficient evidence in the record that the goods have never been delivered to the Respondent Company as produced and also communicated to the petitioner by way of Reply dated 14.05.2021 to the Demand Notice dated 30.04.2021 received on 05.05.2021, as issued by the Petitioner. However, the petitioner company failed to establish and prove that the Respondent company is liable to make any payment to the Operational Creditor.

7. Contents of Rejoinder:- On 05.01.2023, the Petitioner filed their rejoinder and stated that the Corporate Debtor on one hand has admitted the fact that the Petitioner and the Buyer Company entered into a sales contract by the Respondent, however, they are denying the same stating that the deal was in the favour of the Respondent/ Corporate Debtor and the Corporate Debtor has even gone to the extent of alleging that the Sales Contracts bearing no. XYLDE 19018 dated 24th May 2019 and bearing no. XYLDE 19023 dated 24th June 2019 produced as Annexure C & C1 of the present Company Petition have not been



executed by the Corporate Debtor, whereas the Corporate Debtor is the party executing the Sales Contract and Operational Creditor has acted upon the terms as agreed between under the Sales Contract, thus the Corporate Debtor is estopped from making any submission contrary thereto.

8. It is stated that both parties entering into a contract are bound by the terms of the contract. The seller is under the obligation to deliver the said goods to the destination as specified in the sales contract. In terms of the sales contracts, the Corporate Debtor required the Goods to be delivered to Tunisia and the Operational Creditor acted as per the specification of the sales contract and delivered the goods to Tunisia. Therefore, the objection raised by the Corporate Debtor that the Goods were not delivered to them is immaterial and is made with ulterior motives to escape its liability. It is further stated that in terms of the sales contract bearing no. XYLDE19018 dated 24<sup>th</sup> May 2019 it is agreed that the Buyer/Tunisian entity will be named as Consignee (in whose name goods are shipped) and terms of sales contract bearing no. XYLDE19023 dated 26th June 2019 specifies that payment will be done by both India and Tunisia.

9. It is stated that the settlement agreement bears the signature of the then director of the Respondent Company Mr. Badreddine El Horry and is a validly executed agreement between the parties thereto. The director of the Corporate Debtor by its own representation was authorized and is well within the rights to execute the agreement for and on behalf of the Corporate Debtor. Therefore, the settlement agreement is binding on the Respondent/Corporate Debtor. It is further stated that the said settlement agreement was duly acted upon and in terms of the said settlement agreement, the Operational Creditor received payment towards first instalment that too in tranches and after the agreed date of payment of the first instalment.

10. It is stated that the Operational Creditor is only claiming payment towards the invoices raised as the Corporate Debtor has not made payment for the said invoices and the invoice referred by the Corporate Debtor in its reply is of no relevance to the present Petition filed by the Operational Creditor. Therefore, the whole stand of the Respondent is an afterthought and the present objection is only



an abuse of the process of law as the same does not disclose any valid objection to the present Petition. It is further stated that the Hon'ble Supreme Court has held in plethora of cases that CIRP can be initiated against a corporate entity who has given a guarantee to secure the dues. The objection raised by the Respondent is very well settled by the Hon'ble Supreme Court in LAXMI PAT SURANA Vs. UOI & ANR. (2021) 8 SCC 481 that the liability of the guarantor is co-extensive with that of the principal borrower and thus enables the creditor to initiate CIRP against a corporate debtor. It is also stated that the Operational Creditor supplied goods to the Corporate Debtor and delivered to its holding company in terms of the Sales Contracts and considering internal arrangement between the Corporate Debtor and its holding company vide its email dated 28<sup>th</sup> February 2020 the Corporate Debtor even agreed to take payment from the holding company of the Corporate Debtor vide settlement agreement dated 16.07.2020 where the Corporate Debtor stands as a confirming party/ guarantor of performance of the second party i.e. the Buyer. Therefore, the objections raised by the Respondent are baseless where the Corporate Debtor clearly owns debt to the Operational Creditor and even stands guarantee to the performance of the settlement agreement by its holding company.

11. It is further stated that the Respondent has raised all these frivolous contentions for the very first time after the demand notice was issued with an ulterior motive to escape from its liability of making payment to the Petitioner as per the Settlement Agreement dated 16.07.2019. Thus, 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.

**Points for consideration are:**

1. Whether the documents rely by the petitioner are valid and enforceable in law?
2. Whether the date of default mentioned in the petition is correct?
3. Whether the default date falls on the suspended period for initiation of CIRP under Section 10 A of IBC, 2019?



4. Whether failure to pay the instalment due as per the settlement deed dated 16.07.2020 is an operational debt?

**Point No.1:**

12. This petition is filed by a foreign company having its office at China, through its power Agent. The power of Attorney deed was executed at China on 25.10.2021, the executant appeared before the Notary on 19.11.2021 confirmed the execution, then the deed was issued with Notary certificate dated 21.11.2021. On 20.12.2021 stamp paper for the value of Rs.100/- was purchased in Delhi, India adds with the deed and used the power of attorney for filing this petition. There is no reference about the date when the power of Attorney was received in India at first. Of course, within one month from the date of certification of notary, the stamp paper was purchased in the names of the parties to the documents, but it does not confirm that whether the stamp paper was purchased after the receipt of executed document in India at first? or even before the receipt of document in India the stamp was purchased?

13. The power of Attorney was executed in China and after the execution received in India, in this regard section 18 of India Stamp Act 1899, deals with the Adjudication of documents executed in foreign countries and received in India. The document was not adjudicated by the collector Stamps as provided under section 18(2) of Indian Stamp Act 1899. Of course, in **Anitha Rajan v. Revenue Divisional Officer, AIR 2010 Ker153**, the Kerala High Court after referring two Madras High Court Judgments held that it was not necessary to produce the power of attorney, even if executed outside India, for adjudication if it was sufficiently stamped. In the supra-Kerala High Court case and two other Madras High Court cases, the fact is that all the power of Attorney documents were executed in foreign countries but they were engrossed on sufficient value of Indian Stamp papers, in the said context the said judgments were delivered. In this case the power of attorney deed was not executed in Indian Stamp papers, but Indian Stamp paper was purchased in India and prefixed with the document. In the situation it is held that the Power of Attorney filed in this case is not valid and unenforceable in India, in the absence of compliance of provisions of Indian Stamp Act, 1899.



IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOCHI BENCH

CP(IB)/45/KOB/2022

In re: M/s. Zhejiang Industrial Group Co., Ltd Vs. M/s. Al Badr Seafoods Private Limited.

14. The other documents rely by the petitioner are sale contract dated 24.05.2019 & 26.06.2019 and settlement agreement dated 16.07.2020. These agreements were executed in counter parts. All the three agreements were engrossed on an unstamped paper. As per Article 5(g) of Kerala Stamp Act 1959, these documents are chargeable with stamp duty of Rs.200/-. Section 34 of Kerala Stamp Act 1959 is pari metria to section 35 of Indian Stamp Act, 1899 prohibits the admission of any document chargeable with stamp duty unless the document is duly stamped. The effect and consequences of an unstamped instrument is explained in section 34 of the Kerala Stamp Act 1959. As per the said section the unstamped instrument cannot be used for any purpose. For validating the unstamped instrument, the person shall pay stamp duty with ten times penalty. Further section 34 of Kerala Stamp Act 1959 clearly says that the unstamped instrument cannot be used for any purpose unless the stamp duty and penalty is paid.

**34. Instrument not duly stamped inadmissible in evidence, etc.** - *No instrument chargeable with duty shall be admitted in evidence for any pur-pose by any person having by law or consent of parties' authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:*

*Provided that-*

*(a) any such instrument not being an instrument chargeable with a duty of [twenty paise] or less than [twenty paise] shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same chargeable, or in the, required to make up such duty, together with a penalty of five rupees or, when ten times the amount of the pro per duty or deficient portion thereof exceeds five rupees, of a sum equal in ten times such duty or portion;*



IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOCHI BENCH

CP(IB)/45/KOB/2022

*In re: M/s. Zhejiang Industrial Group Co., Ltd Vs. M/s. Al Badr Seafoods Private Limited.*

It is true when the insufficiently or unstamped instruments are produced the same should be impounded and taken further action as per section 33 of Kerala Stamp Act 1959, akin to Section 33 of Indian Stamp Act 1899, but the unstamped or insufficiently stamped original documents alone can be impounded, the photo copies cannot be impounded because section 2(14) defines “Instrument” their photo copy or secondary evidence is not considered as Instrument. In this regard the Apex court held in **Hariom Agarwal vs Prakash Chand Malviya 2008(3) CTC 457** that a photo copy of an instrument which is not duly stamped cannot be validated by impounding and cannot be admitted as secondary evidence, instrument under Section 2(14) means only original and does not include a copy thereof. In this case on the petitioner side only photo copy of the document is presented hence further action could not be taken. In these circumstances it is answered that because of non-compliance of provisions of Stamp Acts, the documents rely by the petitioner are invalid and unenforceable in law.

**Points No.2 & 3:**

15. The case of petitioner is the goods were delivered to Al Badar Sarl holding company of the corporate debtor at Tunisia in terms of the sale contracts dated 24.05.2019 & 26.06.2019. The Invoices were raised for the supplied goods in the name of corporate debtor but mentioning Tunisia address. The contention of the petitioner is when the holding company of corporate debtor Al Badar Sarl failed to pay the payment as agreed, Tri parties’ settlement was entered on 16.07.2020. By the said settlement Al Badar Sarl agreed to pay the amount in ten instalments as set out below:

16. That the Second Party agrees and undertakes to pay the Outstanding Amount to the First Party in instalments and the Confirming Party guarantees the performance of the Second Party and as per the following payment schedule:

<i>S. No.</i>	<i>Payment Date</i>	<i>Amount (USD)</i>
<i>1.</i>	<i>On or before 31<sup>st</sup> July, 2020</i>	<i>100,000</i>
<i>2.</i>	<i>On or before 31<sup>st</sup> August, 2020</i>	<i>100,000</i>



IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOCHI BENCH

CP(IB)/45/KOB/2022

*In re: M/s. Zhejiang Industrial Group Co., Ltd Vs. M/s. Al Badr Seafoods Private Limited.*

3.	<i>On or before 30<sup>th</sup> September, 2020</i>	<i>100,000</i>
4.	<i>On or before 31<sup>st</sup> October, 2020</i>	<i>100,000</i>
5.	<i>On or before 30<sup>th</sup> November, 2020</i>	<i>100,000</i>
6.	<i>On or before 31<sup>st</sup> December, 2020</i>	<i>100,000</i>
7.	<i>On or before 31<sup>st</sup> January, 2021</i>	<i>100,000</i>
8.	<i>On or before 28<sup>th</sup> February, 2021</i>	<i>100,000</i>
9.	<i>On or before 31<sup>st</sup> March, 2021</i>	<i>100,000</i>
10.	<i>On or before 30<sup>th</sup> April, 2021</i>	<i>100,000</i>

17. That the Second Party agrees and undertakes that, if it fails to adhere to the aforesaid payment schedule, in that case, the entire Outstanding Amount, less any amount paid by the Second Party under this Agreement, shall immediately become due and payable jointly and severally by the Second Party and the Confirming Party to the First Party.” In the settlement agreement the corporate debtor is termed as confirming party. The second party to settlement Al Badar Sarl failed to pay the first instalment amount of USD 100,000/-on or before 31.07.2020. The first payment of USD 60,000.00 was paid on September 2020 and USD 40,000.00/- was paid on 6<sup>th</sup> October 2020, subsequently payments was not made but sought for time. Now this petition has been filed against the corporate debtor being a guarantor to the second party. This is made clear in the petition that this petition is filed, because of the payment was not made in accordance with the settlement agreement.

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.



IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOCHI BENCH

CP(IB)/45/KOB/2022

*In re: M/s. Zhejiang Industrial Group Co., Ltd Vs. M/s. Al Badr Seafoods Private Limited.*

19. Thus, this petition is rest upon the settlement deed dated 16.07.2020. The second party Al Badar Sarl failed to pay 1<sup>st</sup> 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 1<sup>st</sup> 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



IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOCHI BENCH

CP(IB)/45/KOB/2022

*In re: M/s. Zhejiang Industrial Group Co., Ltd Vs. M/s. Al Badr Seafoods Private Limited.*

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.

21. In view of the answers arrived to the above points this petition is **DISMISSED**.

22. Registry is directed to send e-mail copies of the order forthwith to all the parties and their counsel's concern.

23. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

24. File be consigned to records.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD  
Date: 2023.05.03 16:00:33 +05'30'

**(Satya Ranjan Prasad)**  
**Member (Technical)**

PANDIAN  
MOHAN RAJ

Digitally signed by PANDIAN  
MOHAN RAJ  
Date: 2023.05.03 14:40:34  
+05'30'

**(P. Mohan Raj)**  
**Member (Judicial)**

Signed on this 3<sup>rd</sup> day of May, 2023.

Kaushal P.S.