

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI**

**Chennai Bench**

**(APPELLATE JURISDICTION)**

**Company Appeal (AT)(CH) (Ins.) No. 167 of 2021**

**(Appeal Under Section 61(1) of the I&B Code, 2016)**

**[Arising out of impugned order dated 28.05.2021 passed by the Adjudicating Authority (National Company Law Tribunal) Bengaluru Bench in CP No.(IB)61/BB/2020]**

**In the matter of:**

**Drip Capital Inc.  
No. 555 Bryant St.  
#356, Palo Alto,  
CA 94301,  
United States of America**

**...Appellant**

**Vs.**

**Concord Creations(India) P. Ltd.  
#26/1, 1<sup>st</sup> Floor,  
Regus Gem, IBIS Hotel,  
Bommanahalli,  
Bangalore – 560 068.**

**...Respondent**

**Present**

**Appellant:**

**Mr. Chandrashekhara Chakalabbi, Advocate for Mr. Dharmaprabhas, Advocate**

**Respondent:**

**Notice served (No Appearance)**

**J U D G E M E N T**

**(Virtual Mode)**

**M. Venugopal (J)**

**Introduction**

The Appellant / Petitioner/Financial Creditor has preferred the instant 'Appeal' before this Tribunal as an 'Aggrieved' person being dissatisfied with the impugned order dated 28.05.2021 passed by the 'Adjudicating Authority' (National Company Law Tribunal) Bengaluru Bench in C.P.(IB) No.

61/BB/2020(Filed under Section 7 of the I&B Code, 2016 read with Rule 4 of I&B (AAA) Rules, 2016).

2. The 'Adjudicating Authority' ('National Company Law Tribunal'), Bengaluru Bench while passing the impugned order dated 28.05.2021 in C.P.(IB) No. 61/BB/2020 (Filed by the Appellant / Petitioner / Financial Creditor) at paragraph 5 to 10 had observed the following: -

*"5. we have perused the Receivables Purchase Factoring Agreement dated 12.12.2018, Irrevocable undertaking for recourse on Corporate Debtor, dated 12.12.2018.*

*6. On perusal of the Demand Promissory Note dated 12.12.2018 granted by the Corporate Debtor in favour of the Petitioner, it is established that the Respondent admits to the financial debt of USD 400000 or rupee equivalent along with interest from such date of demand at aggregate rate of (5.7 + 4.0) % per annum or such other rate, and at such rest (monthly or otherwise).*

*7. At this point it is relevant to note that the Hon'ble Supreme Court in the case of Mobilox Innovations Private Limited v. Kirusa Software Private Limited has inter alia held that the I & B Code, 2016 is not intended to be a substitute to a recovery forum and cannot be used to jeopardise the*

*financial health, or an otherwise solvent company by pushing it into insolvency. It is also pertinent to mention that the Hon'ble Supreme Court in the case of K.Kishan v. Vijay Nirman Company Private Limited clarified that the Petitioners cannot use IBC either prematurely or for extraneous considerations or as substitute for debt enforcement procedures.*

8. *On perusal of the MCA master data updated by the Respondent company, it is seen that as on 31.03.2019, it is active compliant and is into manufacturing activity. It has a paid up capital of Rs. 15 crores, though reduced to Rs. 5.39 crore due to negative reserves and surplus. It has tangibles assets of Rs. 4.46 crore and trade receivables of Rs. 7.59 crore. Its total current assets have increased in the last three years and stand at Rs. 19.46 crore. It had net revenue from operations of Rs. 19.31 crore which has increased over the last three years and shows a growth rate of 46% over last year. It has a net profit of Rs. 77 lakhs and an improving and positive return to equity ratio. Thus prima facie, it has sufficient income and assets to repay its debt and cannot be termed as insolvent.*

9. We may add that the impact of the present financial distress caused by the global novel corona virus pandemic necessitating a nationwide lockdown, cannot be ignored. Major decisions have been taken to protect industry from its effects, to inject economic stimulus and to revive the economy. More specifically, on 24.03.2020 the Legislature increased the minimum threshold of default from Rs. 1 Lakh to Rs. 1 Crore so that the Code is not used merely for recovery of debt. Modifications and suspension of various provisions of the Code have been initiated so that companies facing financial stress due to the pandemic can be supported rather than be pushed into CIRP, else in the present scenario they may end up in liquidation and lose value further, which is the not objective of the IBC or other enactments. Steps have also been taken to ensure availability of more funds in the hands of businesses so that they can cope with the present economic scenario and restart their business.

10. In light of the above grim economic scenario and the fact that the Respondent is not an insolvent company, we are of the considered view

*that the Respondent should be given some more time to repay the debt. Considering the amount involved, its financial status and the present economic scenario, despite the argument of the Petitioner that it is a fit case for admission, we are of the view that it would be fair to allow the Respondent some more time. The Code cannot be used to jeopardise the financial health of an otherwise solvent company by pushing it into insolvency, which would be against the objects of the Code.”*

and disposed of the petition without costs by directing the Respondent/Corporate Debtor to repay the balance due or the amount as settled with the petitioner within a period of six months failing which the petitioner would be at liberty to file a fresh petition for admission.

### **Appellant’s Submissions**

3. Challenging the impugned order dated 28.05.2021 in C.P.(IB) No. 61/BB/2020 passed by the ‘Adjudicating Authority’ (‘National Company Law Tribunal’), Bengaluru Bench, the Learned Counsel for the Appellant contends that the impugned order is invalid and an illegal one because of the fact that the ‘Adjudicating Authority’ after accepting the fact that there was a ‘debt’ due and payable to the Appellant / Financial Creditor by the Respondent / Corporate Debtor, by virtue of the reason that the said debt was defaulted by

the Respondent / Corporate Debtor, had no basis to defer the initiation of CIRP' against it.

4. According to the Learned Counsel for the Appellant, the 'Adjudicating Authority' had no jurisdiction to evaluate the financial health of the 'Corporate Debtor' for the purpose of admitting 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor'. Furthermore, *'inability to pay the debt'* is also not a consideration i.e. mandatory for initiating 'CIRP' against the 'Corporate Debtor'.

5. The Learned Counsel for the Appellant comes out with a stand that the Respondent / Corporate Debtor had entered its 'appearance' but had not filed the 'Reply' and also not filed the 'objections'. Added further, the application was based on the default committed by the 'Corporate Debtor' in 2019 and that the Appellant / Petitioner's application under Section 7 of the I&B Code, 2016 was filed prior to the onset of COVID Pandemic.

6. The Learned Counsel for the Appellant contends that the 'Adjudicating Authority' had committed an error in making an observation in the impugned order to the effect that the application u/s 7 of the Code filed by the Appellant / Petitioner was one for recovery. In fact, the Appellant / Financial Creditor / Petitioner is interested in the revival of the Company that can take care of all the claims and run the business.

7. It is represented on behalf of the Appellant that the 'Adjudicating Authority' in the absence of necessary pleadings by the 'Corporate Debtor', had assumed the defenses that could have been taken by the 'Corporate Debtor'.

## **Claim**

8. Section 3(6) of the 'I&B' Code, 2016 defines claim meaning (a) a right to payment, whether or not such right is reduced to judgement, fixed, disputed, undisputed, legal, equitable, secured or unsecured (B) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgement, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.

## **Corporate Debtor**

9. Section 3(8) of the Code defined Corporate Debtor' meaning a Corporate Person who owes a debt to any person.

## **Creditor**

10. Section 3(10) of the Code defines 'Creditor' meaning any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

## **Debt**

11. Section 3(11) of the Code defines 'Debt' means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

## **Default**

12. Section 3(12) of the Code defines 'Default' means non-payment of debt when whole or any part or instalment of the amount of debt has become due

and payable and is not paid by the debtor or the corporate debtor, as the case may be.

### **Circumstances for Admission of Application**

13. It is relevantly pointed out that the 'Adjudicating Authority' is not a 'Court of Law' and that 'CIRP' is not a litigation. As a matter of fact, if the 'Adjudicating Authority' is subjectively satisfied as to the existence of default and arrive at a conclusion that the application is a complete one and further that no disciplinary proceedings are pending against the proposed 'Resolution Professional' it is incumbent upon it to admit the application. In reality, no other 'yardstick' is required to look into any other requirement for admission of the application.

14. It cannot be gainsaid that an initiation of CIRP does not amount to recovery proceedings and that the 'Adjudicating Authority' at the time of determination as to whether to admit or reject an application u/s 7 of the 'I&B' Code is not to take into account the reasons for the Corporate Debtor's default.

### **Appraisal**

15. In the application filed by the Appellant / Financial Creditor to initiate CIRP (u/s 7 of the I&B Code) read with Rule 4 of the 'Insolvency and Bankruptcy'(application to Adjudicating Authority) Rules, 2016 (30.11.2019) under part IV 'particulars of financial debt' it is mentioned in S.No. 1 and 2 as under:-

1.	TOTAL AMOUNT OF DEBT GRANTED	Under the Receivables Purchase Factoring Agreement dated December 12, 2018 (RPA) executed between the
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		<p>Financial Creditor and the Corporate Debtor, read with an Irrevocable undertaking for recourse against Corporate Debtor in case of happening of Commercial Dispute, issued in favour of Financial Creditor dated December 12, 2018(Undertaking) and the request for Corporate Debtor dated July 9, 2019, the Financial Creditor paid an aggregate amount of USD 36,532.00 (USD Thirty Six Thousand Five Hundred and Thirty Two only) to Corporate Debtor towards assignment of its 3 invoices under Invoice Number CCPL/M011/19-20, CCPL/M013/19-20 and CCPL/M014/19-20, details of which are specified in Invoice Schedule (together referred to as "Invoices"). The said Invoices were primarily payable by Aquarius USA Inc. at Sight through bank transfer. The Invoices mentioned that it has been assigned to Financial Creditor by stating 'This invoice has been sold and assigned to Drip Capital Inc., 555 Bryant St #356 Palo Alto, CA 94301 USA'. Further, the Receivables under the Invoices were assigned by Corporate Debtor to the Financial Creditor on with recourse basis under the Undertaking, against the payment of aforesaid aggregate amount i.e. in case of happening of Commercial Dispute or failure to repay the aforesaid aggregate amount, the Financial Creditor shall have right of recourse to the Corporate Debtor for recovery of aforesaid payments.</p> <p>A true copy of the Receivable Purchase Factoring Agreement dated 12.12.2018 executed between the Financial Creditor and the Corporate Debtor is annexed hereto and marked as <b>Exhibit 5.</b></p> <p>A true copy of the Undertaking dated 12.12.2018 executed by the Corporate Debtor is annexed hereto and marked as <b>Exhibit 6.</b></p> <p>A true copy of the Invoice Schedule containing the outstanding dues payable to Financial Creditor is annexed hereto and marked as <b>Exhibit 7.</b></p> <p>True copies of the Request cum assignment deed by Corporate Debtor along with copies of invoices are annexed hereto and marked as <b>Exhibit 8.</b></p> <p>The date of payment of purchase consideration to Corporate Debtor towards aforesaid invoices and the Repayment Due Date are more particularly described in Invoice Schedule (<b>Exhibit 7</b>).</p>
2.	<p>AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)</p>	<p>As per the clause 2 &amp; 3 of the Undertaking of Corporate Debtor read with clause 4.5(f) of the RPA, upon happening of any Commercial Dispute, Corporate Debtor is required to pay the Outstanding Receivables to Financial Creditor within 3 days from the date of demand and Financial Creditor has full recourse on Corporate Debtor with respect to such Outstanding Receivables.</p> <p>Accordingly, upon receiving the email from Aquarius USA Inc. dated 12/09/2019 clearly establishing Commercial Dispute amongst Corporate Debtor and Aquarius USA, Inc., Financial Creditor exercised recourse on Corporate Debtor by raising official demand vide its letter dated October 14, 2019("Demand") for repayment of Outstanding Receivables (Financial debt) under the overdue Invoices.</p> <p>A true copy of email dated 12/09/2019 sent by Aquarius USA Inc. to Financial Creditor is annexed herewith as <b>Exhibit 9.</b></p>

	<p>A true copy of the demand made by the Financial Creditor dated October 14, 2019 against the Corporate Debtor is annexed herewith as <b>Exhibit 10</b>.</p> <p>As on the date of this application for insolvency, the Corporate Debtor has failed to repay the amounts to Financial Creditor as per its aforesaid Demand read with RPA and Undertaking, and therefore the Corporate Debtor is in default of its acknowledged obligations to pay its financial debt due to the Financial Creditor.</p> <p>As on November 30<sup>th</sup>, 2019, the default amount under the RPA dated December 12<sup>th</sup>, 2018 read with Undertaking dated December 12<sup>th</sup>, 2018 (annexed as <b>Exhibit 5 and Exhibit 6</b>) is USD 38,213.38 (US Dollar Thirty-Eight Thousand Two Hundred and Thirteen and Thirty-Eight cents Only) approximately equivalent to INR 27,39,899.33/- (INR Twenty Seven Lakh Thirty Nine Thousand Eight Hundred and Ninety Nine and Thirty Three Paise only) along with other amounts due as per the RPA and other allied documents.</p> <p>The initial date of default by the Corporate Debtor is October 17, 2019.</p> <p>The computation relating to the default amount and days of default is annexed hereto and marked as <b>Exhibit 7</b>.</p>
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16. Apart from the above, in part V of the application ‘particulars of financial debt’ it is mentioned as under: -

1.	<p>PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR.</p> <p>Demand Promissory Note granted by the Corporate Debtor: The Corporate Debtor has given a Demand Promissory Note Deed December 12<sup>th</sup>, 2018 in favour of the Financial Creditor. Annexed hereto and marked as <b>Exhibit 11</b> is a copy of the Demand Promissory Note.</p>
2.	<p>PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER), NOT APPLICABLE.</p>
3.	<p>RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACHED A COPY OF SUCH RECORD): NOT APPLICABLE</p>
4.	<p>DETAILS OF SUCCESSION CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION, OR COURT DECREE (AS MAY BE APPLICABLE), UNDER THE INDIAN SUCCESSION ACT, 1925 (10 of 1925): NOT APPLICABLE</p>
5.	<p>THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE (ATTACH COPY)</p> <p>The deals of the financial contracts executed between or in favour of the Financial Creditor by the Corporate Debtor are set out hereinbelow:</p> <ul style="list-style-type: none"> <li>(i) Receivables Purchase Factoring Agreement dated December 12<sup>th</sup>, 2018 (Annexed as <b>Exhibit 5</b>);</li> <li>(ii) Irrevocable undertaking for Recourse against Corporate Debtor dated December 12<sup>th</sup>, 2018 (annexed as <b>Exhibit 6</b>);</li> <li>(iii) Invoice Schedule containing the outstanding dues payable to Financial Creditor (annexed as <b>Exhibit 7</b>);</li> <li>(iv) Request cum assignment deed by Corporate Debtor along with copies of Invoices (annexed as <b>Exhibit 8</b>);</li> <li>(v) Demand made by the Financial Creditor dated October 14, 2019 against the Corporate Debtor (Annexed as <b>Exhibit 10</b>);</li> </ul>

17. The clear cut stand of the Appellant / Financial Creditor is that it had granted an export finance facility to Respondent / Concord Creations India(Pvt.) Ltd. (Corporate Debtor) as per (i) the Receivables Purchase Factoring Agreement (RPA) dated 12.12.2018 duly authorised by the Corporate Debtor through its Board Resolution dated 12.12.2018 (ii) An irrevocable Undertaking for Recourse against Corporate Debtor 12.12.2018 (Undertaking) and in addition to the above documents, the Corporate Debtor had also provided a Demand Promissory Note in favour of Financial Creditor which was dated 12.12.2018.

18. The plea of the Appellant is that under the terms of 'Receivables Purchase Factoring Agreement' read with Undertaking, the Corporate Debtor had requested the Appellant / Financial Creditor / Applicant to purchase and assigned in favour of the Financial Creditor, the receivables under the three invoices on with recourse basis. As a matter of fact, the said goods shipped under the invoices were primarily purchased by Aquarius USA Inc. each invoice mentioned that it was assigned to Financial Creditor by stating "This Invoice has been sold and assigned to the Appellant.

19. In this connection, it is pointed out on behalf of the Appellant that the Appellant / Financial Creditor had remitted payment to Corporate Debtor in respect of the purchase and consequential assignment of said three invoices, to the tune of USD 36,532.00(USD) 36,532/- only. Further, the 'Receivables' under the Invoices' were assigned by the Corporate Debtor to the Financial Creditor on with recourse basis under the Undertaking against the payment of aforesaid aggregate amount etc.

20. The Learned Counsel for the Appellant / Financial Creditor/Applicant points out that the Appellant had reminded Aquarius USA Inc. of its obligations to make payments towards the 'Invoices' directly to the Financial Creditor on Repayment Due Dates. But, the Aquarius USA Inc. had informed the Appellant / Financial Creditor through e.mail dated 12.09.2019 that the said invoices are disputed and as such, the payments cannot be made. Besides this, Aquarius USA Inc. had also advised the Financial Creditor to get in touch with the Corporate Debtor for its payment.

21. It is the version of the Appellant / Financial Creditor / Applicant that it approached the Corporate Debtor seeking details of the commercial dispute and requesting the payments to be made under the 'Recourse Undertaking' but the Corporate Debtor had failed to reply or arrange payment under the three invoices assigned to Financial Creditor. Hence, the Appellant / Financial Creditor had exercised recourse against the Corporate Debtor based on the Undertaking, by claiming amounts paid by the Financial Creditor in respect of the invoices.

22. It comes to be known that the Appellant / Financial Creditor on 14.10.2019 issued a Letter of Demand to the Corporate Debtor by exercising recourse on the Corporate Debtor, in terms of the 'Receivables Purchasing Agreement' read with duly executed undertaking in respect of repayment of the unpaid aggregate 'Outstanding Receivables' / Financial Debt. However, even after repeated reminders issued to the Corporate Debtor, in regard to the non-payment of Invoices on repayment due date, the Corporate Debtor had failed to reply to the Demand Notice or repay the Financial Debt.

23. The Learned Counsel for the Appellant / Financial Creditor/ Applicant points out that since the Corporate Debtor had defaulted in its payment obligations to the Financial Creditor and is in default of its admitted liability to pay as per the terms of 'Receivables Purchasing Agreement' read with Undertaking and the Demand, the 'CIRP' be initiated against it in accordance with Section 7 of the 'I&B' Code, 2016.

24. It is quite evident from the 'Notice of Default cum Demand' dated 14.10.2019 addressed to the Respondent by the authorised signatory of the Appellant 'Outstanding Receivables' on the due date of USD 37,585.00 together with interests, default interest, overdue fees and all other charges were claimed till the date of actual payment, to be paid by the Respondent / Concord Creations (India) Pvt. Ltd. within three days from the date of this letter.

25. In the instant case, because of the fact that the advances made by the Appellant / Financial Creditor to the Corporate Debtor was supported by the 'Irrevocable Undertaking for Recourse' and as such, it is within its ambit to demand the repayment from the 'Corporate Debtor' etc. Added further, it cannot be forgotten that the invoices purchased and assigned to the Appellant / Financial Creditor/Petitioner were with 'Recourse' and that the said advances will squarely come within the definition of Section 5(8)(e) of the 'I&B' Code, 2016 which reads as under: -

*Section 5(8) "financial debt" means a  
debt alongwith interest, if any, which is*

*disbursed against the consideration for the  
time value of money and includes-----*

*Xx*

*xx*

*xx*

*(e) receivables sold or discounted  
other than any receivables sold on non-  
recourse basis;*

26. Before the 'Adjudicating Authority' the Respondent / Corporate Debtor had entered appearance but had not filed its Reply to the application in CP No.(IB)61/BB/2020. In this connection, on behalf of the Appellant / Financial Creditor / Applicant it is pointed out before this Tribunal that during the pendency of Section 7 Application before the Adjudicating Authority, the Appellant / Financial Creditor / Applicant had agreed for one time settlement to receive only the principal sum / debt of USD 36,532/- by 10.03.2020 and further that this settlement was not honored by the Corporate Debtor, thereby the Appellant / Financial Creditor was constrained to pursue the Section 7 Application before the 'Adjudicating Authority'.

27. As regards the non-payment of invoices on repayment due date', inspite of repeated reminders, the Corporate Debtor had failed to reply to the 'Demand Notice' or repay the 'Financial Debt'. Also that in the instant case, the Corporate Debtor is in default of its admitted liability to pay as per the terms of 'Receivables Purchase Agreement'.

28. As far as the present case is concerned, at paragraph 8 of the impugned order, dated 28.05.2021 in CP No.(IB)61/BB/2020 the Adjudicating Authority had interalia observed that the Respondent Company had net revenue from operations of Rs. 19.31 crore which had increased over the last three years and showed a growth rate of 46% over last year and further it had a net profit of Rs. 77 lakhs and improving and positive return to equity ratio. Further, the Adjudicating Authority' had observed that prima facie the Respondent Company had sufficient income and assets to repay its debt and could not be termed as 'Insolvent.'

29. It is to be pointed out that the 'Adjudicating Authority' in the impugned order had observed that the Respondent was not an 'Insolvent Company' and that it was of the considered view that Respondent should be given some more time to repay the debt etc. had directed the Respondent / Corporate Debtor to repay the balance debt or the amount as settled with the Appellant within a period of six months failing which the Appellant / Petitioner would be at liberty to file a fresh petition for admission, which in the considered opinion of this Tribunal is in negation of the principles laid down at paragraph 30 of the judgement of the Hon'ble Supreme Court in Innovative Industries Ltd. Vs. ICICI Bank (2018) 1 SCC page 407. Therefore, this Tribunal holds that the Adjudicating Authority had exceeded its jurisdiction by taking the defense of the Corporate Debtor, especially in the absence of any 'Reply' or objections projected by the Corporate Debtor. Consequently, this Tribunal interferes with the impugned order, since it suffers from patent legal infirmities. The instant Appeal succeeds.

## **Conclusion**

In fine the Company Appeal (AT)(CH) (Ins.) No. 167 of 2021 is allowed. Resultantly, the impugned order dated 28.05.2021 passed by the Adjudicating Authority (National Company Law Tribunal) Bengaluru Bench in CP.(IB)61/BB/2020 is hereby set aside. No costs. The Adjudicating Authority is directed by this Tribunal to restore CP.(IB)61/BB/2020 to its file, 'Admit' the same and to proceed further in accordance with Law.

**[Justice M. Venugopal]  
Member(J)**

**[Kanthi Narahari]  
Member (T)**

**8<sup>th</sup> November, 2021**

***Shashi***