

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI.

Company Appeal (AT) (Ins) No. 936 of 2020

IN THE MATTER OF:

**BDH Industries Limited,
(Ms. Nikita Phatak – Company Secretary)
Nair Baugh, Akurli Road, Kandivli (East)
Mumbai-400001.**

...Appellant

Versus

**Mars Remedies Private Limited,
(Mr. Mahmadyusuf Karbhari Abdulla, Director)
635, G.I.D.C. Estate,
Waghodia, - 391760. Gujarat.**

...Respondent

Present

For Appellant:- Mr. Kairav Trivedi, PCA

**For Respondent:- Mr. Pavan Godiawala and MS Vishnu Sankar,
Advocates**

J U D G M E N T

(Date: 07.02.2022)

(VIRTUAL MODE)

[Per.: Dr. Alok Srivastava, Member (Technical)]

This appeal has been filed under section 61(1) of Insolvency and Bankruptcy Code, 2016 (hereafter called IBC) against the order dated 24.6.2020 passed by NCLT, Ahmedabad (the Adjudicating Authority) in CP (IB) No. 804/7/NCLT/AHM/2019 Company Appeal (AT) (Ins) No. 936 of 2020

(hereafter called the Impugned Order) in a Section 9 application filed by the Appellant-BDH Industries Limited.

2. In brief, the facts of the case, as presented and argued by the Appellant, are that an MOU was entered between the Appellant/financial creditor BDH Industries Limited (hereafter called BDH Industries) and Respondent/Corporate Debtor Mars Remedies Private Limited (hereafter called MRPL) on 7.12.2011 and personal guarantee was given by the directors with the validity of one year, subject to payments received by BDH Industries. The MOU broadly provided that MRPL, would procure and obtain export orders from its customers in favor of BDH Industries for export of products to be manufactured by MRPL. The MOU also provided that BDH Industries would provide funds to MRPL for procurement of raw material and other items required for manufacture of products against such export orders obtained by MRPL. Various clauses of the MOU stipulated that MRPL will be responsible for procuring export orders from its overseas customers and ensuring payment directly to BDH Industries for such sales.

3. We heard arguments presented by Ld. Counsels of both the parties and also perused the record.

4. The Learned Counsel for Appellant has claimed that the Appellant/BDH Industries was to provide funds to MRPL as a loan for manufacture of drugs and allied products. He has stated that it was MRPL's responsibility to procure export orders from its customers abroad and fulfill such orders by manufacturing pharmaceuticals and allied products using funds provided by BDH

Industries. He has explained that the MOU provides that payment for sales made against such export orders was to be made directly to BDH Industries and the profits therein were to be shared between MRPL and BDH Industries in accordance with a mechanism contained in the MOU. The Learned Counsel for Appellant has further argued that, on the basis of the fact that BDH Industries provided funds as loan to MRPL, it assumes the status of financial creditor and, therefore, its application under section 7 ought to have been admitted.

5. In support of his contention, the Learned Counsel for Appellant has adverted to a letter written by Respondent/MRPL to Appellant/BDH Industries dated 27.11.2011 (attached at pp. 85 – 86 of Appeal Paperbook, Vol.I)) wherein MRPL has stated that it is expecting a net financial assistance of Rs. 50 lakhs from BDH Industries for its project. He has referred specifically to Paragraphs 4 and 5 of this letter, to claim that the funds provided by BDH Industries to MRPL were in the nature of financial assistance.

6. Further, the Learned Counsel for Appellant has referred to letter dated 28th March 2014 sent by MRPL to BDH Industries (attached at page 86 of the Appeal Paperbook, Vol. I) wherein MRPL has requested that since it was unable to procure requisite export orders it is unable to make repayment and it seeks last extension, in addition to four extensions already granted to MRPL, vide letters dated 26.7.2012, 23.12.2012, 25.6.2013 and 29.8.2013. He has also referred to an email dated 13th December 2016 sent by MRPL to BDH Industries attaching the accounts ledger along with interest calculation at the rate of 15% per year

for the financial years 2011 to 2016. Furthermore, he has referred to the ledger accounts at pages 88–93 of Appeal Paperbook, Vol. I to claim that repayment of the funds loaned by BDH Industries were being made by MRPL and another email dated 20th December 2016 (attached at page 94 of the Appeal Paperbook, Vol. I)) sent by MRPL to BDH Industries to claim that an interest @ 15% was levied and the amount totaling Rs.24,44,241/- (Twenty Four Lacs Forty Four Thousand Two Hundred Forty One only) was calculated as interest for the years 2011–12 till 2015–16. Ld. Counsel for Appellant has also referred to communication dated 2nd November 2017 (at page 96 of Appeal Paperbook, Vol. I)) sent by MRPL to further reinforce the claim that the payment was being made by MRPL to BDH Industries and due to certain business issues it was seeking time till 31st December 2017 for completing the entire payment.

7. In response, the Learned Counsel for Respondent has argued that the MOU is not a financing agreement as is evident from various clauses, particularly clause 3 of the MOU (attached at page 146 of the Appeal Paperbook, Vol. I) and therefore, the Appellant is not entitled to file a section 7 application as a financial creditor. He has claimed that the MOU is in the nature of a business agreement wherein the rights and responsibilities of both the parties have been clearly laid out and the funds advanced by BDH Industries to MRPL are as part payment of the export orders and not a loan given to Respondent/MRPL by Appellant/BDH Industries. He has also referred to Para 1 in the reply affidavit of Respondent to claim that since exports could not happen, the advance was used for purchasing raw materials.

8. In rejoinder, the Learned Counsel for Appellant has reiterated that in accordance with letter dated 27.11.2011 (attached at page 85 of the Appeal Paperbook, Vol.I) a specific request has been made for financial assistance by MRPL in connection with a project and therefore the amount provided by BDH Industries to MRPL is actually a loan. He has also claimed that if the MOU was in the nature of a business agreement, then there was no need for the Respondent to ask for financial assistance as has been done by the Respondent vide letter dated the 27.11.2011 (supra). He has urged that he had argued all these issues before the Adjudicating Authority which have somehow not been noticed in the Impugned Order.

9. We reproduce below relevant provisions of the IBC which define debt, default, financial debt and financial creditor as these definitions would be important in ascertaining in this appeal the correct relationship between the Appellant and Respondent:-

“Section 3(11) *“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.*

Section 3(12) *“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.*

Xxx xxx xxx

Section 5(7) – *“financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.*

Section 5(8) – “financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes –

(a) money borrowed against the payment of interest.”

10. We now examine the MOU dated 7.12.2011 to see whether it is in the form a loan agreement or is merely an agreement as business arrangement between two companies. This MOU is an agreement between the four parties viz. Mars Remedies Private Limited (First Party), BDH Industries Limited acting through its Executive Director Shri Suresh Chandra Kachhara (Second Party), Shri M.Y. Karbhari (Third Party) and Shri Yogendra Patel of Mars Remedies Private Limited represented by Power of Attorney M.Y. Karbhari (Fourth Party). The recitals in the MOU particularly (b), (c), (e) and(f) very clearly lay down that MRPL has registered its various products in several countries and holds valid registration certificates and licenses for export of such products and since it has been finding in difficult to accept and execute more export orders for reasons of working capital constraints and other logistic requirements, it has got in touch with BDH Industries to accept and execute such export orders procured in the name of BDH Industries from its customers. Furthermore, recital (e) is about the readiness of BDH Industries, on certain terms and conditions, to accept and execute domestic as well as export orders procured by MRPL from its customers in the name of BDH Industries. Recital (f) which shows the business arrangement between MRPL and BDH Industries, is reproduced below:-

“f. MRPL has agreed to procure and obtain export orders from its customers in the name and favour of BDH for export of the products to be manufactured by MRPL at its factory and the BDH has agreed to provide finances for procurement of raw materials and other items required for manufacturing and export of the products as per each such export orders on certain mutually acceptable terms and conditions between the said MRPL and BDH as recorded hereinafter.”

11. From the above, it is clear that MRPL would procure and obtain export orders from its customers in the name of BDH Industries and BDH Industries would provide funds for procurement of raw-material and other items required for manufacturing and export of products as per each such export orders.

12. Furthermore, various clauses of this MOU viz. clauses (3) and (4) put the responsibility for manufacturing the said products and packaging them in a certain time schedule between the parties. Clause (5), which is about payments for the orders, is as follows:-

“5. It is agreed by the parties hereto that on an order being placed by BDH and subsequent procurement of the required raw materials and packing materials as provided in the Para-4 above, BDH shall make payments in a specified manner and to the extent as hereinafter provided to MRPL or directly to its suppliers on written requests from the MRPL. However BDH shall make payments for purchases of the order related raw

materials and packing materials only after delivery of the same is received in the factory premises of the MRPL and details of the same, in writing, is provided to BDH along with requisition for payments.”

13. Thus, it is clear that BDH Industries is to make payments for purchases of orders related to raw-materials and packaging materials only after delivery of the same in the factory of MRPL. This means no advance payment even for raw-materials and packing materials is to be done, but BDH Industries shall make payments only after delivery of raw-material and packing materials in the factory premises of MRPL.

14. Clauses (10) and (11) detail the mode and schedule of payments, and in particular clause (11) outlines that 60% of the value of orders placed by BDH Industries to be exclusively utilized for procurement of raw materials and packing materials, next 20% of total payment shall be made on completion of the shipment of the products and the balance 20% on and after receipt of the full and final payment against each such export sales. Further, Clause (15) is about sharing of profit margin and credit cycle (which means the total number of days) and margin of profit when the credit cycle exceeds 45 days.

15. Furthermore, the terms of this MOU are to be valid for a period of one year and till all payments due to BDH Industries against exports and/or from MRPL has been received and realized and there are no claims due to BDH Industries. Thus, it is clear that the said MOU dated 7.12.2011 is in the nature of business arrangement which outline how MRPL shall procure orders in the

name of BDH Industries, procure raw-materials and packaging materials for manufacture of pharmaceuticals and allied drugs obtain payments. BDH Industries is to make payments for raw-materials and packing materials in accordance with a time schedule given in clause (11) of MOU. There is no mention of any loan, its terms and conditions, the schedule of disbursement and repayment and any interest on the principal amount. Thus, we come to a conclusion that the MOU dated 7.12.2011 is in the nature of a business arrangement between two entities BDH Industries and MRPL and is not a loan agreement.

16. We now turn our attention to examine whether the amount provided by BDH Industries to MRPL is a financial loan or not. Referring to letter of MRPL addressed to BDH Industries dated 27.11.2011 (at page 85 of Appeal Paperbook, Vol. I) we find that the subject written therein is "regarding-financial assistance for upgrading and WHO/GMP certification". Furthermore, in the same letter the following is stated: –

“Our cost of the project is Rs. 65 lakhs, out of which we have spent Rs. 4.70 lakhs and shall finance from internal accruals by Rs. 10.30 lakhs. Net assistance expected is Rs. 50 lakhs”.

17. The Corporate Debtor then goes on to state its annual turnover for FY 2010-11 and FY 2011-12 (upto November) and also its volume of products and sales and how it will obtain export orders and execute them. He has also mentioned that MRPL ‘may also require financial help on agreed terms to reduce lead time of our company’.

18. In Para 5 of the above mentioned letter, MRPL has stated as

follows: –

‘(5) we guarantee amount advanced to us by way of following:-

(i) lien on of asset created out of loan

(ii) personal guarantee by directors

(iii) any other mode which may be asked by you.’

From the contents of the letter dated 27.11.2011, it is amply clear that MRPL/Corporate Debtor is seeking financial assistance and is guaranteeing the assistance on the assets stated in Para 5 of the letter. Thus, it is amply clear that even if there is no explicit agreement regarding provision of loan by BDH Industries to MRPL, this letter itself constitutes a document which is proof of a loan being provided by BDH Industries to MRPL.

19. Further, in letter dated 28 March 2014 addressed by MRPL to BDH Industries (attached at page 86 of the Appeal paperbook Vol. 1), the MRPL has requested for further extension granted to repay the loan. It has stated that it will not be able to repay on 31.3.2014 as it has not yet completed WHO/GMP compliance and therefore is not able to procure export orders. The extensions already granted by BDH Industries for repayment have also been mentioned in four letters viz. 26.7.2012, 23.12.2012, 25.6.2013 and 29.8.2013 and the Corporate Debtor has further requested grant of last extension upto 31st May, 2014 whereafter it has given liberty to the financial creditor/BDH Industries to dispose of the shares and deposit the cheques for balance amount. Thereafter vide e-mail dated 13th December 2016 addressed by MRPL to BDH Industries the accounts ledger with interest calculation at 15% per year for FY 2011 to 2016 has been forwarded. The ledger accounts

of loan obtained by Mars Remedies from BDH Industries is attached at pp. 88-93 of Appeal paperbook Vol.I. Furthermore, the interest calculation has also been communicated by MRPL/Corporate Debtor to BDH Industries/financial creditor vide email dated 20th December 2016 (attached at pp. 94 – 95 of Appeal paperbook, Vol.I).

20. All the above documents go to show that there was a financial assistance requested vide letter dated 27.11.2011 regarding which there were delays in repayment and extensions sought by MRPL vide letter dated 28th March 2014. The documents also show that interest @ 15% per year has been calculated and communicated by the Corporate Debtor to the financial creditor. All these documents go to show that the amount provided by BDH Industries to MRPL was in the nature of loan, which was adequately secured and there was a repayment with a certain interest rate. In such a situation, it is amply clear that even though there is no explicit loan agreement between the Corporate Debtor, MRPL and financial creditor BDH Industries yet these documents establish quite convincingly the existence of a loan provided by BDH Industries to MRPL and steps taken in repayment along with repayment of interest. Thus we are convinced that the Appellant is a 'financial creditor' as defined in Section 5(7) and the debt owed to him is a 'financial debt' as defined under section 5(8) of the IBC.

21. Now we have to see whether the said debt is in default. BHD Industries in its application under section 7 of the IBC has attached the following documents in proof of its demand for repayment:-

- (i) Demand notice dated 30.8.2018 addressed to MRPL and also to Mahmadyusuf Karbhari Abdulla, Uday Kumar B. Dhadhal, Hardik J. Desai and Tasleem Karbhari, all directors of MRPL, which is a notice of demand of Rs.74,70,043/- (attached at pp. 129-133 of Appeal paperbook Vol. I).
- (ii) Demand notice dated 10.10.2018 (attached at pp.134-138 of Appeal paperbook, vol. I).
- (iii) Demand notice dated 20.12.2018 sent by Advocate Nitin Divate of the Financial Creditor BDH Industries.

22. Upon perusal of the above mentioned demand notices, it is clear that the BDH Industries as financial creditor had sought repayment of the full financial debt given to the Corporate Debtor Mars Remedies Private Limited (MRPL). The section 7 application submitted to the Adjudicating Authority (attached at pp. 115-120 of Appeal paperbook Vol. I). clearly states the above mentioned demand notices. However, the amounts mentioned in the Demand Notices Part-IV of section 7 application are different. We are not concerned with the exact amount of debt at the stage of admission of section 7 application. It would suffice for the purpose of admission of section 7 application, if the debt is above threshold value of Rs. 1 lakh. Therefore, we find that the debt is in excess of Rs. 1 lakh of threshold value and also in default. Hence the debt owed to the Financial Creditor by the Corporate Debtor is above the threshold value and payable in default and it satisfies the definition under section 3(12) of the IBC regarding default

23. In the judgment delivered on 03.01.2022 by NCLAT in the matter of **Jayanthi Ravi v Chemizol Additives Pvt Ltd, [TA No.**

117/2021, Company Appeal (AT) (Insolvency) No. 553/2020/022), it was held that it is adequate for the Appellant to establish the existence of financial debt via record of the loan transaction in the minutes of the meeting of the board of directors and the subsequent entries in the balance sheet. Hence we find that an explicit agreement to prove disbursement of loan amount is not a necessary pre-requisite for admission of a section 7 application. In this judgment NCLAT has further held that *‘the Adjudicating Authority’ must be satisfied as to the existence of ‘Default’ and in fact, is not required to note any other criteria for ‘Admission of the Application’.*

24. Thus it is considered sufficient for admission of a section 7 application that the Applicant/Petitioner is able to establish the existence of a ‘Debt’ and the Corporate Debtor’s default, and if the ‘Application’ is complete in all aspects, the Application ought to be admitted by the Adjudicating Authority. In this judgment the NCLAT relied on the order passed by the NCLT, Mumbai Bench in **Anchor Leasing Pvt. Ltd. v. Euro Ceramics Ltd.** (CP No. 66/IBC/NCLT/MB/MAH/2018) wherein it was observed and held that *“IBC nowhere prescribed the compulsory existence of an express agreement to prove the loan and its disbursement. The statement of accounts produced on record were held enough to prove the disbursement of loan amount.”* Hence, in our opinion, and based on the above mentioned judgment of NCLAT, we infer that even in the absence of an explicit agreement to provide loan/financial assistance if the documents can show the existence of a loan they can be considered as an adequate evidence of the existence of loan.

25. Also, in the matters **M/S Mahabir Cold Storage v. CIT, Patna [1991 Supp (1) SCC 402]** and **Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff [1961 SCC OnLine Cal 128]** Hon'ble Supreme Court has held that the registers of a company are *prima facie* evidence and the balance sheet disclosing loans and borrowings which form part of annual returns constitute admission and acknowledgment of the CD regarding the debt. Again in the matter **Asset Reconstruction Company vs Bishal Jaiswal & Anr [Civil Appeal No.323 of 2021]** Hon'ble Supreme Court upheld the same principle regarding debt owed by the corporate debtor to financial creditor wherein the financial creditor had claimed that the balance sheets of the Corporate Debtor are a valid periodical acknowledgment of CD's debts, and the mere fact that the filing of balance sheets is a mandate under the law does not vitiate this position. Thus, as Hon'ble Supreme Court has accepted that acknowledgement of debt could be surmised from balance sheets of the corporate debtor, it stands to reason that a letter which admits and acknowledges debt should also be considered as evidence of debt as is the case in the instant appeal.

26. We are quite clear that while there was an MOU entered into between BDH Industries and MRPL dated 7.12.2011, it was in the nature of an arrangement made by Appellant/BDH Industries and Respondent/MRPL to carry out business together and the rights and responsibilities of the parties to source raw materials, manufacture pharmaceuticals and allied products, procure export orders, make supplies and obtain payments and penalty to be imposed in the event of late payments has all been stipulated in the MOU. Therefore, we conclude that the said MOU does not provide evidence of loan in question being taken by the corporate

debtor from the financial creditor.

27. We find that letter dated 27.12. 2011 sent by MRPL to BDH Industries is an adequate proof of financial assistance being sought by MRPL/Corporate Debtor from BDH Industries/financial creditor which was agreed to and disbursed by the Appellant/Financial Creditor to the Respondent/Corporate Debtor. In the face of such a document as proof of loan being given to the corporate debtor, we hold that Appellant/BDH Industries satisfies all the necessary ingredients of being a financial creditor under the IBC and the amount given by it to the Respondent is in the nature of a financial debt. As discussed earlier this debt is in default and payable to the Appellant, and hence section 7 application ought to have been admitted. The appeal, therefore, succeeds and in the result, we set aside the Impugned Order of the Adjudicating Authority dated 24.6.2020 and direct that the Adjudicating Authority shall, within a period of fifteen days of this order, pass order as required under law for initiating Corporate Insolvency Resolution Process against the Respondent/Mars Remedies Private Limited and other consequential actions as provided in IBC.

28. There is no order as to costs.

(Justice Ashok Bhushan)
Chairperson

(Dr. Alok Srivastava)
Member (Technical)

New Delhi

7th February, 2022

/aks/