NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) No. 922 of 2021

(Arising out of Order dated 29.09.2021, passed by National Company Law Tribunal, Court No. V, Mumbai Bench, C.P. No. 329/(IB)-MB-V/2020)

IN THE MATTER OF:

Shamji Optima Private Limited
(Formerly known as Four Seasons Developers Private Limited)
702 runwal & Omkar Esquare,
Eastern Exp Hwy, Sion East,
Mumbai – 400022
Email: info@sopl.biz **...Appellant**

Versus

Tridhaatu Aranya Developers LLP
5th Floor, B – Wing, Shrikant Chambers, Near R.K. Studio, Sion – Trombay Road, Chembur, Mumbai – 400071
Email: info@tridhaatu.com **...Respondent**

For Appellant:	**Mr. Arun Kathpalia, Sr. Advocate with Mr. Sanjay Udeshi, Mr. Varun Singh, Ms. Pranati Bhatnagar, Mr. Darshan Ashar, Mr. Dharmesh Chheda and Mr. Aditya Udeshi, Advocates.**
For Respondent:	**Mr. Somasekhar Sundaresan and Mr. Vishesh Kalra, Advocates.**

J U D G E M E N T

[Per: Shreesha Merla, Member (T)]

1. Aggrieved by the Order dated 29/09/2021 in C.P. No.- 329/(IB)-MB-V/2020 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Court V, Mumbai Bench), *'M/s. Shamji Optima Private Limited'* preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'The Code'). By the Impugned Order, the Adjudicating Authority has dismissed the Application filed under Section 7 of the Code, by the Appellant herein, against *'M/s. Tridhaatu Aranya Developers LLP'* (hereinafter referred to as the 'Corporate Debtor'), observing as follows:

> *"38. Upon perusal of the documents annexed to the Petition and hearing counsels from both the sides, the Bench is of the considered opinion that there is no privity of contract between Petitioner and Corporate Debtor and the LLP agreement dated 07.os.20L2 and the Supplementary Retirement Deed dated 15.08.2OL6 is not a contract signed by and between the Petitioner and Corporate Debtor herein. The Supplementary Retirement Agreement contemplates certain liability of Tridhaatu wherein Tridhaatu agreed to pay the outstanding sum of Rs, 45,08,08,384/- to the Petitioner and provided certain cheques to be paid by the corporate Debtor herein being the group company. The corporate Debtor also confirmed the liability of payment of Rs. 4,03,28,000/- to the Petitioner herein as on 31.03.2018, however, this does not demonstrate any liability towards payment of financial debt.*
>
> *39. The Petitioner has failed to demonstrate the basic ingredients of financial debt along with interest, if any, which is disbursed against consideration for time value and money and is in existence between the Petitioner and Corporate Debtor. The Petitioner is relying up reference being made in Supplementary Retirement Deed and that cheques were presented as security without any basis of contractual terms between the Petitioner and Corporate Debtor.*
>
> *40. Tt is an undisputed fact that there is no privity of contract between the parties and a mere reference to certain liability while handing out cheques, confirmation of liability, it cannot be construed that there is a binding agreement of any debt due in terms of Section 5 (8) of the Code and hence, there is no evidence of default for non-payment of money by the Corporate Debtor towards his obligation of payment of monies under any contract is thus not established, Further, the claim is barred by limitation.*
>
> *41. Unless the liability is crystallised by a regular civil court, the Petition under Section 7 of IBC cannot be admitted. The mere reference of handing over of cheque of Corporate Debtor as security does not fasten any liability to the Corporate Debtor for*

> *payment of monies and any debt due under the Supplementary Retirement Deed. The expression Tridhaatu affiliated nominee including sister concern cannot be bound unless it is expressly confirmed that the sister concern is liable to pay in case of default and in the absence of any absolute liability. The claim has to be adjudicated by a regular civil court and hence the petition is liable to be dismissed."*

2. <u>Submissions of the Learned Counsel appearing on behalf of the Appellant:</u>

- The Learned Senior Counsel for the Appellant contended that the Appellant, (formerly known as 'Four Seasons Developers Private Limited') is a 'Financial Creditor' of the 'Corporate Debtor', having disbursed unsecured loans, which the 'Corporate Debtor' had defaulted in repayment; that 'Tridhaatu Group' and 'Prince Care Group' are engaged in the business of Real Estate; 'Tridhaatu Group' promoted by Mr. Krishnan Muthukumar, Mr. Dhananjay Anand Sandu and Mr. Pritam Chivukula include entities i.e., Tridhaatu Asset Holding LLP, Tridhaatu Mumbai Structures Private Limited and Sandu Homes LLP; 'Prince Care Group' promoted by Mr. Dharmesh Kishore Chheda and Mr. Bhavesh Kishore Chheda includes entities forming a part of *Shamji Optima Private Limited'* (the Appellant herein) and Prince Care Developers LLP. It is argued by the Learned Senior Counsel that the definition of 'Tridhaatu Group' includes the respective sister concerns and all group Companies.
- The Appellant retired from the Respondent LLP vide Retirement Agreement dated 12/08/2016 and received amounts receivable as share of profits.

- Learned Counsel contended that the principal outstanding loan amount is confirmed in the Balance Sheets for the Financial Year 2018–19 of the 'Corporate Debtor'; that cheques were issued by the 'Corporate Debtor' in favour of the Appellant towards repayment of the unsecured loans, which cheques were dishonoured on account of insufficient funds.
- The Learned Adjudicating Authority has failed to take into consideration the Supplementary Retirement Deed dated 12/08/2016, whereby the factum of the unsecured loans repayable to the 'Corporate Debtor' was recorded.
- It is submitted that the Appellant disbursed the loan to the tune of Rs.6,43,28,000/- on 12/08/2016, the repayment of which is stated in the Supplementary Retirement Deed dated 13/08/2016 entered into between the 'Tridhaatu Group' and the 'Prince Care Group'. The Agreement also provided for payment of interest by the 'Tridhaatu Group' to the 'Prince Care Group'.
- As per the Agreement, the debt disbursed was to be repaid by on or before 31/12/2016. It is argued that the 'Tridhaatu Group' admitted its liability to pay the amounts to 'Prince Care Group' vide letter dated 05/08/2019, but failed to pay the same. Under these circumstances, the Appellant filed an Application under Section 7 of the Code.
- The Learned Counsel strenuously contended that the Balance Sheet of the Corporate Debtor Company as on 31/03/2018, the cheques issued by the 'Corporate Debtor' in favour of the Appellant and the Retirement Deed clearly shows that there is a privity of contract between the Appellant and the Corporate Debtor Company. It is also

argued that the definition of 'Financial Debt' in Section 5(8) of the Code does not expressly exclude an interest free loan and that the Adjudicating Authority has failed to take into consideration the ratio of the Hon'ble Apex Court in *'M/s. Orator Marketing Private Limited' Vs. 'M/s. Samtex Desinz Private Limited', 2021 SCC OnLine SC 513.*

- It is the 'Agreement' which is the 'Financial Contract' between the parties and the existence of the Financial Contract is not a *sine qua non* for the purpose of filing of Application under Section 7 of the Code.
- The Learned Counsel contended that the claims are well within the period of Limitation as the Limitation would extend from time to time on account of the acknowledgement in the Balance Sheets and placed reliance on the Judgement of the Hon'ble Supreme Court in *'Asset Reconstruction Company (India) Limited' Vs. Bishal Jaiswal and Anr.', 2021 SCC OnLine SC 321.*

3. <u>Submissions of the Learned Counsel appearing on behalf of the Respondent:</u>

- Learned Counsel for the Respondent strenuously contended that there is no privity of contract between the 'Corporate Debtor' and the Appellant herein and that there is no debt due under the provisions of IBC. The LLP Retirement Deed is dated 12/08/2016 and the Supplementary Retirement Deed is dated 13/08/2016 and as per Clause 15 of the LLP Deed, the partners of the LLP, on retirement, were entitled to receive amounts standing to the credit of their capital account. This is the only obligation of the 'Corporate Debtor' towards its partners, which was duly fulfilled and acknowledged by the Appellant.

- The LLP is governed by the Limited Liability Partnership Act, 2008, and as per Section 3 of the Act; the LLP is a body corporate independent of its partners and cannot be bound by the partners of the LLP. The dispute arises out of the LLP Retirement Deed dated 12/08/2016 and the Supplementary Deed dated 13/08/2016, to which the 'Corporate Debtor' Tridhaatu Aranya LLP is not a party. Hence there is no privity of contract *qua* the Appellant under the said deeds.
- The acknowledgement in the Balance Sheets is only for the sake of accounting purpose and the same cannot be read dehors the facts. Out of the alleged amount of Rs.4,05,08,08,384/- a sum of Rs.40,96,11,329/- has already been paid to the Appellant and there are disputes pertaining to reconciliation which are pending between the parties and highlighted in the correspondence dated 05/08/2019.
- The payment was to be made to the Appellant by the 'Tridhaatu Group' and not by the 'Corporate Debtor' herein. The amount stipulated under the Supplementary Deed was under various heads and a mere issuance of the cheque cannot be a basis to state whether the liability is that of the 'Financial Creditor' or of the 'Operational Creditor'.
- It is contended that the amounts were acknowledged only for the purpose of accounting and the amounts have been mentioned in the Balance Sheet only on account of the cheques having been issued. The act of issuance of the cheques cannot alleviate the 'Corporate

Debtor' to the status of a guarantor and the cheques were given in good faith and they by themself do not constitute any 'Financial Debt'.

- The Learned Counsel placed reliance on the ratio of the Judgement of the Hon'ble Supreme Court in *'Reliance Natural Resources Limited' Vs. 'Reliance Industries Limited', (2010) 7 SCC 1,* in paras 58 to 60, 125, 297, 303, 305, 311 and 329(ii) to buttress his argument that the MoU is a private pact between the members of the family and not binding on the Company.

Assessment:

4. For better understanding of the relationship between the parties, we need to see the parties to the LLP Retirement Agreement dated 12/08/2016, which is detailed as hereunder:

> *"LLP RETIREMENT AGREEMENT*
>
> *This Limited Liability Retirement Agreement (this Agreement) is made and entered into on the 12th August, 2016, at Mumbai by and between:*
>
> *i. Mr. Krishnan Muthukumar.*
> *ii. Mr. Dhananjay Anand Sandu.*
> *iii. Mr. Pritam Chivukula.*
> *iv. Tridhaatu Asset-Holdings LLP.*
> *v. Tridhaatu Mumbai Structures Private Limited.*
> *vi. Sandu Homes LLP.*
> *vii. Four Seasons Developers Private Ltd.*
> *viii. PriceCare Developers LLP."*

5. It is seen from the LLP Retirement Agreement dated 'Four Seasons Developers Private Limited' and 'Prince Care Developers LLP' have chosen to retire and only serial nos. 1, 2, 3, 4, 5 and 6 are collectively referred to as 'continuing partners' who formed a Limited Liability Partnership named 'Tridhaatu Prince Care Developers LLP'. Clause 15 of the LLP denotes that the retiring Party was entitled to their share which was ascertained at Rs. 8 Crs./-. Clause (d) of the said Deed reads as follows:

> *"D. Vide notice dated 20th April, 2016, the Retiring Partners had expressed their desire to retire from the said LLP w.e.f. 31st July, 2016 at the close of the day and the Continuing Partners have given their consent unanimously to the Retiring Partners to retire from the said LLP. The said LLP has paid total amount of Rs.8,00,00,000/- (Rupees Eight Crore Only) in full and final settlement to the Retiring Partners in their Profit Sharing Ratio, the details of payment of which are as under:*

Date of Payment	***Mode of Payment by Cheque of BOI Sion Branch***	***Name of Retiring Partner***	***Amount Paid to Retiring Partner***
12th August, 2016	*031378*	*Four Seasons Developers Pvt. Ltd.*	*99,00,000/-*
12th August, 2016	*031379*	*PriceCare Developers LLP*	*7,01,00,000/-*
Total			*8,00,00,000/-*

(Emphasis Supplied)

6. It is the case of the Respondent/'Corporate Debtor' that *qua* the LLP, the entire amount has been finally settled and the aforenoted clause proves that an amount of Rs. 8 Crs./- was paid towards full and final settlement.

7. The Supplementary Retirement Deed was executed between the 'Tridhaatu Group' and 'Prince Care Group' on 13/08/2016, the relevant provisions of which reads as follows:

NOW THIS SUPPLEMENTARY DEED WITNESSETH AS FOLLOWS:

1. **REPAYMENT TO PRINCECARE AND PURPOSE OF UTILIZATION OF REPAYMENT:**

A. **PrinceCare Refund:**

a. Tridhaatu has agreed to repay to PrinceCare an aggregate amount of Rs.45,08,08,384/- (Rupees Forty Five Crores Eight Lakhs Eight thousand three hundred eight four only (**"PrinceCare Refund"**) towards the following:

i. Compensation to PrinceCare Group as and by way of **"One-Time Settlement"** towards monies contributed by PrinceCare in the said LLP

ii. Refund of Unsecured Loans alongwith Interest thereon advanced by PrinceCare in the said LLP (**"PrinceCare Unsecured Loans"**) calculated as on 15th August 2016.

iii. Refund of Unsecured Loans alongwith Interest thereon advanced by third parties and affiliates of PrinceCare in the said LLP (**"Third Party Unsecured Loans"**)calculated as on 15th August 2016

iv. Monies contributed by PrinceCare LLP and its affiliates (being Rs.6,13,34,457/-) towards miscellaneous expenses for the said Project (**"Miscellaneous Expenses"**)

The manner of distribution of PrinceCare Refund amongst the One Time Settlement, PrinceCare Unsecured Loans, Third Party Unsecured Loans and Miscellaneous Expenses shall be solely at the discretion of PrinceCare.

b. Tridhaatu has initiated necessary procedures and formalities for availing financial assistance for the Project and for repayment of PrinceCare Refund.

c. Tridhaatu has agreed to pay the PrinceCare refund in the following manner and schedule:

i. 1st Installment: Rs.15,00,00,000/- (Rupees Fifteen Crore Only) on or before 12th August 2016 simultaneously with the execution of the LLP Retirement Deed of PrinceCare.

ii. 2nd Installment: Rs.5,00,00,000/- (Rupees Five Crore Only) on or before 25th August 2016

iii. 3rd Installment: Rs.5,40,48,430/- (Rupees Five Crore Forty lacs Forty eight Thousand four hundred and thirty Only) on or before 15th September 2016

iv. **Balance PrinceCare Refund:** Rs.19,67,59,954/- (Rupees Nineteen Crores Sixty Seven Lakh Fifth Nine Thousand Nine Hundred Fifty Four Only) on or before 31st December, 2016.

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d. Tridhaatu shall pay to PrinceCare, 'Interest'@ 21% per annum on the One Time Settlement, PrinceCare Unsecured Loans and Third Party Unsecured Loans to be calculated from 15th August 2016 till repayment of the Balance PrinceCare Refund or part thereof. Tridhaatu shall pay to PrinceCare, 'Interest' @ 18% per annum on the Miscellaneous Expenses to be calculated from 15th August 2016 till repayment of the Balance PrinceCare Refund or part thereofThe Interest payable by Tridhaatu to PrinceCare as per this Clause shall be paid at the end of every financial quarter. Tridhaatu shall endeavor and ensure to make all payments before the above given deadlines.

* * * * * * * * *

4. <u>**DEFAULT IN REPAYMENT:**</u>In the event of default in repayment of the Balance PrinceCareRefund, PrinceCare Borla Refund and Interest or part thereof by Tridhaatu PrinceCare in accordance with this Supplementary Deed, PrinceCare shall be entitled to:

   a. En-cash the PDCs by depositing the same with their Bankers;

   b. Enforce the DPN and demand from Tridhaatu the outstanding amounts out of the Balance PrinceCare Refund;

   c. <u>Call upon Tridhaatu to execute an Agreement for Sale under the Maharashtra Ownership of Flats Act, 1963 and/or any other laws applicable for Sale of the Secured Area to such persons as nominated by PrinceCare, upon which, Tridhaatu shall execute the Agreement for sale as aforesaid and PrinceCare shall be entitled to appropriate the Consideration or part thereof received from the purchasers of the Secured Area towards the outstanding amounts of the Balance Prince Care Refund and Interest and Tridhaatu shall retain the balance, if any out of the Consideration after appropriation of the same towards the outstanding amounts of the Balance Prince Care Refund and Interest</u>

   d. It is clarified that upon default of any repayments the retirement will stand cancelled and simultaneously the partnership will stand restored as earlier.

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(Emphasis Supplied)

8. The material on record evidences that the Supplementary Deed was executed between the 'Tridhaatu Group' and the 'Prince Care Group' and signed accordingly by their representatives.

9. The definition of 'Financial Debt' under Section 5(8) is reproduced as hereunder:

> *"(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;*
>
> *(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
>
> *(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
>
> *(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
>
> *(e) receivables sold or discounted other than any receivables sold on non-recourse basis;*
>
> *(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*
>
> > *[Explanation.—For the purposes of this sub-clause,—*
> > *(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*
> >
> > *(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]*

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;"

10. It is the main case of the Appellant that there is a privity of contract between the Appellant and the Corporate Debtor Company having regard to the principal outstanding amount being reflected in the Balance Sheet for the year ending March 2019; the Supplementary Retirement Deed executed by the continuing partners of the 'Corporate Debtor' recording the factum of unsecured loans and finally the cheques issued by the 'Corporate Debtor' in favour of the Appellant towards payment of the due amount. At the outset, we address ourselves to the issue raised by the Appellant that the Supplementary Retirement Deed evidences a privity of contract between the Appellant and the 'Corporate Debtor'.

11. It is evident from the material on record that both the Retirement Deed dated 12/08/2016 and the Supplementary Retirement Deed dated 13/08/2016 were entered into between the 'Tridhaatu Group' and 'Prince Care Group', to which the 'Corporate Debtor' 'Tridhaatu Aranya Developers LLP' is not a party. The 'Corporate Debtor' is a Limited Liability Partnership incorporated under the provisions of the Limited Liability Partnership Act, 2008, and is a body incorporate independent of its partners. It is to be seen whether any debt/liability has been taken up by a partner in the name of the LLP. In the Application under Section 7 of the Code filed by the Appellant herein the 'Corporate Debtor' is described as an LLP, and as a part of the 'Tridhaatu Group'. The repayment amounts and the terms reflected in Clause 1(A)(c) of the Supplementary Retirement Deed dated 13.08.2016 are between 'Tridhaatu' and 'Prince Care' 'Groups' and essentially between the partners thereof, pursuant to which, the post dated cheques were issued. Likewise, Clause 4, which speaks of 'Default in Repayment' also establishes that the terms are between the Partners of 'Tridhaatu' and 'Prince Care' 'Groups' only. Even the correspondence dated 10.06.2019 is addressed by the representatives of the 'Prince Care Group' to the representatives of the 'Tridhaatu Group'. It is specifically stated in the legal Notice dated 05.08.2019 issued on behalf of the 'Prince Care' 'Group' that the cheques issued by 'Tridhaatu Builders LLP' and 'Tridhaatu Aranya Developers LLP' were dishonoured, against which issue, the Appellant has issued Notices under the provisions of Section 138 of the Negotiable Instruments Act, 1881 and that their *claim is against the 'Tridhaatu Group'.* The 'Corporate Debtor' is a distinct legal entity and the aforenoted 'Deeds' do not construe any privity of contract between the 'Corporate Debtor' and the Appellant and further establishes that mere issuance of these 2 cheques does not construe 'liability' having consideration for 'time value of money'. Further, the LLP Retirement Deed refers to a lumpsum amount of Rs.45,08,08,384/- to be paid by the 'Tridhaatu Group'. It is the case of the Respondent that out of this sum, a sum of Rs.6,13,34,457/- is towards miscellaneous expenses and the remaining amount is not bifurcated and is towards 'One Time Settlement'.

12. It is an admitted fact that there were disputes between the Appellant and continuing partners of the Respondent LLP. It is also evident from the Supplementary Deed which records that the parties may exchange ownership of facts to settle their obligations. It is pertinent to mention that the Appellant has for the first time, in this Appeal has pleaded that the partners can bind the LLP and relies on cheque copies and the Balance Sheet reference. The onus to establish that the amount which is 'due and payable' falls within the ambit of the definition of 'Financial Debt', as defined under Section 5(8) of the Code, is on the Appellant herein. We find force in the contention of the Counsel for the Respondent that the acknowledgement in the Financial Statements for the Financial Year ending 2018–19 cannot be read in isolation and has to be seen, keeping in view, the terms of both the Deeds entered into between the parties and the nature of relationship between them. Further, the Retirement Deed establishes that no amount is 'due and payable' *qua* the Respondent herein. There is no ascertained sum crystallised as 'due and payable'. To reiterate, there is no documentary evidence filed to prove that the two cheques amount to acknowledgement of any 'Financial Debt', especially in the light of the fact that the Retirement Deed and the Supplementary Retirement Deeds have been entered into between the 'Tridhaatu Group' and 'Prince Care Group', for which the Respondent/'Corporate Debtor' is not a party. Therefore, we are of the earnest view that the 'amounts' do not possess the essential ingredients of 'Financial Debt' as defined under Section 5(8) of the Code. This Tribunal has also observed in a catena of Judgements that IBC is not a 'recovery' proceeding or a Code for settlement of collateral disputes.

13. Hence, we see no reasons to interfere with the well-considered Order of the Adjudicating Authority. This Appeal fails and is accordingly dismissed. No Order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Ms. Shreesha Merla]
Member (Technical)

New Delhi
04th May, 2022
himanshu