IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-I

CP (IB) 311/MB/2020

Under section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of
Mr. Dharmesh Kishore Chheda
702, Runwal & Omkar Esquare, Eastern Exp Hwy,
Sion East, Mumbai – 400022.

… Financial Creditor /Petitioner

Versus

Tridhaatu Builders LLP
5th Floor, B-Wing, Shrikant Chambers, Near R. K. Studio, Sion-Trombay Road, Chembur, Mumbai - 400071.

… Corporate Debtor /Respondent

Order Pronounced on: 10.02.2023

Coram:

Hon'ble Member (Judicial)	:	Justice P. N. Deshmukh (Retd.)
Hon'ble Member (Technical)	:	Mr. Shyam Babu Gautam

Appearances:

For the Financial Creditor	:	Mr. Aditya Udeshi, Advocate.
For the Corporate Debtor	:	Mr. Vishesh Kalra, Advocate.

ORDER

Per: Justice P.N. Deshmukh, Member (Judicial)

1. This Company Petition is filed under section 7 (“**the Petition”**) of the Insolvency and Bankruptcy Code, 2016 **(IBC)** by **Mr. Dharmesh Kishore Chheda** ("the Financial Creditor or Petitioner"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Tridhaatu Builders LLP** ("the Corporate Debtor or Respondent").

2. The present Petition was filed on 20.01.2020 before this Adjudicating Authority on the ground that a loan for a sum of Rs. 4,50,50,000/- (Rupees Four Crore Fifty Lakh Fifty Thousand Only) was advanced by the Financial Creditor to the Corporate Debtor and the Corporate Debtor has defaulted in repayment of the same.

3. The total amount claimed to be in default by the Financial Creditor is Rs.4,73,29,967/- (Rupees Four Crore Seventy-Three Lakh Twenty-Nine Thousand Nine Hundred and Sixty-Seven Only) along with 21% interest per annum from 01.08.2019 till date of payment. The date of default stated to be is 31.07.2019.

4. The Corporate Debtor is a limited liability partnership incorporated on 30.08.2011 under the Limited Liability Partnership Act, 2008, with the Registrar of Companies, Maharashtra, Mumbai. Its registered office is at 5th Floor, B-Wing, Shrikant Chambers, Near R. K. Studio, Sion-Trombay

Road, Chembur, Mumbai - 400071. Therefore, this Bench has jurisdiction to deal with this petition.

<u>Submissions made by the Financial Creditor by way of Petition:</u>

5. The Financial Creditors submits that the application is filed on account of failure on the part of the Corporate Debtor to make payment of the admitted financial debt due and payable to the Petitioner towards refund of monies advanced by the Petitioner in favor of the Corporate Debtor. Disbursement of the debt is as follows:

Sr. No.	Date	Amount (in Rs.)
1.	21.10.2013	50,00,000/-
2.	24.10.2013	1,00,00,000/-
3.	29.10.2013	2,00,00,000/-
4.	22.03.2016	56,00,000/-
5.	22.03.2016	44,50,000/-
	Total	**4,50,50,000/-**

6. The copies of Statement of Bank Accounts for the period of 15.10.2013 to 13.08.2019 of the Financial Creditor are placed at “Annexure 5” of the petition. The computation of claim is placed in “Annexure 3” of the petition.

7. The Petitioner submits that the Corporate Debtor has admitted the amount claimed and had issued cheques in favor of the Petitioner, further the Corporate Debtor has issued an account confirmation in favor of the Petitioner *inter alia* admitting its liability towards the Petitioner. The account confirmation letter issued by the

Corporate Debtor to the Petitioner is placed in "Annexure 26" of the Petition.

8. The present Application has been filled on the basis of the aforementioned cheques and the Supplementary Retirement Agreement Deed dated 13.08.2016 executed between Tridhaatu Group and Princecare Group. The Petitioner submits that in April 2012, Tridhaatu Group and Princecare Group had formed a Limited Liability Partnership known as Tridhaatu Princecare Developers LLP (herein referred to as 'the said LLP'). Copy of the Supplementary Retirement Deed is placed at "Annexure 8" of the Petition.

9. The Applicant through Shamji Optima Private Limited (Formerly known as Four Seasons Developers Private Limited) and Princecare Developers LLP, being partners of the said LLP, by themselves and through their nominees and affiliates, contributed monies towards development of the said LLP's project. While carrying on development work, Princecare Group and Tridhaantu Group realized they cannot work together on account of differences and amicably decided to get separated. It was agreed that Princecare group would leave the project and Tridhaantu group will take over the said LLP. Under a supplementary retirement deed dated 13th August 2016, between Tridhaatu Group and Princecare Group, Tridhaatu has agreed to pay and aggregate amount of Rs. 45,08,08,384/- (Forty Five Crore Eight Lakh Eight Thousand Three Hundred and Eighty Four Only) to Princecare in the following manner and schedule:

Sr. No.	On or before	Amount (in Rs.)
1.	12.08.2016	15,00,00,000/-
2.	25.08.2016	5,00,00,000/-
3.	15.09.2016	5,40,48,430/-
4.	31.12.2016	19,67,59,954/-
	Total	**45,08,08,384/-**

Tridhaantu also agreed to pay interest on One Time Settlement, Princecare Unsecured Loans and Third-Party Unsecured Loans at 21% interest per annum and on Misc. Expenses 18% per annum from 15.08.2016 till the date of repayment.

10. As on the date of the Supplementary Retirement Agreement an amount of Rs. 4,71,00,297/- (Rupees Four Crore Seventy One Lakh Two Hundred and Ninety Seven Only) was payable to the Petitioner, being a part of Princecare Group on account of Tridhaatu Builders LLP, being a part of Tridhaatu Group. Copy of the Supplementary Retirement Deed is placed at "Annexure 9" of the Petition.

11. Thereafter, the Financial Creditors addressed reminder letter dated 10.06.2019 to the Corporate Debtor seeking repayment of the amount claimed. However, the Corporate Debtor failed to repay the amount.

12. Owing to the failure of the Corporate Debtor, the Petitioner deposited cheques issued by the Corporate Debtor numbered 954764, 954765 and 954766 all dated 23.07.2019, drawn on IDBI Bank, Chembur Branch, totaling to the amount claimed inter alia calling upon the Corporate Debtor to repay the amount. However,

the cheques were returned dishonored with the remarks as "Funds Insufficient". Copy of the Cheques and Intimation of dishonor are placed at "Annexures 10, 11, 12, 13, 14 and 15" of the Petition.

13. The Corporate Debtor vide its letter dated 05.08.2019 replied to the letter of the Financial Creditor dated 10.06.2019, wherein the Corporate Debtor disputed the debt. The contents of the said notice are not elaborated herein for the sake of brevity. The letter addressed by the Corporate Debtor is placed at "Annexure 19" of the Petition.

14. The Petitioner submits that without prejudice to the total debt due, the Respondent has admitted its liability vide account confirmation sent on 31.03.2018 to the tune on Rs. 4,71,00,297 (Rupees Four Crore Seventy One Lakh Two Hundred and Ninety Seven Only). As per the Supplementary Retirement Deed, the Corporate Debtor has undertaken to make payment for all that is due to Princecare Group on or before 31.12.2016. Corporate Debtor has also made part payment to the tune of Rs.4,50,00,000/- (Rupees Four Crore Fifty Lakh Only) towards discharge of its liability towards the applicant. The Corporate Debtor has defaulted in making payment of the admitted amount due to the Petitioner.

<u>Submissions made the Corporate Debtor by way of reply:</u>

15. The preliminary objection raised by the Corporate Debtor is on the issue of maintainability. The Corporate Debtor submits that they are not a party nor a signatory to any of the agreements, the claim is not maintainable against them as there is no privity of

contract between the Corporate Debtor and the Petitioner. The transaction between the parties does not classify as a Financial Debt, further the debt claimed by the party is time barred.

16. The Respondent submits that the issues raised in the present Petition are squarely covered by the judgement of this Tribunal in the case of ***Shyamji Optima Pvt. Ltd. vs Tridhaatu Aranya LLP*** where the same deeds have been considered. It was held that there is no privity of contract between the parties and there is no financial debt for the purposes of IBC. The said judgement has been upheld by the Hon'ble NCLAT and Hon'ble Supreme Court. Copy of the said orders are placed at "Annexures A, B and C" respectively of the Reply.

17. Further, the Corporate Debtor states that the Financial Creditor have not relied upon any loan agreement or any communication in the form of letters, emails etc. for the purpose of substantiating the claim as financial debt.

18. Reliance is placed by the Corporate Debtor on judgement of the Hon'ble Supreme Court in ***Central Bank of India & Ors. vs Dragendra Singh Jadon [Civil Appeal No. 5036 of 2022]*** to support the proposition that the principle of constructive res judicata would be attracted to deny relief:

> *"14. It is not correct to say that the Respondent obtained the order of this Court by suppressing the fact that an earlier Writ Petition moved by the Respondent had been dismissed. In Paragraph 5.5 of the Writ Petition, the Respondent clearly stated that both the parties had challenged the Award of the*

Tribunal before the High Court - the Management of the Appellant-Bank against the entire Award and the Respondent against the part of the Award refusing back wages. Both the Writ Petitions i.e. W.P. No. 621 of 2009(S) filed by the Respondent and W.P. No. 3091 of 2009(S) filed by the Appellants were heard analogously and dismissed by a common order dated 8th May 2012. The Respondent not only mentioned the fact that he had initiated a Writ Petition earlier, but also annexed a copy of the common judgment and order of the High Court in the earlier Writ Petitions as Annexure P-4.

15. Even though, the Court may not have specifically dealt with the issue of res judicata raised by the Appellant-Bank as a preliminary issue, it is clear from the judgment and order of the Single Bench as also the impugned judgment and order of the Division Bench, that the second writ petition was not barred by the principles of res judicata or analogous principles.

16. The principles of res judicata are attracted where the matter in issue in the later proceedings have directly and substantially been in issue in earlier proceedings, between the same parties, in a competent forum having jurisdiction. Res judicata debars the Court from exercising jurisdiction to determine the lis, if it has attained finality between the parties. There is a distinction between res judicata and issue estoppel. In the case of issue estoppel, a party against whom an issue has been decided would be estopped from raising the same issue again."

19. The Corporate Debtor placed reliance upon the Order of Hon'ble NCLAT in the case of ***Vikas Dahiya vs Arrow Engineering Limited***

(Company Appeal (AT)(Insolvency) No. 699 of 2022) to establish that Doctrine of res judicata is applicable even to the proceedings under IBC and challenge to the findings in incidental or collateral proceedings amounts to an abuse of process of Court:

> *"In addition to the above judgment of Hon'ble Supreme Court, in the recent judgment in Civil Appeal No. 4840 of 2021 dated 17.08.2021 in the matter of Neelama Srivastava Vs. State of UP and Ors. held that when the judgment attained finality, it cannot be re-agitated in any collateral or incidental proceeding. In Rudra Kumar Sain and Ors. Vs. Union of India and Ors. while dealing with identical issue, the Hon'ble Supreme Court held that reconsideration of the judgment of the Court which has attained finality is not normally permissible. The decision upon the question of law rendered by this Court was conclusive and would bind the Court in subsequent cases. The Court cannot sit in appeal against its own judgment.*
>
> *37. In the matter of Union of India Vs. Maj. S.P. Sharma, the Hon'ble Apex Court held a decision rendered by the Competent Court cannot be challenged in a collateral proceeding for the reason that it is not permissible to do so as and when chooses and the finality of the proceeding would seize to have any meaning.*
>
> *38. Applying the principle laid in the above judgment to the present facts, to give quietus to the dispute and to avoid abuse of the process of Court to challenge the judgment which attained finality in a collateral or incidental proceeding, the appellants must be nonsuited.*
>
> *39. In view of the principle laid down in the above judgements, the principle of resjudicata, though a part of CPC, it would be*

applicable to the proceeding of this Tribunal and IBC. Only to prevent the abuse of process of law and give a finality to any proceeding, or orders, and to avoid an endless litigation to frustrate the very object of enacting IBC, the claim of appellants is liable to be rejected."

Submissions made by the Financial Creditors by way of Affidavit in Rejoinder:

20. The arguments advanced by the Financial Creditors is that the Corporate Debtor has committed the offence of perjury and has made false statements on oath. The petitioner prays to initiate the necessary enquiry under Section 340 of the Code of Criminal Procedure, 1973 on account of the aforesaid offence committed by the Respondent.

21. Petitioner submits that the existence of the debt is evident from the amounts disbursed by the Financial Creditor to the Corporate Debtor which is explicitly clear from the bank statement of the Financial Creditor. The Corporate Debtor further submits that the fact that these amounts were disbursed as a loan is evident from the Balance Sheets of the Corporate Debtor itself as the Corporate Debtor classifies these amounts disbursed as unsecured loans. The balance sheets referred to in this paragraph are already annexed at Annexure "A", "A-1" and "A-2" of the Rejoinder.

22. On debt due, the petitioner submits that as far as the total amount claimed to be in default by the Financial Creditor is concerned, the said amount has been arrived at on account of the fact that as per the agreement between the parties i.e. the Supplementary

Retirement Deed dated 13th August, 2016, the Corporate Debtor is liable to make payment of interest at the rate of 21% per annum on the principal outstanding amount and the Corporate Debtor has, in its books of accounts, only recorded the principal outstanding amount and has not factored in the interest due and payable.

23. The Petitioner submits that the privity of contract between the parties is demonstrated from the admission by the Corporate Debtor that there is an outstanding amount due and payable by it to the Financial Creditor and the same is of the nature of an Unsecured Loan. Further, there are documents annexed to the captioned Petition which also demonstrate that there is a privity of contract between the Financial Creditor and the Corporate Debtor.

24. Reliance is placed on ***M/s. Orator Marketing Pvt. Ltd. versus M/s. Samtex Desinz Pvt. Ltd.***, order dated 26.07.2021 in Civil Appeal No. 2231 of 2021 that a stipulation for payment of interest is not necessary for existence of a financial debt and a financial debt can exists even without any such stipulation and therefore, even on this count, the defence of the Corporate Debtor that there is no financial debt lacks merit and is liable to be rejected.

25. The Petitioner has also cited position of law as laid down by the Hon'ble Supreme Court of India in ***Asset Reconstruction Company (India) Limited vs Bishal Jaiswal and Anr. (2021 SCC Online SC 321)***, that an entry in the balance sheet would amount to an acknowledgement of liability. Further, it is also held by the Hon'ble Supreme Court of India in ***Laxmi Pat Surana vs Union***

Bank of India and Anr. (2021 SCC Online SC 267) that an acknowledgement of debt extends limitation for filing an application under the provisions of IBC. In the present case, admittedly, there is such an admission of liability by the Corporate Debtor on 31.03.2017, 31.03.2018, 31.03.2019, 23.07.2019 and on 31.03.2020 and the last of which is made by the Corporate Debtor on 31.03.2020. The date of filing the present Petition is 20.01.2020. Therefore, admittedly, in the present case, such admissions extend the time for filing the application under Section 7 of the IBC and therefore, the present Petition is within limitation.

26. The Petitioner rejoins that the order dated 29th September, 2021 was passed with respect to two other entities both, of the Tridhaatu Group and the PrinceCare Group and not with respect to parties to the present Company Petition and the mere existence of an order by a co-ordinate bench of this Tribunal does not, in any manner bar this Tribunal from taking an independent and contrary view.

27. The Petitioner has cited that the dishonour of the cheques evidences the existence of the debt and the default on the part of the Corporate Debtor in making payment towards the same. The Petitioner has relied on the position in law as laid down in ***Ashok Commercial Enterprises & Anr. vs Parekh Aluminex Ltd. (2014 SCC Online Born 4681)*** that even when a security cheque is given to a party the party can and is bound to deposit the same in the event of a default on the party making payment in accordance with the said cheque.

28. The Petitioner contends that finally an amount of Rs.21,00,000/- remains due and payable by Corporate Debtor's own admission and the same is evidenced by the Balance Sheet for the year ended 31.03.2019 of the Respondent.

Findings:

29. Heard the Ld. Counsel for the Financial Creditors and the Ld. Counsel for the Corporate Debtor and perused the records.

30. On the issue of Limitation, we rely on the Hon'ble Supreme Court Judgement in the case of Asset Reconstruction Company (India) Limited Vs. Bishal Jaiswal & Anr. (Civil Appeal No. 323 of 2021) where in it has been upheld that entries in the Financial Statements of the Company amount to an acknowledgement of debt for the Purpose of Limitation Act. In the given case the Corporate Debtor has issued an account confirmation to the Petitioner on 31.03.2018 which would make the claim within the period of limitation.

31. In order to understand the relationship between the parties, we need to see the parties to the LLP Retirement Deed dated 12.08.2016 and Supplementary Retirement Deed dated 13.08.2016, 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. PrinceCare Developers LLP.

32. The Supplementary Retirement Deed dated 13.08.2016 was entered into between the 'Tridhaatu Group' and 'Prince Care Group'. It is evident from both the above stated agreements that is LLP Retirement Agreement and Supplementary Retirement Deed from which the Financial Creditor states to derives its right to sue, the Corporate Debtor 'Tridhaatu Builders LLP' is not a party. Hence, there is no privity of contract.

33. Further, the Financial Creditor has placed reliance on its bank statements and confirmation of accounts of the Corporate Debtor that reflect transactions between the parties. However, in absence of any written document indicating the purpose of the said transactions, it cannot be assumed to have been towards a loan as claimed by the Financial Creditor.

34. It has been observed that proceedings around this issue have already been addressed by all the forums available to the Petitioner. The identical issue emanating out the very same agreements relied upon up the Financial Creditor herein have been decided by the Hon'ble NCLAT and has been upheld by the Hon'ble Apex Court. The facts of the case therein are similar to the case before us. Therefore, it is useful to reproduce the Order of the Hon'ble NCLAT in ***Shamji Optima Private Limited (Formerly known as Four Seasons Developers***

Private Limited) vs Tridhatu Aranya Developers LLP whereby it is held as under :

"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.”

35. The Bench reiterates the view taken by Hon’ble NCLAT that IBC is not a ‘recovery’ proceeding or a Code for settlement of collateral disputes.

36. Hence, for the reasons stated above we **reject** the Company Petition bearing **C.P.(IB) No.311 /MB/2020**.

Sd/- **Sd/-**

SHYAM BABU GAUTAM
Member (Technical)

JUSTICE P. N. DESHMUKH
Member (Judicial)

10.02.2023
SAM