

TEAM CODE:

17TH SURANA & SURANA NATIONAL CORPORATE LAW

MOOT COURT COMPETITION

BEFORE THE HON'BLE SUPREME COURT OF INDIA

AT NEW DELHI

REVIEW APPLICATION NOS. 1 OF 2019

(FILED UNDER ORDER XLVII RULE 1 OF CPC)

AGAINST CIVIL APPEAL NOS. 10000 & 10001 OF 2018

FIRST TO LEND BANKING LTD REVIEW APPLICANT

V.

SOFT SOLUTIONS PVT LTD REP BY ITS SHAREHOLDERS RESPONDENT

AND

SHAREHOLDERS OF SOFT SOLUTIONS PVT LTD REVIEW APPLICANT

V.

FIRST TO LEND BANKING LTD RESPONDENT

MEMORIAL ON BEHALF OF THE PETITIONER

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MEMORIAL ON BEHALF OF THE PETITIONERLIST OF ABBREVIATIONS

&	And
A/c	Account
AIR	All India Report
Art.	Article
BoD	Board of Directors
CIT	Commissioner of Income Tax
Co.	Company
Corp.	Corporate
CPC	Civil Procedure Code,
Cr.	Creditors
Ed.	Edition
FEMA	Foreign Exchange Management Act, 1999
HC	High Court
Hon'ble	Honorable
IBC	Insolvency and Bankruptcy Code, 2016
ICA	Indian Contract Act, 1872
ITA	Income Tax Act, 1961
Ltd.	Limited
NCLAT	National Company Law Appellate Tribunal

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NCLT	National Company Law Tribunal
Ors.	Others
PoEM	Place of Effective Management
Pvt.	Private
RBI	Reserve Bank of India
SC	Supreme Court
Sec.	Section
UoI	Union of India
V.	Versus

MEMORIAL ON BEHALF OF THE PETITIONERINDEX OF AUTHORITIESCASES REFERRED

SERIAL NO.	CASE NAME	CITATION
1.	Alpha and Omega Diagnostics (India) Ltd v. Asset Reconstruction Company of India	2017 TAXPUB(CL) 0532 (CNCLT-MUM)
2.	Arjan Singh v. State of Punjab	AIR 1970 SC 703
3.	Arun Tomar v. Union of India	W.P. (C) 7284/ 2015
4.	Authority of India v. Sutni Sangam	AIR 2010 SC 112
5.	B.K. educational services Pvt. Ltd. v. Parag Gupta and Associates	AIR2018SC5601
6.	Bajrang Prasad Jalan v. Mahabir Prasad Jalan,	AIR 1999 CAL 156
7.	Bank of Bihar Ltd v. Damodar Prasad	(1969) 1 SCR 620, AI 1969, SC 297
8.	Bar Council of India v. A.K. Balaji & Ors	(2018) 146 SCL 0681
9.	Black Pearls Hotel Pvt. Ltd v. Planet M Retail Ltd	[2017] 138 CLA 87 (SC)
10.	C Gupta v. Glaxo-Smithkline Pharmaceuticals Ltd.	(2007)7 SCC 171
11.	CCE v. Madras Rubber Factory Ltd.	(1989) 3 SCC 238
12.	Central Bank of India v. Workmen	AIR 1960 SC 12
13.	Chapleo v. Brunswich Permanent Building	(1881) 6 QBD 696 (CA).

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	Society	
14.	CIT v. Chittor Electricity Supply Corp.	(1995) 2 SCC 430
15.	CIT v. Shelly Products	(2003) 5 SCC 461
16.	CIT v. Vatika Township	(2015) 1 SCC 1
17.	Commissioner of Income Tax v. Vatika Township Pvt. Ltd.	(2015)1SCC1
18.	Commissioner of Income Tax v. Natika Township Pvt. Ltd.	(2015)1SCC1
19.	CST v. Pinc Chemicals	995 SCC (1) 58, JT 1994 (7) 206
20.	De Beers Consolidated Mines Ltd. v. Howe, Surveyor of Taxes	[1906] AC 445
21.	Delhi Development Authority v. Skipper Constructions Co. (P) Ltd	(1996) 4 SCC 622
22.	DLJMB Mauritius Investment Co. v. CIT	228 ITR 268 (AAR)
23.	Ferro Alloys Corporation Ltd v. Rural Electrification Corporation Ltd	C.P. (IB) No. 251/KB/2017)
24.	Garikapati Veercya v. N. Subbiah Chaudhry	AIR 1957 SC 540
25.	West v. Gwyne	(1911) 2 Ch 1 at pp 11, 12
26.	Gem Granites v. CIT	(2005) 1 SCC229
27.	Gibbs & Sons v. Societe Industrielle Des Metaux,	[1890] 2 QBD 399
28.	Govind Das and Ors. v. The Income Tax Officer and Anr	., AIR 1977 SC 552

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29.	Gulab Chand v. Kudi Lal &Anr	, 1966 AIR 1734, 1966 SCR (3) 623
30.	H Mahommad Khan v. Andhra Bank Ltd,	AIR 1983 Kant 73
31.	Hackbridge-Hewittic & Easun Ltd. v. G.E.C. Distribution Transformers Ltd.,	[1992] 74 Comp Cas 543 (Mad)
32.	Industries Ltd. v. ICICI Bank & Anr	, (2018) 1 SCC 407
33.	Janardan Reddy v. State,	AIR 1951 SC 124
34.	K. C. Arora v. State of Haryana, (1984) 3 SCC 281
35.	Keshvan v. State of Bombay,	AIR 1951 SC 128
36.	Life Insurance Corporation of India v. Escorts Ltd. & Ors.	, (1986) 1 SCC 264
37.	Macquarie Bank ltd. v. Shilpi Cables Ltd.	(2018) 2 SCC 674
38.	Mahadeo Lal Kanodia v. Administrator General of W. B.	AIR 1960 SC 936
39.	Mithilesh Kumari and Anr. v. Prem BehariKhare,	AIR 1989 SC 1247
40.	Mithilesh Kumari v. Prem Bahadur Khare,	AJR 1989 SC 1247
41.	National Project Construction Corporation v. Sadhu and Co.	AIR 1990 P&H 300
42.	Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustee Ltd.,	Company Appeal (AT) (Insolvency) No. 44 of 2017
43.	Ones v. Lipman,	[1962] 1 All ER 442
44.	P.Suseela Anti Ors. v. University Grant Commission,	AIR 2015 SC 1976

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45.	PN Eswara Iyer v. Registrar, supreme court of India	AIR 1980 SC 808
46.	Purbanchal Cables and Conductors Pvt. Ltd. v. Assam State Electricity Board and Anr	AIR 2012 SC 3167,
47.	Purbanchal Cables and Conductors Pvt. Ltd. v. Assam State Electricity Board and Anr	AIR 2012 SC 3167
48.	R. Rajagopal Reddy (Dead) by L.Rs. and Ors. v. Padmini Chandrasekharan(Dead), L.Rs	AIR 1996 SC,
49.	Rafiquennesa (Mst.) v. Lal Bahadur Chetri,	AIR1964 SC 1511
50.	Rao Shiv Badhadur Singh And Another v. The State of Vindhya Pradesh	1953 SCR 1188
51.	Re Dover and Deal Rly, Cinque Ports, Thanet and Coast Junction Co., Lord Londeborough's, Case	(1854) 4 De GM & G 411
52.	Shyam Sundar v. Ram Kumar	AIR 2001 SC 2472
53.	Singer India v. Chander Mohan Chadha	[2004] 122 Comp. Cas. 468 (SC)
54.	State Bank of India v. Ramakrishnan and Ors	AIR2018SC3876
55.	State of Bombay v. Vishnu Ramchandra	AIR1961 SC 307
56.	State of Madhya Pradesh v. Rameshwar Rathod	AIR 1990 SC 1849
57.	Subhra Mukherjee v. Bharat Coking Coal	(2000) 3 SCC 312

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58.	T.K.LakshmanaIver&Ors v. State of Madras & Ors.	1968 SCR (3) 542
59.	The Queen v. St. Mary Whitechapel	(1848)12 QB 120
60.	Trimbak Damodhar Rajpurkar v. Assaram Hiraman Patil	AIR 1966 SC 1758
61.	United States v. Milwaukee Refrigerator Transit Company	(1905) 142 F, Edn. 247
62.	Vodafone v. Union of India	(2012) 6 SCC 613
63.	West v. Gwyne	(1911) 2 Ch 1 at pp 11, 12
64.	Zile Singh v. State of Haryana	AIR 2004 SC 5100

BOOKS REFERRED

1. 5 DD BASU, *COMMENTARY ON THE INDIAN CONSTITUTION* (8TH EDITION, 2009)
2. ASHISH MAKHIJA , *INSOLVENCY AND BANKRUPTCY CODE OF INDIA* , LEXIS NEXIS , 2018
3. 1 AHARWALS, *LAW OF LIMITATAION* (3RD EDITION 2000)
4. 1 POLLOCK & MULLA, *INDIAN CONTRACT & SPECIFIC RELIEF ACTS* (12TH EDITION)
5. AVTAR SINGH, *CONTRACT AND SPECIFIC RELIEF* (11TH EDITION)

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STATEMENT OF JURISDICTION

The Review Application has been filed before the Hon'ble Supreme Court of India under Art. 137 of the Constitution of India read with Order XL of the Supreme Court rules 2013 and ORDER XLVII Rule 1 of the CPC 1908.

Article 137. Review of judgments or orders by the Supreme Court.—

Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

ORDER XLVII Rule 1 of the CPC 1908. It provides that a review before the Hon'ble Court can be made if there is -

- discovery of new important matters of evidence;
- mistake or error on the face of the record; and
- Any other sufficient reason.

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SYNOPSIS OF FACTS

1. Soft Solutions Pvt Ltd is an Indian Company incorporated under the **Companies Act, 1956** on April 1, 2000. Its shareholding is divided among four directors (herein referred as **personal guarantors**) equally. It has a US subsidiary (herein referred as **US Co.**), wherein, 52% shares are held by the Indian Co. and the remaining 48% shares by the four directors.
2. They approached First to Lend Banking Ltd (herein referred as **Indian Bank**), which is a subsidiary of a US Banking Co. (herein referred as **Foreign Bank**) for the Indian Co. and the US Co., on March 31, 2011.
3. The due date for the re-payment was 30.04.2014. However, the companies defaulted and so two notices were given under **SARFAESI Act 2002** on October 31, 2014 and November 30, 2014, for the Indian and the US Co. respectively, after declaring them as **non-performing assets** (herein referred as **NPA**) on October 31, 2014.
4. On December 1, 2016, the **Insolvency and Bankruptcy Code, 2016** (herein referred as **IBC**) was enacted. FLB India filled an application before the **National Company Law Tribunal** (herein referred as **NCLT**) which held that limitation period is not applicable, the personal guarantors cannot take benefit of moratorium and only the corporate debtors are eligible.
5. The parties appealed before the **National Company Law Appellate Tribunal** (herein referred as **NCLAT**) on March 31, 2018. NCLAT rejected the plea challenging application. Thereafter on June 6, 2018, an ordinance on IBC came which introduced section 238A and declared that the personal guarantors cannot take benefits of moratorium.
6. On June 30, 2018, the Supreme Court heard the matter and held that limitation period is applicable and benefits of moratorium cannot be taken by the personal guarantors.
7. Hence, the present Review petition has been filled.

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STATEMENT OF ISSUES

Issues raised before Hon'ble Supreme Court of India are as follows:

I.

WHETHER THE REVIEW PETITION IS MAINTAINABLE.

II.

WHETHER THE LIMITATION ACT SHOULD BE APPLIED

RETROSPECTIVELY

III.

**WHETHER THE DIRECTORS BE HELD LIABLE FOR THEIR PERSONAL
GUARANTEE GIVEN WHEN THEY INDIRECTLY HOLD 51% SHARES IN THE**

US COMPANY

IV.

**WHETHER THE CODE IS APPLICABLE TO A LOAN GRANTED BY A
FOREIGN BANK TO A FOREIGN COMPANY TO WHICH THE INDIAN
COMPANY STOOD AS A GUARANTOR**

V.

**WHETHER THE BENEFIT OF THE MORATORIUM PERIOD BE AVAILED BY
THE PERSONAL DIRECTORS**

VI.

WHETHER THE BANK HAS DEFAULTED IN DECLARATION OF NPA.

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SUMMARY OF ARGUMENTS

ISSUE 1- THE PETITION IS MAINTAINABLE

The present petition is maintainable because there is an error apparent on the face of record.

**ISSUE 2- THE LIMITATION ACT SHOULD NOT HAVE BEEN APPLIED
RETROSPECTIVELY**

That the limitation act cannot be applied retrospectively as it is interfering with the existing rights and has not been expressly mentioned in the amendment act.

ISSUE 3- THE SURETY ARE LIABLE FOR THEIR GUARANTEE

That the FEMA regulation has been wrongly quoted and they indirectly hold 51% in the US Co.

**ISSUE 4- THE CODE APPLIES TO A LOAN GRANTED TO A FOREIGN
COMPANY BY A FOREIGN BANK**

As per ICA, a creditor can go against the guarantor before the principal debtor & further that, the draft proposal recognizes the right of a foreign creditor to proceed under IBC.

ISSUE 5- THE PERSONAL GUARANTORS ARE NOT ENTITLED MORATORIUM.

That the corporate debtor & personal guarantors are separate legal entities. Moreover, moratorium for personal guarantors is given in Part III of the code which has not been notified yet.

ISSUE 6- THE BANK HAS NOT DEFAULTED IN DECLARATION OF NPA

The bank has declared the loan as NPA after 6 months which is more than the prescribed limit as per the RBI regulations of 90 days and hence no default has been made.

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PLEADINGS

ISSUE 1– THE PRESENT PETITION IS MAINTAINABLE

1. The petition is maintainable because there has been an error apparent on the face of it and the court has inherent power to review to prevent injustice to the bank.

1.1. THERE HAS BEEN AN ERROR ON THE FACE OF RECORD

2. A petition for review can be accepted if there is an error apparent on the face it. This court in **CST v. Pine Chemicals**¹ has held that interpretation of statute law at variance with the clear and simple language, thereof, is an error apparent on the face of the record.
3. Moreover, it is an error apparent on the face of it, if there is clear ignorance and disregard to the provisions of law² or the interpretation of law adopted by a bench is inconsistent with earlier decisions delivered by a co-ordinate or a larger bench.³
4. The Hon'ble Court has declared that the Limitation Act to apply retrospectively on the ground that it is of a procedural nature, it can be given a retrospective effect.⁴ However the court's attention was not drawn to the various cases of this court, wherein, it has been held that an amendment act cannot be applied retrospectively if it essentially takes away an already established right.⁵
5. In the present matter the IBC was enforced on 01.12.16 and had no provision for Limitation Act. Further, the provision for Limitation Act was only included by the amendment act which

¹ CST v. Pine Chemicals, 1995 SCC (1) 58.

² PN Eswara Iyer v. Registrar, AIR 1980 SC 808, 5 DD BASU, *COMMENTARY ON THE INDIAN CONSTITUTION*, Page 5936 (8th ed.).

³ 5 DD BASU, *COMMENTARY ON THE INDIAN CONSTITUTION*, Page. 5942, ¶ 6 (8th ed.).

⁴ B.K. Educational Services Private Limited v. Respondent: Parag Gupta & Associates, Page 13, ¶ 60.

⁵ R. Rajagopal Reddy (Dead) by L.Rs. & Ors. v. Padmini Chandrasekharan(Dead)by L.Rs, AIR 1996 SC 238, Purbanchal Cables & Conductors Pvt. Ltd. Ns. v. Assam State Electricity Board & Anr., AIR 2012 SC 3167, Garikapati Veercya v. N. Subbiah Chaudhry, AIR 1957 SC 540, West v. Gwyne (1911) 2 Ch 1 at pp 11, 12 (England).

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came into force on 06.06.18⁶ and thereafter the court gave it a retrospective effect, thus taking away an established right which is wholly against the previous decision of this Hon'ble Court.

1.2. THE COURT HAS INHERENT POWER TO REVIEW IT DECISION

6. The Supreme Court has inherent power to review its decision in the interest of justice and prevent the abuse of power of the court.⁷
7. In **V Chandrashekharan v. Admin Officer**⁸, it was held that a misleading or an inaccurate statement in a petition only to achieve ulterior purpose, is an abuse of power of the court. Moreover, a review petition may be accepted if the decision is passed '*per incuriam*' or if it is manifestly wrong.⁹
8. The personal guarantors have misquoted the FEMA regulations to save their liability and thus abused the power of the court. Further review petition can be entertained taking into consideration the public importance of the issue involved¹⁰, and, if there is a good compelling reason.¹¹
9. In the present case it would be unjustified to take away the right of the bank as certain facts have not been brought before the court. There was an implied extension of time for the repayment of debt and thus, it is humbly pleaded that the review may be allowed when a decree is passed under clear ignorance of facts and law.

**ISSUE 2- THE SUPREME COURT OUGHT NOT TO HAVE APPLIED THE
LIMITATION ACT RETROSPECTIVELY**

⁶ Insolvency And Bankruptcy Code (Second Amendment) Act, 2018, S. 1 (2).

⁷ 5 DD BASU, *COMMENTARY ON THE INDIAN CONSTITUTION*, Page 5935, ¶ 1 (8th ed.), SIR PETER BENSON MAXWELL, *INTERPREATION OF STATUTES*, 202-205, (12th ed.).

⁸ V Chandrashekharan v. Admin Officer, (2012) 10 SCR 603.

⁹ Cauvery Water Dispute Tribunal , In. re., AIR 1992 SC 522.

¹⁰ CCE v. Madras Rubber Factory Ltd., (1989) 3 SCC 238.

¹¹ 5 DD BASU, *COMMENTARY ON THE INDIAN CONSTITUTION*, Page 5938, ¶ 6 (8th ed.).

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10. Normally an enactment is prospective in nature, unless there is something in it to show that it means otherwise.¹² Furthermore, the enactment should expressly provide that it should be deemed to have come into effect from a past date, if it is retrospective in nature¹³.
11. In **CIT v. Vatika Township Pvt. Ltd**¹⁴, it was held that, the legislature must expressly, in clear and unequivocal language give retrospective operation to an enactment.

2.1. THE BANK HAD THE VESTED RIGHT TO RECEIVE MONEY.

12. There was a meeting between the bank and the directors for part payment of the loan with an extension of 18 months. It was only after this 18 months' time that an application before the NCLT was filed and hence, the suit is not barred by limitation at the very instance.¹⁵ The petitioner submits that, obtaining acknowledgement of debt extended limitation period.¹⁶ And the guarantors are also barred by the rule of estoppel.¹⁷
13. It is a well-known principle of Roman law that where there is a right, there is a remedy.¹⁸ Limitation Act ends the right to legal action by the judicial process in the court of law but certainly not through other process.

Thus, it is humbly submitted that the bank has a right to approach NCLT under IBC.

2.2. A NEW REMEDY ALTOGETHER IS PROPOSED UNDER IBC

14. The petitioner pleads that the IBC is a complete code in itself and is not an ordinary legislation for the recovery of debts.¹⁹ The NCLAT in **Neelkanth Township and**

¹² Meenakshi Sharma v. State of J&K & Ors , SWP no.953/2013 MP no.1344/2013 Date of order: 14 .11.2017.

¹³ GarikapattiVeeraya v. N. Subbiah Choudhury, AIR 1957 SC 540.

¹⁴ CIT v. Vatika Township Pvt. Ltd., (2015) 1 SCC 1.

¹⁵ ¶ 8, Moot Proposition.

¹⁶ Limitation Act, 1963, S. 18.

¹⁷ The Indian Evidence Act, 1872, S. 115, Combe v. Combe, [1951] 2 KB 215 (England), Central London Property Trust v High Trees House Ltd., [1947] Kings Bench (England).

¹⁸ Ubi Jus, Ibi Remedium- Where there is a right, there is a remedy (Law of Equity under Common Law).

¹⁹ Innoventive Industries Ltd. v. ICICI Bank & Anr, (2018) 1 SCC 407.

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Construction Pvt. Ltd. v. Urban Infrastructure Trustee Ltd²⁰, held that the Limitation Act is not applicable to the Code, since it's not an act for recovery of money claim, but relates to initiation of CIRP.

Hence, so long as the debt is due, the Code can be invoked irrespective of the limitation period.

15. Further, it is argued that the “*right to apply accrues*” as used in item 137 of Schedule I, Limitation Act, 1963, shall be interpreted as the right accrued when the right or the remedy becomes due. In the present case, the right to file a case accrued when the directors defaulted in the payment of dues and accordingly the steps were taken under the SARFAESI Act, 2002.²¹ However, the right to file an application under the IBC accrued on 01.12.2016 and thus, the period of limitation must be calculated from this date.

2.3. RULE OF BENEFICIAL CONSTRUCTION

16. As per **Maxwell's Interpretation of Statute**²², no rule of construction is more firmly established than that, a retrospective operation is not to be given to a statute so as to impair an existing right or obligation. Moreover, if the enactment is expressed in language, which is capable of either interpretation, it ought to be construed as prospective only.²³
17. It was held in **West v. Gwyne**²⁴ that, retrospective operation is one matter and interfering with the existing rights is another. The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation; it cannot be so construed to have a retrospective operation.²⁵ Further, it is a cardinal principle of construction

²⁰ Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustee Ltd., Company Appeal (AT) (Insolvency) No. 44 of 2017.

²¹ ¶ 6, Moot Proposition.

²² SIR PETER BENSON MAXWELL, *INTERPREATION OF STATUTES*, 202-205 (12th ed.).

²³ Purbanchal Cables & Conductors Pvt. Ltd. v. Assam State Electricity Board & Anr., AIR 2012 SC 3167.

²⁴ West v. Gwyne, (1911) 2 Ch.1 at pp 11, 12 (England).

²⁵ Garikapati Veercya v. N. Subbiah Chaudhry, AIR 1957 SC 540.

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that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation.²⁶

The amendment act came into force on 06.06.18 and hence, must be applied from this date.

2.4. AN AMENDING ACT CANNOT TAKE AWAY THE EXISTING RIGHTS

AVAILABLE TO A PERSON

18. This Court in **P. Suseela v. University Grant Commission**²⁷, held that any regulation should not be given a retrospective effect so as to prejudicially affect the interests of any person to whom such a regulation may be applicable.
19. Further, where a statute operates in future, it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included.²⁸
20. Similarly, in the case of **Mithilesh Kumari & Anr. v. Prem Behari Khare**²⁹, the Court held that the presumption against retrospective operation is strong where such retrospective operation impairs with an existing right or obligation or would be unjust and oppressive.
21. In **Steel Authority of India v. SUTNI Sangam**³⁰, the court held that a substantive provision providing for substantive right or a statutory provision providing statutory right should prevail over the procedural aspects of the matter.

²⁶ Keshvan v. State of Bombay, AIR 1951 SC 128 ; Janardan Reddy v. State, AIR 1951 SC 124 ; Mahadeolal Kanodia v. Administrator General of W. B., AIR 1960 SC 936 ; State of Bombay v. Vishnu Ramchandra, AIR 1961 SC 307 ; Rafiquenessa (Mst.) v. Lal Bahadur Chetri, AIR 1964 SC 1511 ; Arjan Singh v. State of Punjab, AIR 1970 SC 703 ; K. C. Arora v. State of Haryana, (1984) 3 SCC 281 ; Mithilesh Kumari v. Prem Bahadur Khare, AIR 1989 SC 1247 ; State of Madhya Pradesh v. Rameshwar Rathod, AIR 1990 SC 1849 ; Shyam Sundar v. Ram Kumar, AIR 2001 SC 2472 ; Zile Singh v. State of Haryana, AIR 2004 SC 5100 ; Gem Granites v. CIT, (2005) 1 SCC 229 ; C Gupta v. Glaxo-Smithkline Pharmaceuticals Ltd., (2007)7 SCC 171.

²⁷ P. Suseela v. University Grant Commission, AIR 2015 SC 1976.

²⁸ Rao Shiv Badhadur Singh & Anr. v. State of Vindhya Pradesh, 1953 SCR 1188 ; T.K. Lakshmana Iyer & Ors. v. State of Madras & Ors., 1968 SCR (3) 542.

²⁹ Mithilesh Kumari & Anr. v. Prem Behari Khare, AIR 1989 SC 1247.

³⁰ Steel Authority of India v. SUTNI Sangam, AIR 2010 SC 112.

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22. Recently, the Delhi High Court, in **Arun Tomar v. Union of India**³¹ stated that, “it is trite that a vested right cannot be taken away except by a law which is expressly made retrospective and must stand the scrutiny of law”. Moreover, in **Gulab Chand v. Kudilal & Anr.**³², it was held that application of a statute retrospectively can never be left to a matter of presumption and it must be clearly stated.
23. In the present case, the bank had an existing debt and a vested right to receive the money back. The amendment act, undoubtedly come into force on the 06.06.18.³³ There is no specific word in the amendment act to suggest its retrospective applicability.
24. Therefore, it is most humbly submitted, limitation act cannot operate retrospectively because it will lead to immediate termination of the vested rights of the bank and that would be against the various judgment of the Supreme Court.

ISSUE 3- THE GUARANTORS ARE LIABLE FOR THERE GUARANTEE

25. At the outset, it must be clarified that guarantors have wrongly quoted the FEMA regulation.³⁴ Firstly, the condition of holding 51% stake to give a guarantee applies only to Indian Party, i.e. an Indian company and not to a natural person, i.e. the personal guarantors.³⁵ Secondly, this rule is applicable when the guarantee is being extended to a second level step down subsidiary and not a direct subsidiary.³⁶

³¹ Arun Tomar v. Union of India, W.P. (C) 7284/ 2015.

³² Gulab Chand v. Kudilal & Anr., 1966 AIR 1734.

³³ Insolvency And Bankruptcy Code (Second Amendment) Act, 2018.

³⁴ ¶ B.1.2. (b) Master Direction – Direct Investment Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad (2016).

³⁵ ¶ A.3(K)) Master Direction – Direct Investment Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad (2016).

³⁶ ¶ B.1.2. (b) Master Direction – Direct Investment Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad (2016).

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26. Further, an Indian entity may extend guarantee to WOS in which it has equity participation³⁷ and an Indian Party may create charge on its assets in favour of an overseas lender as security for availing of the fund for a WOS outside India.³⁸
27. Hence, it is submitted that the condition of holding 51% equity in a foreign subsidiary is in no way related to the present case and since the US Company is a direct subsidiary the guarantee of the personal guarantors and the Indian company are valid in law and must be made liable for the same.
28. A company acts through its human agents and thus, the smoke screen of the company must be removed and identified individuals should be held liable for the corporation's debts despite the rule of limited liability and of separate personality.³⁹

3.1. US COMPANY IS THE ALTER EGO OF THE DIRECTORS

29. Corporate veil can be lifted if subsidiary company is the alter ego of the individual debtor.⁴⁰ Further when the companies are “**guided by the same head and brain**” and the parent controlled the actions of its subsidiary veil must be pierced.⁴¹
30. In **Life Insurance Corporation of India v. Escorts Ltd. &Ors.**⁴², Supreme Court ruled that for the purposes of ascertaining the ownership in the investment, lifting of the veil would be necessary, to ascertain the nationality or origin of the shareholders.

³⁷ Clause B.1.2. (b) Master Direction – Direct Investment Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad (2016).

³⁸ ¶ B.1.9. Master Direction – Direct Investment Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad (2016).

³⁹ Sealy's Cases & Materials in Company Law, 9th ed., Len Sealy, Sarah Worthington ; Oxford, Page 53.

⁴⁰ CF Trust Inc. v. First Flight Ltd. Partnership, (1972) 2 SCC 788, Page 806.

⁴¹ Hackbridge-Hewittic & Easun Ltd. v. G.E.C. Distribution Transformers Ltd., [1992] 74 Comp Cas 543 (Mad).

⁴² Life Insurance Corporation of India v. Escorts Ltd. &Ors., (1986) 1 SCC 264.

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31. It is therefore submitted that, the Indian company is the alter ego of the four directors and the US Company is an instrumentality of the Indian company as it holds 52 % of its shares and exercises control over it. Thus, the directors indirectly hold more than 51 % stakes in the US Company and hence they must be made liable.

3.2. CORPORATE VEIL CAN BE LIFTED TO PREVENT FRAUD

32. In **Ones v. Lipman**⁴³, Russel J. held that a company must not be used as a “device or a sham, a mask which he holds before his face and attempt to avoid recognition by the eye of equity”.

33. Further, in **Subhra Mukherjee v. Bharat Coking Coal Ltd.**⁴⁴, the court held it was justified to pierce the veil of incorporation to ascertain the true nature of the transaction and know who the real parties to the contract were. In **Bajrang Prasad Jalan v. Mahabir Prasad Jalan**⁴⁵, it was held that the corporate veil could be lifted in the cases not merely of a holding company, but also its subsidiary, when both are family companies.

34. Lastly, in **Singer India v. Chander Mohan Chadha**⁴⁶, the court observed that corporate veil could be lifted to do justice between the parties concerned, if the company is used to commit illegalities or to defraud.

35. Courts have also lifted the corporate veil if it is found that a subsidiary company has been constituted with the sole intention of concealing the true facts, to act as a façade and thereby perpetrate a fraud⁴⁷, or to look at the realities of the situation and to know the real state of affairs.⁴⁸

36. It is humbly submitted that in the present case grave injustice will be done to the Bank, if it is not allowed to recover from the personal guarantors. The directors, who have earlier given

⁴³ *Ones v. Lipman*, [1962] 1 All ER 442 (England).

⁴⁴ *Subhra Mukherjee v. Bharat Coking Coal Ltd.*, [2000] 3 SCC 312.

⁴⁵ *Bajrang Prasad Jalan v. Mahabir Prasad Jalan*, [2000] 6 Comp LJ 377.

⁴⁶ *Singer India v. Chander Mohan Chadha*, [2004] 122 Comp. Cas. 468 (SC).

⁴⁷ *Delhi Development Authority v. Skipper Constructions Co. (P) Ltd.*, (1996) 4 SCC 622.

⁴⁸ *Subhra Mukherjee v. Bharat Coking Coal*, (2000) 3 SCC 312.

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their guarantee for the loan according to the FEMA guidelines, cannot now deny it just because they have an indirect holding especially when this guarantee was an essential term of the contract.⁴⁹

**ISSUE 4- THE CODE APPLIES TO A LOAN GRANTED TO A FOREIGN
COMPANY BY A FOREIGN BANK**

37. The provisions of ICA provide that a creditor can go against the guarantor before approaching the principal debtor. Further, IBC has provisions for cross border insolvency and the draft proposal also recognizes the right of a foreign creditor to proceed under IBC.

**4.1. THE CREDITOR CAN GO AGAINST THE GUARANTORS BEFORE
APPROACHING THE PRINCIPAL DEBTORS AS PER THE ICA, 1872.**

38. As per the Sections 126 and 128 of the ICA 1872, the creditor is empowered to go against the guarantors before proceeding against the principal borrowers. This court in **Bank of Bihar v. Damodar Prasad**⁵⁰ has held that it is the choice of the creditor to recover the money either from the principal debtor or from the surety. In addition, directors may bind themselves personally by a guarantee which they sign or adopt, on behalf of a company.⁵¹ Thus, a creditor cannot be restrained from action against the surety.
39. Recently the NCLAT in **Ferro Alloys Corporation Ltd v. Rural Electrification Corporation Ltd.**⁵² held that – the creditor can go against the personal guarantors without initiating CIRP against the principal borrower.

⁴⁹ ¶ 3, Moot Proposition.

⁵⁰ Bank of Bihar v. Damodar Prasad, AIR 1969 SC 297; National Project Construction Corp. v. Sadhu And Co., AIR 1990 P&H 300.

⁵¹ Re Dover and Deal Rly, Cinque Ports, Thanet & Coast Junction Co., Lord Londeborough's Case, (1854) 4 De GM & G 411, Chapleo v. Brunswich Permanent Building Society, (1881) 6 QBD 696 (CA) (England).

⁵² **Ferro Alloys Corporation Ltd v. Rural Electrification Corporation Ltd**, Company Appeal (AT) (Insolvency) No. 92 of 2017.

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40. The bank was reluctant to give loan, however, it was only after the guarantee was given, the loan was sanctioned.⁵³ And therefore it is argued that the bank has right to go against the personal guarantors.

4.2. THE CENTRE OF MAIN INTEREST (COMI) IS IN INDIA

41. The COMI⁵⁴ is India. In principle, the insolvency proceeding are to be initiated where the debtor COMI is present regardless of assets and creditors in different states.

42. **Foreign Main Proceedings (FMP)**⁵⁵, “*is a foreign proceeding taking place in the State where the debtor has the center of its main interests.*” Just as PoEM⁵⁶ is used to determine the residential status of a company in tax matters, similarly, in cross border insolvency matters, COMI is determined to initiate CIRP.

43. In **DLJMB Mauritius Investment Co. v. CIT**⁵⁷, it was held that the mind and brain of the organization of the company are situated wherein the BoD meetings took place. Further the following factors are considered for determining COMI – Firstly, ascertaining the creditors, secondly, determining the principal assets and operations of the debtor, and lastly ascertaining the management of the debtor.

44. Thus, it is humbly submitted that in the present case the parent company is in India and the US co. is controlled by the directors and all the key management decisions are made in India. Therefore the COMI is India and IBC shall be made applicable.

4.3. THE DRAFT PROPOSAL ALLOWS CROSS BORDER INSOLVENCY

PROCEEDINGS AGAINST GUARANTORS THAT HAVE ASSETS IN INDIA

⁵³ ¶ 3, Moot Proposition.

⁵⁴ UNICITRAL Model Law.

⁵⁵ The Model Law, Art. 2 (b).

⁵⁶ IT Act, 1961, S. 6.

⁵⁷ DLJMB Mauritius Investment Co. v. CIT, 228 ITR 268 (AAR).

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45. The foreign creditor shall have the right to sought remedy under the IBC as per the draft proposal on cross border insolvency introduced by MCA on cross border insolvency under the IBC.⁵⁸
46. It is pertinent to note that sections 234 and 235 of the IBC, in fact, recognize the rights of a foreign creditor to initiate insolvency proceedings and therefore, the court must consider the persistence of such provisions.
47. It is further important to understand that the winding up/insolvency of the parent does not result in the winding up/insolvency of the subsidiary as held in **Vodafone v. Union of India**⁵⁹ and thus, merely because an action can be taken by the bank under the US insolvency law, proceedings under the Indian law cannot be halted.
48. Further, section 1(2)(d) of the draft part [Z] provides that the creditors in a foreign country have an interest in requesting the commencement of, or participation in, a proceeding under this Code. From the abovementioned provision, it is clear that a foreign creditor shall have the right to seek remedy under the IBC, 2016.
49. In **Macquarie Bank Ltd. v. Shilpi Cables Ltd.**⁶⁰, this court held that, the foreign creditors shall have the same rights as the domestic creditors to participate and initiate the corporate insolvency resolution process under IBC. Court in the above case expanded the definition of “person” to include persons residing outside India.
50. This court in **Bar Council of India v. A.K. Balaji and Ors.**⁶¹ has observed that the basic features of the Model Law, i.e. “access”, which allows foreign insolvency officials and foreign creditors a direct access to domestic courts, has been specifically tailored to meet the Indian context with regards to cross border insolvency.

⁵⁸ Draft part on Cross Border Insolvency dated 20.06.2018.

⁵⁹ Vodafone v. Union of India , (2012) 6 SCC 613.

⁶⁰ Macquarie Bank Ltd. v. Shilpi Cables Ltd., (2018) 2 SCC 674.

⁶¹ Bar Council of India v. A.K. Balaji and Ors., (2018) 146 SCL 0681.

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Thus, it is argued that in the current case, the foreign creditor i.e. the U.S. bank has a right to initiate CIRP against the guarantors in India.

**4.4. THE US BANK CAN PROCEED AGAINST INDIAN COMPANY THROUGH
ITS SUBSIDIARY BANK IN INDIA.**

51. The Indian bank has issued a LC for the loan given to the US co. and hence it owns a financial debt to the US co.⁶². It is therefore argued that the Indian bank is itself a financial creditor. As per section 7⁶³, a financial creditor can move against the corporate debtor in case of a default and since a default is made in the present case, the Indian bank has a *locus standi* to file an application.
52. Further as per section 37 of the ICA, 1872, the Indian company is bound by its obligation to act on the guarantee given on behalf of the US co. and is therefore, liable to be proceeded against by the bank.
53. It is therefore argued that the argument of the personal guarantors and Indian co. that, the loan was disbursed in foreign currency and the bank in India did not invoke the bankruptcy law in the US, is completely baseless and thus not tenable that the COMI is India and so a foreign creditor shall be allowed to initiate CIRP through its Indian subsidiary under IBC.

**ISSUE 5- THE PERSONAL GUARANTORS ARE NOT ENTITLED TO THE
BENEFIT OF MORATORIUM.**

54. It is humbly pleaded that the personal guarantors are not entitled to the benefit of moratorium under *Section 14(3)(b)* of the Code⁶⁴, the applicability of moratorium shall not be extended to a surety in a contract of guarantee to a corporate debtor. A corporate debtor and personal guarantors are separate legal entities.⁶⁵

⁶² LC issued as per S. 5(8) h of IBC.

⁶³ Insolvency & Bankruptcy Code.

⁶⁴ After the Insolvency & Bankruptcy Code (Second Amendment) Act, 2018.

⁶⁵ M/s Sicom Investments & Finance Ltd. v. Rajesh Kumar Drolia & Anr., (2017) SCC 23 Bom 9725.

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55. NCLAT in **Alpha and Omega Diagnostics (India) Ltd v. Asset Reconstruction Company of India**⁶⁶, laid down that moratorium had no application on properties not under the ownership of the debtor⁶⁷ therefore the assets of guarantors of corporate debtors shall be excluded from the scope of moratorium.

Further according to the BLRC report, all the questions related to insolvency of any legal entity in India will find an answer in a single legislation⁶⁸.

56. In **State Bank of India v. Ramakrishnan and Ors**⁶⁹, the Hon'ble Supreme Court correctly held that section 14 of the IBC, 2018 shall not be applicable upon personal guarantors and made several observations holding the abovementioned viewpoint which shall be further contended.

**5.1. THE CORPORATE DEBTOR AND PERSONAL GUARANTOR ARE
SEPARATE LEGAL ENTITIES**

57. It is pertinent to note that the corporate debtor and personal guarantor being separate legal entities cannot be deemed to be undergoing the insolvency proceedings under the code at the same time. A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor.⁷⁰ As the guarantors' liability is distinct and separate from that of the corporate debtor, a suit can be maintained against the surety, though the principle debtor has not been sued.⁷¹

58. It is further contended that, although Part III of the Code has not been brought into force, it is clear that if an insolvency resolution process is to be carried out against a personal guarantor, it can be done only under Part III, which contains a *separate moratorium provision*, namely,

⁶⁶Alpha and Omega Diagnostics (India) Ltd v. Asset Reconstruction Company of India, NCLAT, New Delhi, by Order dated 10th July 2017.

⁶⁷ 2017 TaxPub (CL) 0532 CNCLT-Mum.

⁶⁸ BLRC Report, Page 76, ¶ 5.1.

⁶⁹ State Bank of India v. Ramakrishnan and Ors., AIR 2018 SC 3876.

⁷⁰ State Bank of India v. Smt. Goutami Devi Gupta & Ors., AIR 2002 MP 81.

⁷¹ Indian Contract Act, 1872, S. 128.

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Sections 96 and 101, both of which would attach only if a separate insolvency process were carried out as against the personal guarantor.⁷²

59. When contrasted with Section 101, it becomes clear that Section 14 cannot possibly attach to a personal guarantor as well, as Section 101 does not speak of a 'debtor' but speaks 'in relation to the debt', but would attach only if Part III proceedings were to be instituted against the personal guarantor.⁷³

**5.2. SUBSTITUTION OF A NEW SECTION IN THE CODE HERE IS OF
CLARIFICATORY NATURE AND HENCE WILL ALWAYS HAVE A
RETROSPECTIVE EFFECT.**

60. In the current case, the Supreme Court concluded that the surety in a contract of guarantee cannot take benefit of moratorium, vide the IBC Second Amendment Act, 2018 dated 06.06.2018 and that the said legislation is to be applied retrospectively for the purpose of insolvency proceedings.⁷⁴

61. As per the reports of the **Insolvency Law Committee**, appointed by the Ministry of Corporate Affairs, dated 26.03.2018, certain key recommendations must be looked upon which includes: "(iv) to clear the confusion regarding treatment of assets of guarantors of the corporate debtor vis-a-vis the moratorium on the assets of the corporate debtor, it has been recommended to clarify by way of an explanation that all assets of such guarantors to the corporate debtor shall be outside scope of moratorium imposed under the Code."⁷⁵

62. The committee made several other findings as mentioned in its report⁷⁶ which makes it clear that the object of the amendment was to clarify and set at rest what the Committee thought was an overbroad interpretation of Section 14. It was further held in **CIT v. Shelly**

⁷² State Bank of India v. Ramakrishnan and Ors.

⁷³ Supra.

⁷⁴ ¶ 5, Moot Proposition.

⁷⁵ Report of the Insolvency Law Committee, March 2018.

⁷⁶ ¶ 5.5-5.11 of Chapter 5

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Products⁷⁷ that the statutes in question “being clarificatory in nature it must be held to be retrospective, in the facts and circumstances of the case.” Similar views were held in several other judgements including **CIT v. Chittor Electricity Supply Corporation**⁷⁸, **CIT v. Vatika Township**⁷⁹ and **Central Bank of India v. Workmen**⁸⁰. Hence it is established that personal guarantors cannot be granted the benefit of moratorium in this case.

ISSUE 6 – THE BANK HAS NOT DEFAULTED IN DECLARATION OF NPA

63. An asset, including a leased asset, becomes non-performing when it ceases to generate income for the bank⁸¹, and it is the prerogative of the banks to decide the capability of the repayment by the borrowers of the loans to declare as NPAs.
64. According to the RBI guidelines⁸², a loan can be declared as a non performing asset where the interest and/ or installment remains overdue for a period of more than 90 days .The loan became due on April 30, 2014 and declared as NPAs, after waiting for six months. Thus it is submitted that, the argument of the guarantors is completely baseless no default has been made by the bank.

⁷⁷ CIT v. Shelly Products, (2003) 5 SCC 461.

⁷⁸ CIT v. Chittor Electricity Supply Corporation, (1995) 2 SCC 430.

⁷⁹ CIT v. Vatika Township, (2015) 1 SCC 1.

⁸⁰ Central Bank of India v. Workmen, AIR 1960 SC 12.

⁸¹ ¶ 2.1.1 of the Master Circular by RBI, dated DBOD.No.BP.BC.9/21.04.048/2014-15.

⁸² Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances 2014.

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THE PRAYER

Wherefore, in the light of the Issues Raised, Arguments Advanced and Authorities Cited it is most humbly and respectfully submitted that this Hon'ble Court may adjudge and declare that:

- 1. The Review Petition is maintainable.**
- 2. The Limitation Act cannot be applied retrospectively such that it takes away an existing right.**
- 3. The personal guarantors indirectly hold more than 51% of the shares and hence, must be made liable for their guarantee.**
- 4. The IBC is applicable even when there is a loan granted by an foreign bank to a foreign company of which Indian company stood as a guarantor.**
- 5. The benefit of the moratorium period is not available to the personal guarantors under IBC.**
- 6. The bank has not defaulted in declaration of the assets as NPA.**

The Court may also be pleased to pass any other order, which this Hon'ble Court may deem fit in light of Justice, Equity and Good Conscience.

All of which is respectfully affirmed and submitted.

Counsels on Behalf of Petitioner