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LIST OF ABBREVIATIONS

ABBREVIATIONS	EXPANSIONS
FLB	FIRST TO LENDING BANK
SS	SOFT SOLUTIONS
LTD	LIMITED
AIR	ALL INDIA REPORTER
SC	SUPREME COURT
SCC	SUPREME COURT CASES
&	AND
ART.	ARTICLE
ANR.	ANOTHER
HC	HIGH COURT
NCLT	NATIONAL COMPANY LAW TRIBUNAL
NCLAT	NATIONAL COMPANY LAW APPELLATE TRIBUNAL
IBC	INSOLVENCY BANKRUPTCY CODE, 2016
CIRP	CORPORATE INSOLVENCY RESOLUTION PROCESS
HON'BLE	HONOURABLE
NO.	NUMBER

§	SECTION
v.	VERSUS
GOVT.	GOVERNMENT
US	UNITED STATES
COI	CONSTITUTION OF INDIA
CPC	CODE OF CIVIL PROCEDURE, 1908
NPA	NON-PERFORMING ASSETS
SARFAESI	SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002
FEMA	FOREIGN EXCHANGE MANAGEMENT ACT, 1999
ed	EDITION
Cal	CALCUTTA
PVT.	PRIVATE
SH'S	SHAREHOLDERS
ROI	RATE OF INTEREST
CA	COMPANIES ACT, 1956 & 2013
LA	LIMITATION ACT, 1963
ICA	INDIAN CONTRACT'S ACT, 1872

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2.	The Indian Contracts Act, No. 9 of 1872, INDIAN CODE (1872).
3.	The Code of Civil Procedure, No. 5 of 1908, INDIAN CODE (1908).
4.	The Limitation Act, No. 36 of 1963, INDIAN CODE (1963).
5.	The Companies Act, No. 18 of 2013, INDIAN CODE (2013).
6.	The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, No 54 of 2002, INDIAN CODE (2002).
7.	The Foreign Exchange Management Act, No. 42 of 1999, INDIAN CODE (1999).

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1.	The Constitution of India, 1950.

VI. BOOKS REFERRED

SERIAL NO.	NAMES
1.	TRAYNER'S LATIN MAXIMS (4 TH ED. 2006).
2.	A RAMAIYA, GUIDE TO COMPANIES ACT (VOL 3. 18 TH ED. 2015).
3.	UN MITRA'S, LAW OF LIMITATION AND PRESCRIPTION (VOL 1. 12 TH ED. 2010).
4.	SUPREME COURT ON CONTRACT AND SPECIFIC RELIEF (VOL 2.)
5.	POLLOCK AND MULLA THE INDIAN CONTRACT AND SPECIFIC RELIEF ACTS (VOL 2. 14 TH ED. 2015).
6.	IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW (2 ND ED. 2005).
7.	MP JAIN, THE CODE OF CIVIL PROCEDURE (4 TH ED. 2016).
8.	BLACK'S LAW DICTIONARY (9 TH ED. 2009).
9.	TANNAN'S BANKING LAW AND PRACTICE IN INDIA (26 TH ED. 2017).
10.	TOTTEL'S INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION (1 ST ED. 2009).

VII. WEB RESOURCES

SERIAL NO.	NAMES
1.	<i>www.manupatrafast.com</i> (MANUPATRA)
2.	<i>www.delhihighcourt.nic.in</i> (DELHI HIGH COURT OFFICIAL)
3.	<i>www.judis.nic.in</i> (SUPREME COURT OF INDIA OFFICIAL)
4.	<i>www.jstor.org</i> (JSTOR)
5.	<i>www.sconline.com</i> (SCC ONLINE)
6.	<i>www.westlaw.india.com</i> (WEST LAW INDIA)
7.	<i>www.bombayhighcourt.nic.in</i> (BOMBAY HIGH COURT OFFICIAL)

VIII. REGULATIONS

SERIAL NO.	NAME
1.	Direct Investment by Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad, Reserve Bank of India Master Direction, 2016 (India)

STATEMENT OF JURISDICTION

The Review Applicant No. 1 most humbly and respectfully submits to the jurisdiction of this Honourable Court under Article 137 of the Constitution of India read along with Order XLVII of the Supreme Court Rules, 2013.

Article 137 of the Constitution envisages:

“Article 137: Review of judgements or orders by the Supreme Court.

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

STATEMENT OF FACTS

SS Pvt. Ltd (R1), is a co. incorporated under the CA, 1956, by four IIT-ians, with SH 25% each. A subsidiary was set up with the following shareholding pattern, 52% by R1 and 48% distributed four ways between the 4 SHs. Business in the subsidiary declined due to meltdown in US markets. Rapid Capital influx undertaken by the SHs. R1 approached FLB for expansion of both the companies (\$20 million for the US Company and INR200cr for the R1). FLB agreed to provide the loan. The loans were disbursed with the maturity of 3 yrs. with fixed ROI of 12% p.a. The SHs stood surety for the loan to R1 and R1 along with its SHs stood surety for the Loan to the US subsidiary. R1 started making default interest- payments and thus FLB had to compromise on such delays. Following this, the R1 defaulted in payment of the principal amount and interest on the maturity date. FLB declared the loans as NPA (after a 6 months wait). A notice was serviced u/s 13 of the SARFAESI Act to the SHs for repayment of the loans by Dec 31, 2014 failing which both secured and attached personal assets were to be seized. In their reply to the aforesaid notice, the directors disputed the amount mentioned in the notice on several grounds, to which no reply was serviced by FLB. In furtherance, the SHs moved the court to stay the possession notices due to failure in following compliances by FLB. Another § 13(2) notice under the SARFAESI was sent to the SHs regarding the repayment of loan extended to the US subsidiary of R1, with penal interest on or before Jan 31, 2015, failing which provisions under the said Act will be invoked. The SHs of R1 disputed the legal notice (30/11/2014) and further raised contentions that the US branch of FLB shall proceed against the US subsidiary of R1 directly. Pursuant to the same it was agreed by the SH that 25% of the dues be paid along with the remaining dues to be paid off within a period of 18 months, failing which the company shall face legal consequences. Finally after realising that recover of debt won't be possible, FLB filed two applications with the NCLT u/s 7 of the IBC, for the initiation of CIRP against the R1. After hearing both parties the NCLT admitted both the application and declared moratorium period from March 01, 2018. Against the impugned NCLT order, an appeal was preferred in the NCLAT by the SHs. The NCLAT reversed the order of the NCLT. To the same the SHs further appealed to the apex court regarding the issue of Limitation and application of S.14 of the code. The Apex court on a joint hearing of both the application, held that S.14 applies only to corporate debtor and not non-corporate debtor and that limitation does apply to application under the IBC. However, other issues mentioned in the Review application were not adjudicated on. Following which on the same subject passed two judgments regarding limitation and personal guarantee, respectively, which laid some clarity to the situation. The Judgment passed in June deemed to be not acceptable by both parties concerning respective unattended issues as mentioned.

HENCE THIS REVIEW APPLICATION

MEMORIAL FOR REVIEW APPLICATION NO. 1 PREFERRED BY THE BANK

STATEMENT OF ISSUES

- I. WHETHER THE REVIEW APPLICATION FILED BY FLB INDIA AGAINST THE JUDGEMENT OF THE SUPREME COURT IS MAINTAINABLE OR NOT?**

- II. WHETHER THE SUPREME COURT OUGHT TO HAVE APPLIED A NEW AMENDMENT RETROSPECTIVELY?**

- III. WHETHER THE APPLICATION FILED BY FLB INDIA UNDER § 7 OF THE INSOLVENCY BANKRUPTCY CODE, 2016 WAS HIT BY LIMITATION?**

- IV. WHETHER THE GUARANTORS CAN BE DIRECTLY SOUGHT AFTER IN INDIAN COURT FOR THE US COMPANY'S LOAN.**

- V. WHETHER THE PERSONAL GUARANTORS CAN BE HELD LIABLE FOR THE LOAN GRANTED TO THE US COMPANY?**

SUMMARY OF ARGUMENTS

[1]. The Review Application filed by FLB India is Maintainable.

[1.1] Jurisdiction of the Supreme Court under Art 137 can be invoked under exceptional circumstances, in furtherance of ends of justice for any other sufficient reason.

[1.2] The instant application arises out of the second condition stated in O47 R1 (b);

[2]. The Supreme Court ought not to have applied a new enactment retrospectively.

[2.1] Retrospective legislation is never presumed, and therefore a law will only be applied to cases occurring after its date, unless it appear from the statute itself that it is intended to have retroactive effect.

[3]. The application made under the insolvency bankruptcy code was not hit by limitation.

[3.1] Admission of “sufficient cause” for condonation of delay.

[3.2] S.22 of the Limitations (continuous cause of action), deems to be applicable in the instant case.

[4]. The guarantors can be directly sought after in Indian court for the US company’s loan.

[4.1] The liability of the surety is coextensive with that of the principal debtor

[4.2] The Application of “*Forum non Convenience*”

[5]. The Personal Guarantor can be held liable for the loan granted to the US Company.

[5.1] FEMA is not applicable as the US Subsidiary is an immediate Subsidiary.

[5.2] The liability of surety is coextensive with that of principal debtor.

WRITTEN PLEADINGS**I. THE REVIEW APPLICATION FILED BY FLB AGAINST THE JUDGEMENT PASSED BY THE SUPREME COURT OF INDIA IS MAINTAINABLE.**

“To perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience.”¹

1. This review petition impugns the judgment and order dated 30.06.2018 passed by this Hon’ble Court in Civil Appeal No.10000 and in all connected matters. In light of precedents set and provisions laid under the COI. 1950 and the CPC, 1908 this instant application deems fit to be maintainable. In order to establish the same we observe the circumstances from which a review application arises, particularly laid down under O47 R1 of the CPC, 1908

Particularly:

- Cases in which no appeal lies.
 - Cases in which appeal lies but not preferred.²
 - Decision on reference on court of small causes.
2. In reference to *Cogent EMR Solutions Ltd. v. Virendar Kumar Sharma*³, the grounds of review are prescribed; discovery of new matters or evidence which, after the exercise of due diligence was not produced in court and has resulted in an erroneous judgement; mistake or error apparent on the face of the record; under exceptional circumstances in furtherance of ends of justice for any other

¹ M.S. Ahlawat v. State of Haryana, (2000) 1 SCC 278 (India).

² Lily Thomas v. Union of India & Ors, (2000) 6 SCC 224 (India).

³ Cogent EMR Solutions Ltd v. Virendar Kumar Sharma, (2009) 111 DRJ 673 (India).

sufficient reason.⁴ The words any other sufficient reason must mean a reason sufficient on grounds, at least analogous to those specified in the rule.⁵ Even though it is not specified in the statute as to what specified reasons would be for the maintainability of the particular review petition , some clarity may be derived from precedent set in various cases in the privy council , supreme court and the federal courts.

3. A review of a judgement is a serious step and reluctant resort to it is called for only where glaring omission, patent mistake or grave error has crept in earlier by judicial fallibility.⁶The instant application arises out of the first condition stated in O47 R1 (b). In the instant case, there does not lie an appeal that can be preferred against the Judgement by the Supreme (Dated: 30/06/2018). Even if the statute is applied literally and a strict interpretation is adopted, the review application still checks out the condition for maintainability. Thus, not only is the review of the same maintainable but also necessary under a strict interpretation of the statute to forward the ends of justice. Hence maintainable.
4. Alternatively, a more proportionate and relevant approach may be adopted for this instant case if we shall construe “ Any Other Sufficient Reason ” to be a scenario where the court had failed to consider a material issue, fact or evidence⁷. In this view, we observe the current review petition and claim as per mentioned in para 12 of the fact sheet, that the Supreme Court did not deal with other merits of the case and disposed of the appeals accordingly .

⁴ Narayan Pd. Mishra v. State of Orissa, (2008) 105 Cut LT 792 (798) (DB)

⁵ M.P. Jain, The Code of Civil Procedure (4th ed. 2016)

⁶ Sow Chandra Kanta v. Sheikh Habib, AIR (1975) SC (1500) (India).

⁷ Burma Shell Oil Storage Distributing Co. of India Ltd. v. Labour Appellate Tribunal, 1955 AIR (Cal.) 92.

The following are the issues that were not dealt with the Supreme Court:

- a) Whether the personal assets of the shareholders had any protection.
 - b) Whether the Indian company is to be treated as a corporate debtor with respect to the loan given to its subsidiary in the US?
 - c) “Sufficient Cause” was not appreciated while applying limitation.
 - d) Issues related to the application of the FEMA act.
 - e) No light shed on how the recovery of the loans shall eventually happen.
5. Thus, it is a prerogative for the counsel for the Review applicant 1 to bring into the court’s attention, the unattended issues and facts which remain unappreciated in the previous appeal.
6. Hence, it is contended that the present review application is maintainable as per provisions laid under O47R1 CPC and Article 137 of the COI and the aforementioned neglected issues form sufficient ground for this purpose. The afore-mentioned errors are apparent on the face of the record and does not require to be probed out, thus making review an imperative step to ensure justice. Thus, the counsel brings attention to factual and legal fallacies (points (a)-(e)) of the previous impugned judgement and contends that the same to be qualified as ‘any other sufficient reason’ under the provisions of existing laws for the time being in force.

II. THE SUPREME COURT OUGHT NOT TO HAVE APPLIED THE AMENDMENT RETROSPECTIVELY.

*'Nova constitution futuris formam imponere debet non praeteritis.'*⁸

1. The stance of law regarding retrospective effect can be crystallized by observing relevant case laws and judicial commentary. The Black's Law Dictionary defines retroactive laws (also called retrospective law) as a ruling extending in scope or effect to matters that have occurred in the past.⁹ As stated by T.C. Hartley¹⁰ that "true retroactivity" consists in the application of a new rule of law to an act or transaction which was completed before the rule was promulgated.
2. Retrospective legislation is never presumed, and therefore a law will only be applied to cases occurring after its date, unless it appear from the statute itself that it is intended to have retroactive effect.¹¹ The Supreme Court in the case of **Nani Sha v. State of Arunachal Pradesh**¹², clearly states that in order to make an amendment have retroactive effect it has to be expressly stated in the provision. "Nothing had stopped the Government before amending the statute to word it specifically, making it retrospective"¹³. From this explanations the counsel infers that in order for an amendment to be applied retrospectively would require it, not to change the intent or the position of the law drastically, as it will cause gross procedural errors and millions

⁸ Osborn: Concise Law Dictionary, p.224

⁹ The Black's Law Dictionary, (9th ed. 2009).

¹⁰ T.C.Hartley, The Foundations of European Community Law 129 (1989)

¹¹ Trayner's Latin Maxims, (14th ed. 2006).

¹² Nani Sha v. State of Arunachal Pradesh, 2007 (5) TMI 593 (India).

¹³ Nani Sha v. State of Arunachal Pradesh, 2007 (5) TMI 593 (India).

of rupees in damage Hence to preserve the legislative intent of IBC and avoid miscarriage of justice the amendment ought not to be applied retrospectively.

III. THE APPLICATION MADE UNDER THE INSOLVENCY BANKRUPTCY CODE WAS NOT HIT BY LIMITATION

1. Rules of Limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly.¹⁴ The law of limitation is based on the maxim, *Interest reipublicae up sit finis litium*, thus it is imperative for the sake of litigants and delivery of justice that a life span be fixed for claiming remedy against any particular legal injury. In the case of *S. Ganesharaju v. Narasamma*¹⁵, Supreme Court observed that law of limitation is not meant to destroy or foreclose the rights of parties.
2. Other than the aforementioned act limitation clauses has been provided in the CA, 2013¹⁶ and IBC, 2016¹⁷ with regards to institution of an application for grievances. Although, the said provision is attracted to any application that is being tried by the NCLT (Companies Act being the Parent statute), it is also noticed that such limitation is subjected to flexibility under § 5 of the LA 1963, pursuant to the deciding Judge's discretion on admission of "sufficient cause" for condonation of delay.
3. Discretion of the court is a very important aspect of § 5 of the Limitation Act as the act does not specify as to how much delay can be condoned. In *Balakrishnan V. M.A. Krishnamurthy*¹⁸ the apex court explained that length of delay is no matter,

¹⁴ Balakrishnan v. M.A. Krishnamurthy (1998) 7 SCC 123 (India).

¹⁵ S Ganesharaju v. Narasamma, (2013) 11 SCC 341 (India).

¹⁶ The Companies Act, No. 18 of 2013, §433 r/w §408, INDIAN CODE (2013).

¹⁷ The Insolvency Bankruptcy Code, No. 31 of 2016, §238A, INDIAN CODE (2016).

¹⁸ Balakrishnan v. M.A. Krishnamurthy (1998) 7 SCC 123 (India).

acceptability of the explanation is the only criteria. Pursuant to the same the court reemphasized that the words “sufficient cause” u/s 5 of the Limitation Act should be construed liberally so as to advance substantial justice. Further, to elaborate on the same point, the counsel would like to place reliance on the judgement delivered in *Balwant Singh V. Jagdish Singh and Others*¹⁹, wherein the court held, that a liberal construction of the expression “sufficient cause”, pre-supposes that there is no negligence or inaction on the part of the applicant. And it has been established in a recurring manner through the facts of the case that there was no negligence or failed due diligence on the part of FLB either while serving the notice under the SARFAESI Act or moving to the NCLT for CIRP.

4. The court while deciding with regards to condonation of delay, generally as a normal rule should condone the delay unless respondents are able to show *mala fide* in not approaching the court within the period of limitation. The trend of the courts while dealing with such matters is tilted more towards condoning the delay and directing the parties to contest the matter on merits, thereby meaning that such technicalities have been given a go-by.²⁰ In respect to the principal enunciated with respect to condonation of delay in the case of *Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy & Ors*²¹, the counsel pleads that the facts of the case are in proportion to principles laid in the above mentioned case.
5. Critically pointing out the cause of action in such cases are particularly difficult, thus the counsel puts forth that the final cause of action with regards to present transactions

¹⁹ Balwant Singh v. Jagdish Singh, (2010) 8 SCC 685 (India).

²⁰ Arun Ganguly v. Amaresh Ganguly, (2015) RSA 222 (India).

²¹ Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy & Ors, (2013) 12 SCC 649 (India).

and debt arises from the default in payment made on July, 2016. Therefore the period of limitation would begin from July, 2016. Secondly, “the right to initiate proceeding under the Code accrues on 1 December 2016 i.e. the date on which the Code came into effect. Hence, an applicant can initiate proceeding under the Code even if the debt is time barred provided he initiates the proceeding with in three years from 1 December 2016.”²²

6. In an alternative perspective, § 22 of the Limitations (continuous cause of action), deems to be applicable in the instant case. ‘If once a cause of action arises, and the acts complained of are continuously repeated, the cause of action continues and goes on *de die in diem*.’²³ The test in applying § 22 of the Limitation Act is not whether the right is a continuing right but whether the wrong is a continuing wrong.²⁴ In a continuing wrong the wrongful act complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance.²⁵ The Respondent 1 have defaulted in the timely payment of interest and further defaulted in paying the principal amount. Pursuant to the same negotiations were entered into, breach of which resulted in further injury to the review applicant 1. Such delay in payments devalue the real price of currency due to inflation for the sole purpose of which interest rates apply, the act of omission of payment results in a continuing injury caused to the review applicant 1 for which a fresh cause of action lies with each injury caused, extending the period of limitation with this regard. Hence, using the ratios of

²² Black Pearls Hotel Pvt. Ltd v. Planet M Retail Ltd, (2017) 4 SCC 498 (India).

²³ Hole v. Chard Union, [1984] 1 Ch 293 (Ch)b

²⁴ Mahavir Spinning Mills Ltd. V. Hb Leasing and Finances Co. Ltd, (2013) 199 DLT 227 (India).

²⁵ U.N. Mitra, Law of Limitation and Prescription (12th ed. 2010)

the above-mentioned case, it is easily established that the prolonged and repeated default in payment can be qualified to be treated as a continuous cause of action.

IV. THE GUARANTORS CAN BE DIRECTLY SOUGHT AFTER IN INDIAN COURT FOR THE US COMPANY'S LOAN.

1. This issue will be dealt with in five sub-assertions for the convenience of the court, which will deal with the following questions of law:
 - Will enforceability of LC agreement will overshadow the breach of contract in determining jurisdiction?
 - Whether there lies a remedy with respect to the debt of US under provisions of Indian Laws?
 - Where the Jurisdiction may lie in absence of an exclusive jurisdiction clause?
 - Will the recovery of debt be initiated against corporate debtor or guarantor?
 - How companies act, 2013 applies to foreign incorporated company owned by Indian citizens?
2. The diversified interests of the debtor spread across countries may give rise to confusion with regards to the jurisdiction, especially if conditions for initiating proceedings are met with simultaneously in two or more different countries.²⁶ In the instant case, the contract has failed to mention about any exclusive jurisdiction clause in case of a default. Hence, to determine an appropriate forum, the principle of *forum non conveniens* applies. The term literally translates to an inconvenient court for trying and deciding the question.²⁷ The surety's liability arises only when the principle debtor

²⁶ Ian F. Fletcher, *Insolvency in Private International Law* (2nd ed. 2005)

²⁷ Trayner, *Latin Maxims* (4th ed. 2006)

defaults. In relation to the previously mentioned issues it is important to highlight the commencement of liability on the part of the guarantors for the loans which has been disbursed. The liability in this case arises with the final default. It is not necessary for the bank to exhaust all remedies against the principal debtor in order to make the surety liable, “The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety.”²⁸ The liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract.²⁹ In cases of cross-border guarantees Delhi HC in *Bharat Heavy Electricals Ltd v Electricity Generation Incorporation*³⁰ laid various factors while deciding jurisdiction under special circumstances. The relevant factors to this instantaneous case along with stated facts are observed as follows³¹:

- i. The country in which the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the Indian and foreign courts. Taking the abovementioned point into consideration, the jurisdiction (India), *status-quo* is applicable.
- ii. Whether a trial in the foreign country is a real necessity or a way of only seeking procedural advantages. This point further moves on to establish the devious motif of

²⁸ Bank of Bihar Ltd v. Damodar Prasad & Anr, AIR (1969) SC (297) (India).

²⁹ The Indian Contracts Act, No. 9 of 1872, §128, INDIAN CODE (1872); Lakhi Ram Ram Dass v. Har Prasad syal, (1972) 3 SCC 337 (India).

³⁰ Bharat Heavy Electricals Ltd v. Electricity Generation Incorporation 2018 AIR (Del) (38).

³¹ Sanjika Dang, Delhi High Court upholds clause conferring jurisdiction on foreign courts, Lexis PSL Arbitration (2017).

the respondent to indulge in forum shopping. Forum shopping is deeply “condemned”³² as it hampers fair trial and delivery of natural justice.

3. Thus, the counsel contends that the proceedings against the US subsidiary in Indian courts is valid. Secondly, it can be concluded that in case of a default, the liability of the debtor shifts to that of its surety³³, which the surety can only dispose of, by payment of the debt amount. The subsidiary company of the Corporate Debtor had borrowed money from financial creditor, which was not paid by the principal borrower or the guarantor in this case which is the shareholders and the Indian company with regards to the loan disbursed to the US Subsidiary. Hence applying the ratio in the judgement delivered in the case of *Anil Nutrients Ltd v. Reliance Commercial Finance Ltd*³⁴, the default of corporate debtor amounts to the default of financial debt and hence CIRP Application can be initiated against the guarantor. In furtherance the Supreme Court in the case of *Central Bank of India v. C L Vimla*³⁵ also clarifies the doubt regarding the discretion of the creditor to proceed against the principal debtor or the guarantor as he deems fit.
4. In respect to the current issue the counsel would like to bring the courts attention to the following nuance of the IBC that in absence of any reciprocal agreement that gives effect to process of insolvency, § 234 and 235 of the IBC is not attracted and rendered redundant in the instant case. Another factual detail which was not appreciated was the

³² Arjun Gopal and Others v. Union of India, (2017) 16 SCC 267 (India).

³³ Moschi v. Lep Air Services Ltd., [1973] AC 331

³⁴ Anil Nutrients Ltd v. Reliance Commercial Finance Ltd, (2017) SCC Online NCLT 10554 (India).

³⁵ Central Bank of India v. C L Vimla (2012) 11 SCC 511 (India).

absence of any condition precedent to exhaust all remedies against the corporate debtor first, which would have compelled the creditor to go after the US Company directly.³⁶

5. It is so raised by the counsel that the act of the review applicant 1 to seek out the surety does not constitute any breach in any manner whatsoever.
6. Alternatively, if we look into the shareholding pattern w.r.t. § 379 of the CA 2013³⁷, the current jurisdiction is further justified. A literal interpretation of S.379 enunciates that a company shall attract the provisions of CA 2013, if a company incorporated in foreign has more by than 50% of the paid up share capital held by citizens of India or body corporates established in India.³⁸

V. THE PERSONAL GUARANTORS CAN BE HELD LIABLE FOR THE LOAN GRANTED TO THE US COMPANY

1. Before arguing on the issue of applicability of FEMA, the counsel humbly re-asserts the coextensive nature of a surety's liability. It is further contented that the assertion regarding the 51% shareholding mandate, under FEMA³⁹ is only applicable to an Indian Party and not a natural person. Indian Party - Means a company incorporated in India or body created under an Act of Parliament or a partnership firm registered under the Indian partnership act, 1932 making investment in a joint venture or wholly owned subsidiary abroad and includes any other entity in India as may be notified by the RBI. Therefore, the remedy against the personal guarantors do not fall under the purview of the act (FEMA). Moreover, this condition requires to be fulfilled only in the case when

³⁶ Pollock & Mulla, The Indian Contract and Specific Relief Acts, (14th ed. 2015)

³⁷ The Companies Act, No. 18 of 2013, §379, INDIAN CODE (2013).

³⁸ A. Ramaiya, Guide to the Companies Act, (18th ed. 2015)

³⁹ Direct Investment by Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad, Reserve Bank of India Master Direction, 2016 (India)

the guarantee is being extended to a second level step down subsidiary and not an immediate subsidiary.

2. It has already been asserted in the counsel's previous argument (Para.1), that the remedy against the guarantor in the instant case does not lie from FEMA but is a matter of exercisable right under S.128 of ICA.

*"The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety."*⁴⁰

3. In this regard the intent of such an instrument (guarantee) is analysed with reference to ***Panpori v. Central Bank of India***⁴¹. A guarantee basically ensures that the creditor is immediately indemnified against any losses arising out of a default of payment of principal and interest by the principal debtor. The application of this law is strict to the point that "the solvency of the principal is not a sufficient ground for restraining execution of the decree against the surety. It is the duty of the surety to pay the decretal amount."⁴² Consequently, drawing parity from established precedent in the case of ***SBI v. Indexport Registered***⁴³ it has also been observed that in principle that a creditor cannot be forced to exhaust decretal remedy, and only proceed against the surety in case a deficiency arises. Thus in light of all the statute and precedent stated it is clear that FEMA is inapplicable in this case yet the guarantors are liable coextensively with the principle debtor.

⁴⁰ Bank of Bihar Ltd v. Damodar Prasad & Anr, AIR (1969) SC (297) (India).

⁴¹ Panpori v. Central Bank of India, (2002) 1 ICC 838 1 (P&H)

⁴² Sunder Singh v. Punjab National Bank, 1992 AIR (All.) 132 (India).

⁴³ State Bank of India v. Indexport Registered and Ors, (1992) 3 SCC 159 (India).

PRAYER

In the lights of the facts stated, issues raised, arguments advanced and authorities cited, the First to Lend Banking Ltd. (FLB) most humbly & respectfully pray that,

In Review Petition (C) No. 1 OF 2019 arising out of Civil Appeal No. 10000 of 2018

- a) That the review application instituted by the SS is not maintainable and hence, be quashed.
- b) That § 238A be applied prospectively.
- c) That claims preferred by FLB against SSPL not barred by limitation.
- d) That the remedy against the guarantor be granted.

All of which is most humbly & respectfully submitted.

S/d _____

COUNSEL FOR FIRST TO LEND BANKING LTD.