
17TH SURANA AND SURANA NATIONAL CORPORATE LAW

MOOT COURT COMPETITION- 2019

BEFORE THE HON'BLE SUPREME COURT OF INDIA

AT NEW DELHI

REVIEW APPLICATION NOS. 1 & 2 OF 2019

(FILED UNDER ORDER XLVII RULE 1 OF CPC)

AGAINST

CIVIL APPEALS NOS. 10000 & 10001 OF 2018

IN THE MATTER OF:

FIRST TO LEND BANKING LTD

... REVIEW APPLICANT

VERSUS

SOFT SOLUTIONS PVT. LTD.

REP BY ITS SHAREHOLDERS

... RESPONDENT

AND

SHAREHOLDERS OF SOFT SOLUTIONS PVT. LTD.

...REVIEW APPLICANT

VERSUS

FIRST TO LEND BANKING LTD

... RESPONDENT

MEMORIAL ON BEHALF OF APPLICANTS

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LIST OF ABBREVIATIONS

| Abbreviation | Explanation |
|---------------------|---|
| ¶ | Paragraph |
| & | And |
| § | Section |
| AC | Appeal Cases |
| AIR | All India Reporter |
| All | Allahabad |
| All ER | All England Law Reports |
| Art. | Article |
| Cal | Calcutta |
| CIRP | Corporate Insolvency Resolution Process |
| CLB | Company Law Board |
| Co. | Corporation/Company |
| CPC | Code of Civil Procedure |
| CTR | Current Tax Reporter |
| Del | Delhi |
| DLR | Dominion Law Reports |
| DRT | Debt Recovery Tribunal |
| DRAT | Debt Recovery Appellate Tribunal |
| Fed | Federal |
| FEMA | Foreign Exchange Management Act, 1999 |
| Guj. | Gujarat |
| Hon'ble | Honourable |

| | |
|----------------------|---|
| IBC/I & B Code, 2016 | Insolvency and Bankruptcy Code, 2016 |
| ICA | Indian Contract Act, 1872 |
| IDBI | Industrial Development Bank of India |
| LC | Letter of Credit |
| LR | Law Reports |
| Ltd. | Limited |
| NCLT | National Company Law Tribunal |
| NCLAT | National Company Law Appellate Tribunal |
| NPA | Non-performing Asset |
| Ori | Orissa |
| Punj. | Punjab |
| RBI | Reserve Bank of India |
| SARFAESI | Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Act, 2002 |
| SEBI | Securities and Exchange Board of India |
| SC | Supreme Court |
| SCC | Supreme Court Cases |
| SCR | Supreme Court Reports |
| v. | Versus |
| Vol | Volume |

THE STATEMENT OF JURISDICTION

The applicant by this review application invokes the review jurisdiction of the Supreme Court under Article 137 of the Constitution of India and prays to review the final judgment decided in civil appeal no. 10000 of 2018 passed by this Court. Article 137 empowers the Supreme Court to review any judgment pronounced or made, subject to the provisions of any law made by Parliament or any rule made under Article 145 of the Constitution.

The scope and grounds available for exercise of jurisdiction by this Court under Article 137 as per Order XLVII Rule 1 of the Supreme Court Rules, 2013 dealing with review is as follows:

“i. The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order XLVII, rule 1 of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record.”

The present review application for civil proceedings qualifies the grounds mentioned in Order XLVII, rule 1 of the Code of Civil procedure, 1908.

THE SUMMARY OF FACTS

BACKGROUND:

1. FLB India is a subsidiary of a US banking conglomerate. FLB India extended loans to Soft Solutions Ltd., a software company. The company also has a subsidiary in the USA, for which the Indian company requested loans to be granted through the US bank itself.
2. FLB India issued a Letter of Credit to the US bank for the subsidiary company on behalf of Soft Solutions. Directors of company agreed to be surety for loan amounts and for LC and secured their movable and immovable assets to cover loan amounts.
3. Loans were dispersed on April 30, 2011 with maturity period of three years. Loans were declared as NPA on October 31, 2014 and notices issued by FLB India under SARFAESI Act, to the company on same date. The bank also sent notice for dues of US company on November 30, 2014.

NCLT/NCLAT:

4. FLB India initiated CIRP under IBC by filing applications against the dues of Indian and US company loans respectively, on February 1, 2018.
5. Against the orders of NCLT, Soft Solutions, through its shareholders and the directors, appealed to NCLAT. NCLAT dismissed the appeals on March 31, 2018.

SUPREME COURT:

6. The appellants in the NCLAT matter appealed to the Supreme Court against the NCLAT order. The Supreme Court heard the matter on June 30, 2018 and did not go into merits. Both the parties filed review applications in Supreme Court.

THE STATEMENT OF ISSUES

1. WHETHER THE REVIEW APPLICATION NO. 2 BY THE COMPANY IS MAINTAINABLE BEFORE THE HON'BLE SUPREME COURT.
2. WHETHER THE PROCEDURE UNDERTAKEN BY THE BANK TO DECLARE THE LOANS AS NPAS WAS AS PER THE LAW.
3. WHETHER THE RETROSPECTIVE APPLICATION OF LIMITATION ACT BY THE HON'BLE SUPREME COURT WAS JUSTIFIED.
4. WHETHER THE U.S. BANKRUPTCY LAWS SHOULD BE INVOKED.
5. WHETHER THE PERSONAL GUARANTORS BEEN TITLED FOR MORATORIUM BENEFIT UNDER THE INSOLVENCY & BANKRUPTCY CODE, 2016.
6. WHETHER THE PERSONAL AND ANCESTRAL (UNSECURED) PROPERTIES OF THE SHAREHOLDERS-CUM-DIRECTORS CAN BE ATTACHED FOR THE REPAYMENT OF DUES OF INDIAN COMPANY AND UU SUBSIDIARY COMPANY.

THE SUMMARY OF ARGUMENTS

THAT THE REVIEW APPLICATION NO. 1 IS MAINTAINABLE BEFORE THE HON'BLE COURT.

It is humbly submitted the present review application is maintainable before this Hon'ble court since important questions of merit were not decided by the court before the final disposal of the matter making it a sufficient reason under Article 137 of the Constitution read with Order XLVII of the Rules of CPC.

THAT THE BANK DECLARED NPA AS PER THE LAW AND COULD INITIATE CIRP AGAINST THE INDIAN COMPANY. ALSO, LIMITATION ACT OUGHT NOT TO HAVE APPLIED RETROSPECTIVELY BY THE COURT

It is humbly submitted that The Bank had the right to declare NPA for the dues of the US company and initiate CIRP against The Company because The Company stood as a guarantor to a legally enforceable loan arrangement and The Bank invoked guaranty agreement in the event of default. The Limitation Act ought not have applied retrospectively because it affected the procedural and substantive rights of The Bank even when it had a valid justification for it.

THAT THE BANK CAN TAKE ACTIONS AND ALSO ATTACH PERSONAL PROPERTIES OF PERSONAL GUARANTORS FOR THE DUES OF US COMPANYSINCE THEY ARE NOT ENTITLED TO MORATORIUM PERIOD

It is humbly submitted that The Bank can proceed against. The directors as guarantors because the under contract of guarantee in ICA, 1872 it is the prerogative of the creditor to go against the guarantor or debtor and in doing so the Bank can attach their personal properties for the purpose of debt recovery by The Bank since they stood as guarantors in their personal capacity.

Moreover, Moratorium is not applicable to them since substitution of section 14(3) of The Code has a retrospective effect, and also the Part III of IBC is not notified.

THE ARGUMENT ADVANCED

1. THAT THE REVIEW APPLICATION NO. 1 BY THE BANK IS MAINTAINABLE BEFORE THE HON'BLE COURT.

(¶1) This Hon'ble court is empowered to review¹/correct² its judgment. Article 137 of the Constitution³ read with Order XLVII of the CPC⁴ and a conjoint reading of Section 114 and Order 47 of the CPC⁵ states, that an application for review is maintainable when discovery of new and important matter or evidence which was alien to knowledge or could not be produced by the petitioner at the appropriate time⁶ or, for any other sufficient reason.⁷

(¶2) Presently, his court never commented on merits of the case and disposed the appeals.⁸ The maintainability of the instant review application is not an attempt to re-litigate over the same issue,⁹ as the judgment on limitation is identical to the precedent in *B.K. Educational Services Private Limited v. Parag Gupta and Associates*, and applied the amendment retrospectively.¹⁰ The court didn't decide upon contention of the personal guarantors on their

¹ Supreme Court of India Handbook on Practice and Procedure and Office Procedure, 2017. 26-27 (India).

² *Ibid.*

³ India Const. art. 137.

⁴ O. XLVII Code Civ. Proc.

⁵ § 114 Code Civ. Proc., O. XLVII Code Civ. Proc.

⁶ *Hindustan Sugar Mills v. State of Rajasthan*, AIR 1981 SC 1681 (India).

⁷ *Ajit Kumar Rath v. State of Orissa & Ors.*, AIR 2000 SC 85 (India) (¶30).

⁸ Case data, ¶12.

⁹ *Tamil Nadu Arasu Kooturuvuthurai v. M.R.Srinivasan*, (2015) 7 MLJ 49 (India) (¶23).

¹⁰ Case data, ¶ 7; *see B.K. Educational Services Private Limited v. Parag Gupta and Associates*, AIR 2018 SC 5601 (India) (¶ 12, 13).

liability towards dues of US Subsidiary Company per the requirements under FEMA¹¹ and that FLB India Ltd. (*hereinafter* ‘The Bank’) never contravened the law and RBI Guidelines in declaring NPAs for the company’s dues.¹² Same being essential for final disposal. Huge unpaid amounts to various financial creditors will be jeopardized upon filing an application prior to the amendment like in the instant case¹³, and even this court has already permitted the parties to raise other issues and arguments to assist the court in reaching a just conclusion.¹⁴

2. THAT THE PROCEDURE UNDERTAKEN BY THE BANK TO DECLARE THE LOANS AS NPA WAS AS PER THE LAW AND RBI GUIDELINES.

2.1 THAT THE BANK HAD THE RIGHT TO DECLARE THE DUES ON BEHALF OF THE US SUBSIDIARY COMPANY AS NPAs.

(¶3) It is submitted that as the privity of contract of loans was between The Bank and The Company,¹⁵ in effect The Company and the directors have given a guarantee for the Letter of Credit (*hereinafter* ‘LC’) issued. Further, The Bank had the right to declare NPA for the dues of the US Subsidiary Company as for the following grounds.

2.1.1 THAT THERE WAS SUBSEQUENT DEFAULT OF THE LOAN LENT TO THE US SUBSIDIARY COMPANY.

(¶4) The Company and the directors executed a contract of guarantee on a loan arrangement dated April 30, 2011 and assumed the responsibility of corporate guarantor for the US Subsidiary

¹¹ Case data, ¶ 2.

¹² Case data, ¶ 6.

¹³ Case data, ¶ 1, Reasons for review on behalf of bank.

¹⁴ *Ibid*, Reasons for review on behalf of personal guarantor.

¹⁵ Case data, ¶ 3.

Company loans resulting in formulation of LC.¹⁶ The US Company subsequently failed to repay the amount post 90 days of the maturity period.¹⁷ Allowing The Bank to seek the dues payable by guarantor, failing which they declared it as NPA.

2.1.2 THAT ISSUANCE OF LETTER OF CREDIT WAS AN INDEPENDENT TRANSACTION IN PURSUANCE OF THE LOAN AGREEMENT.

(¶5) Presently, The Bank's Guarantee is analogous to LC and would, attract similar treatment.¹⁸ A bank which issues the LChasa direct obligation to pay the seller, even if the buyer becomes insolvent. There is a caveat to the bank's obligation.¹⁹ Thus, the bank oblige the terms of LC.²⁰

2.2 THAT THE BANK DID NOT DECLARE THE LOANS OF THE COMPANIES AS NPAS AT A MUCH EARLIER STAGE AGAINST THE RBI GUIDELINES.

(¶6) The Bank instead of taking immediate actions, sent reminders to The Company to clear its dues,²¹ but at termination of six months declared the loans to both the companies as NPAs.²² RBI Guidelines defines NPA as loans where (1) *interest and/ or installment of principal remain overdue for a period of more than 90 days*, (2) *the bill remains overdue for a period of*

¹⁶ *Ibid.*

¹⁷ Case data, ¶ 5.

¹⁸ Centax (India) Ltd. v. Vinmar Impex Inc., AIR 1986 SC 1924 (India) (¶5); see M.L. TANNAN, BANKING LAW AND PRACTICE IN INDIA 20 (22nd ed. 2008); S.N. BIDANI, MANAGING NON-PERFORMING ASSETS IN BANKS 124 (Orient Paperbacks, 2005).

¹⁹ Henry Harfield, *Who Does What to Whom: The Letter-of-Credit Mechanism*, 17 UCC L.J. 291,292-93 (1985).

²⁰ Gerald T. McLaughlin, *Letters of Credit and Illegal Contracts: The Limits of the Independence Principle*, 49 OHIO ST. L.J. 1197, 1207 (1989).

²¹ *Supra* note 12.

²² *Ibid.*

more than 90 days when purchased and discounted.²³ It further emphasizes the need to establish internal systems by bank, for immediate identification of NPAs, especially for high value accounts, depending upon their operations.²⁴ The Basle Committee stated that NPAs are advances where, as on balance sheet date for term loans, interest is due for more than 180 days.²⁵ This court accepted that expeditious steps be taken for classification of NPAs.²⁶ International practice as to terming an NPA is, when interest is due for two quarters.²⁷ Thus, The Bank is just in declaring NPAs at that stage.

3. THAT THE RETROSPECTIVE APPLICATION OF LIMITATION ACT BY THE HON'BLE SUPREME COURT WAS NOT JUSTIFIED.

(¶7) It is humbly submitted before this Hon'ble Court that, it should not to have applied the Limitation Act retrospectively²⁸ because of the following arguments. Also, that retrospectivity of an enactment should be either explicit or by necessary implication.²⁹

²³ POINT 4.1, MASTER CIRCULAR - PRUDENTIAL NORMS ON INCOME RECOGNITION, ASSET CLASSIFICATION AND PROVISIONING PERTAINING TO ADVANCES, https://m.rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?id=9009#CT13 (accessed on 3:46 P.M. 26th January, 2018).

²⁴ RESERVE BANK OF INDIA, MASTER CIRCULAR- INCOME RECOGNITION, ASSET CLASSIFICATION, PROVISIONING AND OTHER RELATED MATTERS – UCBS (2011), <https://www.rbi.org.in/CommonPerson/english/scripts/notification.aspx?id=889> (Accessed on 4:30 P.M. 26th January, 2019).

²⁵ NISHA KOSHAL, UNDERSTANDING LETTER OF CREDIT 87 (Notion Press, 2017); *see* R.C. KOHLI, PRACTICAL GUIDE TO NPA RESOLUTION 423, 425 (Taxmann, 4th ed. 2017).

²⁶ *Mardia Chemicals Ltd. & Ors. v. U.O.I. & Ors.*, (2002) Transfer Petition (Civil) No. 724-727 of 2002 (India).

²⁷ RESERVE BANK OF INDIA, MASTER CIRCULAR- INCOME RECOGNITION, ASSET CLASSIFICATION, PROVISIONING AND OTHER RELATED MATTERS – UCBS (2011), <https://www.rbi.org.in/CommonPerson/english/scripts/notification.aspx?id=889> (Accessed on 4:32 P.M. 26th January, 2019).

²⁸ *Supra* note 8.

²⁹ *Binani Industries Ltd., Kerala v. Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore & Ors.*, (2007) 15 SCC 435 (India) (¶25).

3.1 THAT THE BANK HAD A JUSTIFICATION FOR THE ALLEGED DELAY CAUSED.

(¶8) It is humbly submitted that, initially The Bank didn't proceed against the companies because *firstly*, Section 7(1) of the code does mandates The Bank to initiate CIRP as the default occurs³⁰ and *secondly*, expecting a scope of revival and rehabilitation of corporate debtor before initiating CIRP was *bona fide*.³¹The bank accepted the plea of The Company and accommodated the delay to the possible extent;³²afterwards, the defaulters stated their stressful financial position and informed about their positive chances to resurrect from the crisis.³³To the contrary, they paid some portion of the interest amounts and requested extensions to pay the dues.³⁴In December 2016, The Bank understood that the defaulters unable to settle the dues and therefore, wanted to initiate insolvency proceeding.³⁵ Section 243 of the IBC repealed Provincial Insolvency Act, 1920³⁶ thus, The Bank could only proceed under IBC. It was the nuances of the Act and repeated amendments,³⁷ which delayed the insolvency proceeding, as the bank wanted to be sure of the grounds invoked.

3.2 THAT THE PROCEDURAL AND SUBSTANTIVE RIGHTS OF THE BANK WILL BE AFFECTED AND THERE WAS NO NECESSARY IMPLICATION AND EXPRESS MENTION OF RETROSPECTIVE APPLICATION OF THE ENACTMENT.

³⁰ Independent Power Producers Association of India & Ors. v. UOI & Ors., 2018 (9) ADJ 1 (All) (India) (¶51).

³¹INSOLVENCY COMMITTEE REPORT (2018),http://www.mca.gov.in/Ministry/pdf/ILRReport2603_03042018.pdf. (accessed on 7:12 P.M. 26th January, 2019).

³² *Supra* note 17.

³³ Case data, ¶ 7.

³⁴ Case data, ¶ 9.

³⁵ Case data, ¶ 10.

³⁶ § 243 Insolvency and Bankruptcy Code, No. 31 of 2016, INDIA CODE (2016).

³⁷ *Supra* note 8.

(¶9) It is submitted that the limitation act provides three years, from the date whereon the right to file the application accrues,³⁸ presently, such a right accrues on 1 December 2016 i.e. when the Code came into effect.³⁹ The Bank is thus, entitled to file the instant application. Moreover, section 433 of the Companies Act is not applicable presently, due to lack of legislative intent, *ipso facto* negating its application on IBC retrospectively.⁴⁰ The Code aims at ensuring asset value maximization of The Bank, to ensure availability of credit to other companies,⁴¹ and is not a medium for recovery of money claim, it relates to initiation of CIRP.⁴² Presently, the case includes unpaid debt and interest thereon, since the course of action is continuous, it cannot be barred by way of limitation.⁴³ Also, the provisions of I&B Code are silent on the retrospective application of the Limitation law.⁴⁴

(¶10) Instantly, if The Bank is unable to proceed under The Code due to retrospective application of Limitation Act⁴⁵ it would tantamount to a change in forum, changing the nature of proceedings and creating a substantive right.⁴⁶ Amendments in law, relating to right of action and appeal are substantive in nature,⁴⁷ and are prospective in operation, not effecting substantive or

³⁸ art. 137. The Limitation Act, No. 36 of 1963, INDIA CODE (1963).

³⁹ Black Pearl Hotels (Pvt.) Ltd. v. Planet M Retail Ltd., II (2018) BC 53 (India) (¶12).

⁴⁰ M/s. Speculum Plast Pvt. Ltd. v. PTC Techno Pvt. Ltd. [2017], 2017 SCC OnLine NCLAT 319 (India) (¶47).

⁴¹ *Ibid* at ¶56;

⁴² Preamble, Insolvency and Bankruptcy Code, No. 31 of 2016, INDIA CODE (1993).

⁴³ Black Pearl Hotels (Pvt.) Ltd. v. Planet M Retail Ltd., II (2018) BC 53 (India) (¶14); *see* Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustee Ltd., CIVIL APPEAL NO. 10711 OF 2017 (India).

⁴⁴ Black Pearl Hotels (Pvt.) Ltd. v. Planet M Retail Ltd., II (2018) BC 53 (India) (¶2).

⁴⁵ *Supra* note 10, ¶12.

⁴⁶ Videocon International Limited v. Securities and Exchange Board of India, (2015) 4 SCC 33 (India) (¶16).

⁴⁷ Commissioner of Income Tax, Orissa v. Dhadi Sahu, (1992) SCR 3 168 (India); *see* Videocon International Limited v. Securities and Exchange Board of India (2015) 4 SCC 33 (India); Jeevan Ballav Panda, *Procedural*

vested rights of the parties unless made retrospective either expressly or by necessary intendment.⁴⁸As per the golden rule of interpretation, absence of anything in the enactment to show that it is to have retrospective operation, cannot be construed of altering the law applicable to a claim in litigation, when the Act was passed.⁴⁹Thus, instantly the cardinal rule that every statute is *prima facie* prospective unless it is expressly or by necessary implication made otherwise,⁵⁰substantiated by '*Novaconstitution futuris formam imponere debet non praeteritis*'⁵¹, i.e. a new law ought to regulate what is to follow, not the past should be followed.⁵²

(¶11) *In arguendo*, if the Limitation Act is applied retrospectively, the duty which The Bank as statutory functionary is asked to perform within the time prescribed, by a statute which is procedural in nature⁵³would be directory and not mandatory.⁵⁴Thus, the power of the court to extend the time should be considered⁵⁵owing to circumstances, occasioned by acts beyond the

Amendments Affecting Vested Substantive Right Of A Litigant Are Prospective In Application Unless Specifically Made Applicable Retrospectively (May 17, 2018).

⁴⁸ Re, Pulborough Parish School Board Election, Bourke v. Nutt, (1894) 1 QB 725; see K. Narayanan And Others V. State of Karnataka And Others [1994 Supp (1) Supreme Court Cases 44] (India) (¶7); Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 SCC 602 (India); Garikapati Veeraya v. N.Subbaiah Choudhry, AIR 1957 SC 540 (India); Dayawati v. Inderjit, AIR 1966 SC 1423 (India); K.S. Paripoornam v. State of Kerala, (1994) 5 SCC 593 (India) (¶28).

⁴⁹ Garikapati Veeraya v. N. Subbiah Choudhry, AIR 1957 SC 40 (India) (¶30); Monnet Ispat & Energy Ltd. v. Union of India & Ors., AIR 2013 Chh 52 (India).

⁵⁰ Young v. Adams (1898) AC 469; see Keshvan v. State of Bombay, AIR 1951 SC 128 (India).

⁵¹ Monnet Ispat & Energy Ltd. v. Union of Indian & Ors., (2012) 11 SCC 1 (India).

⁵² Shanti Conductors (P) Ltd. and Ors. v. Assam State Electricity Board and Ors., (2016) 15 SCC 13 (India) (¶37).

⁵³ Limitation Act, *Supra* note 38, art. 147; see P.T. Rajan v. T.P.M. Sahir and Ors.(2003) 8 SCC 498 (India) (¶50); Shreenath v. Rajesh (1998) 4 SCC 543 (India).

⁵⁴ Shiveshwar Prasad Sinha v. The District Magistrate of Monghur & Anr. AIR (1966) Pat. 144 (India) (¶7); Nomita Chowdhury v. The State of West Bengal &Ors. (1999) CLJ 21 (India); Garbari Union Co-operative Agricultural Credit Society Limited & Anr. v. Swapan Kumar Jana &Ors. (1997) 1 CHN 189 (India).

⁵⁵ Church of St. John in the Wilderness v. South Eastern Railways & Anr., 2008 (II) OLR 109 (India) (¶¶ 2,3).

control of The Bank and that non-extension would cause grave injustice and affect the substantial rights of The Bank.⁵⁶

4. THAT THE BANK CAN INITIATE PROCEEDINGS UNDER I&B CODE AGAINST THE INDIAN COMPANY AND CAN TAKE ACTIONS AGAINST THE PROMOTERS-CUM-SHAREHOLDERS AS GUARANTORS FOR THE DUES OF US SUBSIDIARY COMPANY.

It is humbly submitted that The Bank can proceed against The Company under The Code for the dues of the US Subsidiary Company. This is primarily because of the following grounds raised.

4.1 THAT THE INDIAN COMPANY BEING THE CORPORATE GUARANTOR IS LIABLE FOR THE DUES.

(¶12) It is humbly submitted that The Bank had extended LC for the US company, on application by The Company⁵⁷ and guaranteed to pay for the dues of US Company in case of default⁵⁸ and the said invocation being subjected to default.⁵⁹ The Bank by sending notice⁶⁰ on default, invoked the same, making The Company a ‘corporate debtor’ from a corporate guarantor,⁶¹ owing a ‘debt’⁶² through guarantee. It is a ‘liability’ in respect of a ‘claim’⁶³ due from

⁵⁶ Limitation Act, *Supra* note 38, § 5.

⁵⁷ *Supra* note 15.

⁵⁸ Driscoll, *The Role of Standby Letters of Credit in International Commerce: Reflections after Iran*, 20 Va. J. Int'l L. 459 (1980).

⁵⁹ *Innoventive Industries Ltd. v. ICICI Bank & Ors.*, AIR 2017 SC 4084 (India) (¶¶ 27, 28).

⁶⁰ Case data, ¶¶ 6,7.

⁶¹ *Ferro Alloys Corporation Ltd. v. Rural Electrification Corporation Ltd. Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 (India)* (¶27).

⁶² *IBC*, *Supra* note 36, §3(11); *see Ferro Alloys Corporation Ltd. v. Rural Electrification Corporation Ltd. Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 (India)* (¶26).

The Bank including ‘financial debt’ under section 5(8) (h) including specific obligation in respect of LC issued by a bank.⁶⁴ Thus, The Code doesn’t bar The Bank from initiating CIRP against The Company first.⁶⁵ Also, the plea of different course of action for US Company and The Company, by the latter, would cause an unimaginable set of inconsistencies, contradictions, errors.⁶⁶

4.2 THAT THE BANK SHOULD BE CONSIDERED AS A FINANCIAL CREDITOR UNDER THE I&B CODE.

(¶13) In accordance with section 7(1) of The Code, a default in a financial debt owed to any financial creditor or to whom such debt is legally assigned to,⁶⁷ not necessarily the applicant financial creditor.⁶⁸ Though, the US Bank advanced the loan,⁶⁹ but the fact that *firstly*, the contract for the loan was entered by The Bank, *secondly*, the US Bank never acted on default and *thirdly*, that the LC was issued by The Bank, against The Company’s guarantee of paying for borrower’s default.⁷⁰

4.3 THAT THE US BANKRUPTCY LAWS SHOULD NOT BE INVOKED.

⁶³ IBC, *Supra* note 36, §3(6); *see* Ferro Alloys Corporation Ltd. v. Rural Electrification Corporation Ltd. Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 (India) (¶34).

⁶⁴ IBC, *Supra* note 36, §5(8)(h).

⁶⁵ *Supra* note 61, (¶34).

⁶⁶ *Ibid.*

⁶⁷ IBC, *Supra* note 36, §7(1).

⁶⁸ *Supra* note 61, ¶¶ 13, 14; *see* Innoventive Industries Ltd. v. ICICI Bank & Ors., AIR 2017 SC 4084 (India)

⁶⁹ Case data, ¶¶ 2,4.

⁷⁰ Ram Bahadur Thakur v. Sabu Jain Limited, 1981 (51) Comp Cas 301 (India) (¶17); *see* Kesoram Industries and Cotton Mills Ltd. v. CWT (1966) 59 ITR 767 (India); *see* M/S. Mauritius Commercial Bank v. M/S. Sujana Universal Industries, O.S.A. Nos. 16 and 22 of 2015 (India).

(¶14) That this Hon'ble court consider The Company's plea of invoking US Bankruptcy Laws⁷¹ as inherently questioning the jurisdiction of this court. Whereas, a review application cannot have a question of jurisdiction.⁷² It is notable that even the maturity period to pay back the US company's loan is regulated by FEMA and even the *situs* of a debt created by LC is the place The Bank,⁷³ i.e. India; as in *Vimal Services Ltd v. Bank of India*,⁷⁴ this matter should be decided by Indian courts. Further, The Company and the U.S. Company, form a single enterprise⁷⁵, by way of control/ significant ownership⁷⁶. The Company has 'decisive control' over its US subsidiary, forming a single economic entity.⁷⁷ The US company's 52% shares were held by the Indian Company and 48% shares were held by the stakeholders of its parent company.⁷⁸

(¶15) Moreover, the aforementioned shareholders, gave 'more capital'⁷⁹; aided by recruiting more employees and even invested in its infrastructure⁸⁰ of the US Company. Thus, as the economic reality and transactional substance has come to light,⁸¹ lifting the corporate veil would

⁷¹ *Supra* note 33.

⁷² *Parsion Devi v. Sumitri Devi*, (1997) 8 SCC 715 (India) (¶¶ 8, 9); *see Shivdeo Singh v. State of Punjab*, AIR 1963 SC 1909 (India).

⁷³ *Taurus Petroleum Limited v. State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2017] UKSC 64.

⁷⁴ *Vimal Services Ltd. v. Bank of India*, GJ HC 30 April 2008 (India) (¶32).

⁷⁵ §2(h) The Competition Act, No. 12 of 2003, INDIA CODE (2003).

⁷⁶ Raimundas, M. and Danielius, U., *Problems Related To Determining of a Single Economic Entity Under Competition Law*, The Central European Journals of Social Sciences and Humanities, Yearbook of Antitrust and Regulatory Studies, 10(16), pp. 107-126 (2017).

⁷⁷ ASHISH MAKHIJA, *INSOLVENCY AND BANKRUPTCY CODE OF INDIA* 382 (Lexis Nexis, 2018).

⁷⁸ *Supra* note 13.

⁷⁹ *Supra* note 11.

⁸⁰ *Ibid*.

⁸¹ *LIC v. Escorts Ltd.*, AIR 1986 SC 1370 (India) (¶92).

reveal that US Company is entirely dependent on its Indian parent. It is the plea of The Company that the assets of the US company should also be used,⁸² and as they are proved to be a single economic unit, even The Company's assets can be used along with that of its US subsidiary.⁸³

4.4 THAT THE PROMOTERS-CUM-SHAREHOLDERS ARE LIABLE FOR THE DUES BEING THE GUARANTORS IRRESPECTIVE OF THE REQUIREMENTS UNDER FEMA.

4.4.1 THAT THE CONTRACT OF GUARANTEE BETWEEN THE BANK AND THE PERSONAL GUARANTORS SHOULD BE GOVERNED BY INDIAN CONTRACT ACT, 1872.

(¶16) As already submitted, the issuance of LC was an independent contract between the parties,⁸⁴ subjected to the Indian Contract Act, 1872. (*hereinafter* 'ICA') The Bank and the personal guarantors had a contract of guarantee under section 126 of the ICA.⁸⁵ Further, under Section 128 of the ICA, the liability of the surety is coextensive with that of the principal debtor.⁸⁶ The Bank can execute the decree against the guarantor without proceeding against the principal borrower.⁸⁷ The personal guarantors, as surety, become liable to pay the entire sum with immediate liability.⁸⁸ Object of guarantee would be defeated if The Bank would be asked to postpone its remedy.⁸⁹

⁸² *Supra* note 33.

⁸³ DHN Food Distributers Ltd. v. Tower Hamlets London Borough Council, [1976] WLR 852.

⁸⁴ U.P Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.(1988) 1 SCC 174 (India) (¶55); *see* Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co. (2007) 8 SCC 110 (India) (¶14).

⁸⁵ §126, The Indian Contract Act, No. 9 of 1872, INDIA CODE (1872).

⁸⁶ ICA, *Supra*note 85, §128.

⁸⁷ State Bank of India v. Indexport Registered and Ors. (1992) 3 SCC 159 (India) (¶10); *see* Ferro Alloys Corporation Ltd. v. Rural Electrification Corporation Ltd. Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 (India).

⁸⁸ Industrial Investment Bank of India v. Bishwanath Jhunjhunwala, 2009 (9) SCC 478 2009 (India) (¶30); *see* Bank of Bihar v. Damodar Prasad and Anr. (1969) 1 SCR 620 (India) (¶3); M/S. Mauritius Commercial Bank vs M/S. Sujana Universal Industries, O.S.A. Nos. 16 and 22 of 2015 (India).

4.4.2 THAT THE PERSONAL GUARANTORS ARE LIABLE UNDER FEMA ALSO.

(¶17) Section 5(b) of the Foreign Exchange Management (Guarantees) Regulations, 2000, regulating the guarantees given under FEMA in promoting a wholly owned subsidiary/ JV outside India⁹⁰ are silent on guarantee given by personal guarantors. The relevant FEMA Regulations⁹¹ read with RBI Master Circulars,⁹² acquiring 50% stakes in a foreign company is not mandatory for a guarantor.

5. THAT THE PERSONAL GUARANTORS ARE NOT ENTITLED FOR MORATORIUM BENEFIT UNDER THE I&B CODE, 2016.

That this Hon'ble court for the conditions mentioned herein, reject the contentions of The Company and it be prohibited from using the moratorium, for the following arguments.

5.1 THAT SUBSTITUTING SUB-SECTION (3) TO SECTION 14 OF THE I&B CODE SHOULD HAVE A RETROSPECTIVE EFFECT.

(¶18) The second amendment transformed The Code in a way as to incorporate itself, into it and The Code be construed as if the substituted provision stands repealed and replaced by the amendment.⁹³ This replacement would be termed as an amendment during the period in which it was in force.⁹⁴ Thus, the second amendment in effect replaces the old section 14 by the

⁸⁹ Bank of Bihar v. Damodar Prasad and Anr. (1969) 1 SCR 620 (India) (¶3), *see* Lachhman Joharimal v. BapuKhandu and Tukaram Khandoji, (1869) 6 Bom HCR 241 (India).

⁹⁰ §5(b), Foreign Exchange Management (Guarantees) Regulations, Notification No. FEMA 8/2000-RB, dated 3-5-2000, Reserve Bank of India.

⁹¹ POINT 6.4 The Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, Notification No. FEMA 120/2004-RB, Dated 7-7-2004, Reserve Bank of India.

⁹² POINT 2.3.5 RESERVE BANK OF INDIA MASTER CIRCULAR - GUARANTEES AND CO-ACCEPTANCES(2015), <https://rbi.org.in/scripts/NotificationUser.aspx?Id=9879&Mode=0> (accessed on 5:09 P.M. 26th January, 2019).

⁹³ Shamrao Parulekar and others. v. District Magistrate, Thana, Bombay and others, AIR 1952 SC 324 (India) (¶7).

⁹⁴ State of Rajasthan v. Mangilal Pindwal, AIR 1969 SC 2181 (India) (¶9).

substituted provision⁹⁵ and must be construed as if it has been incorporated in the Act *ab initio*,⁹⁶ and as it unclear that it is prospective in nature the same comes into effect from the date of the earlier Act.

Moreover, it is pertinent to note that the amendment was not applied retrospectively. It was an ongoing case and the amended law was applied accordingly. Instantly, contrary to same if The Bank is prohibited to proceed, then there will be disparity in the rights of The Bank and the creditors. It is thus, submitted that as the amendment is taking away a vested and substantive right,⁹⁷ it should not only be applied prospectively.

5.2 THAT AS THE PART III OF THE CODE HAS NOT YET BEEN NOTIFIED, THE PERSONAL GUARANTORS ARE NOT ENTITLED TO THE BENEFITS OF MORATORIUM UNDER THE I&B CODE.

(¶19) As stated earlier, benefit of moratorium cannot extend to personal guarantor as, *firstly*, part III of The Code is not in force, it only has the effect of rendering a proceeding against the guarantor under this code as ineffective.⁹⁸ However, the court in *Parag Gupta*,⁹⁹ read upon the difference in section 14 and section 101 regardless of whether the law was in force or not. As held in *State of Kerala and Ors. v Mar Appraem Kuri Co. Ltd. and Anr.*, that a law, even though not in force, would be a “law” on the statute book.¹⁰⁰ *Secondly*, the Company’s stand is flawed as

⁹⁵ Zile Singh v. State of Haryana & Ors., AIR 2004 SC 5100 (India) (¶¶23, 24).

⁹⁶ Shankarappa Mallappa Kelagiri v. The Co-operative Election Commissioner, W.A. Nos. 100076-80 & 100081-83/2014 (India).

⁹⁷ G.P.SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 438 (Lexis Nexis, 9th ed. 2004).

⁹⁸ V.S. WAHI, TREATISE ON INSLOVENCY AND BANKRUPTCY CODE 1243 (Bharat Law House, 2nd ed. 2018).

⁹⁹ *Supra* note 10.

¹⁰⁰ State of Kerala and Ors. v. Mar Appraem Kuri Co. Ltd. and Anr., AIR 2012 SC 2375 (India) (¶17).

section 60 of The Code aids in locating a tribunal having jurisdiction to try the matter and its sub-clause (2) and (3) opine bankruptcy proceeding against a personal guarantor be initiated in NCLT but as per the Provincial Insolvency Act. Also, the IBC mandates that proceedings against individuals be initiated in the DRT¹⁰¹. Also, section 179 not being in force, renders section 60(4) inoperative.

(¶20) Vide section 31,¹⁰² since the approved resolution plan is binding on both the parties, the contention on part of The Company for inapplicability of the moratorium period on guarantors would render uncertainty in liability.¹⁰³ This contradicts ICA u/s 133 that mandates change in contractual terms releases the guarantor from the liability to pay.¹⁰⁴ The intent of moratorium under section 14 is to apply principles of contract of guarantee, allowing the creditor to fulfil his rights against the debtor/surety.¹⁰⁵ When suit has already begun, the creditor is justified to go against the guarantor,¹⁰⁶ i.e. the shareholders of Indian company,¹⁰⁷ thus literal reading of section 14 is seminal.

6. THAT THE PERSONAL PROPERTIES OF THE PROMOTERS-CUM-DIRECTORS, CAN BE ATTACHED, BEING LIABLE FOR THE DUES OF INDIAN COMPANY AND US SUBSIDIARY COMPANY AS GUARANTORS.

¹⁰¹ IBC, *Supra* note 36, §179.

¹⁰² IBC, *Supra* note 36, §31.

¹⁰³ Arcelor Mittal India Private Limited v. Satish Kumar Gupta & Ors., AIR 2018 SC 5646 (India) (¶67).

¹⁰⁴ State Bank of India v. V Ramakrishnan & Ors., AIR 2018 SC 3876 (India) (¶28).

¹⁰⁵ Bank of Bihar v. Damodar Prasad, AIR 1969 SC 297 (India) (¶6).

¹⁰⁶ Central Bank of India v. State of Kerala & Ors., (2009) 4 SCC 94 (India) (¶17).

¹⁰⁷ *Supra* note 13.

(¶21) Since the shareholders stood as guarantors in personal capacity¹⁰⁸, firstly they will be governed by the Provincial Insolvency Act, 1920. Secondly, the personal properties of the guarantors is be liable for debt recovery. Section 28A of the aforementioned act,¹⁰⁹ states that property be attached in respect of an insolvent human in a way,as the person might exercise his right for self-benefit at the onsetof his insolvency.¹¹⁰

(¶22) The Bank is unable to realize the loan fromcorporate debtor's asset,¹¹¹ it has been held that when sale of mortgaged properties do not realize the loan, the same isrecoverable by the sale of personal properties of the guarantors.¹¹²Thus, the unrecovered dues be recovered by attaching personal assets as prescribed by law.¹¹³Also, the directors wer guarantors for the total loan¹¹⁴;in their personal capacity.Further, as the directors are personal, not corporate guarantors, their liability is co-extensive with that of the principal debtor as per section 128 of ICA.¹¹⁵

¹⁰⁸ *Supra* note 17.

¹⁰⁹ § 28A The Provincial Insolvency Act, No.5 of 1920, INDIA CODE (1920); *see* Jaiprakash Mangilal Agarwal v. LilabhaiVrijpaljiBhate, AIR 1963 Bom 100 (India).

¹¹⁰ Cheruvu Nageswaraswami v. Rajah Vadrevu Viswasundara Rao and Ors., AIR 1953 SC 370 (India) (¶10).

¹¹¹ *Supra* note 35.

¹¹² KSL and Industries Ltd. v. Arihant Threads Ltd. And Ors., (2008) 9SCC 763 (India) (¶5).

¹¹³ IDBI Bank Limited v. Divine Waters Food & Beverages and Ors., OA No. 1150 of 2014 (India) (¶7); *see* Recovery of Debts Due to Banks and Financial Institutions Act, No. 51 of 1993, INDIA CODE (1993).

¹¹⁴ Casedata, ¶4.

¹¹⁵ ICA, *Supra* note 86.

THE PRAYER

Wherefore, in the light of the issues raised, arguments advanced and authorities cited, it is humbly prayed that this Hon'ble Court may be pleased to hold, adjudge and declare that:-

- a) The Review Application no. 1 is maintainable.
- b) The Second Amendment Act of IBC which introduces a new section,inter alia,should be applied only prospectively from the date of its insertion.
- c) The two Corporate Insolvency Resolution Process Applications are not barred by limitation.
- d) The directors of Soft Solutions Pvt. Ltd. arepersonal guarantors for the loans granted to the U.S. Company and hence liable to pay the due loan amount.
- e) The initiation of Corporate Insolvency Resolution Process against the Indian Company for the dues of U.S. subsidiary company is well within the purview of Insolvency and Bankruptcy Code, 2016 so U.S. Bankruptcy law ought not be invoked.

And pass any other order that it may deem fit in the interest of justice, equity and good conscience.

All of which is respectfully submitted.

On behalf of The Bank.

Counsel for the Review Applicant No. 1