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 Appeal Nos. 10000 & 10001 of 2018

FIRST TO LEND BAKING LTD. …… REVIEW APPLICANT

vs.

SOFT SOLUTIONS PVT. LTD.

REP. BY ITS SHAREHOLDERS ……..….. RESPONDENT

AND

SHAREHOLDERS OF SOFT SOLUTIONS

PVT. LTD. ……..… REVIEW APPLICANT

vs.

FIRST TO LEND BANKING LTD..……..……..… RESPONDENT

ON SUBMISSION TO THE HON'BLE SUPREME COURT OF INDIA

Memorial on behalf of Applicant

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LIST OF ABBREVIATIONS

AA	Adjudicating Authority
AIR	All India Reporter
&	And
COC	Committee of Creditors
Co.	Company
CD	Corporate Debtor
CIRP	Corporate Insolvency Resolution Process
CP	Corporate Persons
FC	Financial Creditors
FLB	First to Lend Banking Pvt. Ltd.
FEMA	Foreign Exchange Management Act, 1999
ICA	Indian Contracts Act, 1872
IBC	Insolvency and Bankruptcy Code, 2016
JV	Joint Venture
LOL	Law of Limitation
LC	Letter of Credit
LA	Limitation Act, 1963

LP	Limitation Period
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
NPA	Non-Performing Asset
PG	Personal Guarantors
RBI	Reserve Bank of India
RA	Review Application
RP	Resolution Plan
§	Section
SARFAESI	Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest, 2002
SSPL	Soft Solutions Pvt. Ltd.
SICA	Sick Industrial Companies (Special Provisions) Act, 1985
SC	Supreme Court
SCC	Supreme Court Cases
u/s	under section
UNCITRAL	United Nations Commission on International Trade Law

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STATEMENT OF JURISDICTION

THE COUNSEL FOR THE APPLICANT HUMBLY SUBMITS BEFORE THE HON'BLE SUPREME COURT OF INDIA, THE MEMORANDUM ON BEHALF OF THE APPLICANT.

The Hon'ble Supreme Court of India has the inherent jurisdiction to try, entertain and dispose of the Review Application under Article 137 of The Constitution of India.

The Review Application has been filed under Order XLVII, Rule 1 of Code of Civil Procedure, 1908 and in accordance with Part IV, Order XLVII of Supreme Court Rules, 2013.

The present Memorandum sets forth the facts, contentions and arguments in the present case.

STATEMENT OF FACTS

- "Soft Solutions" is an Indian Co. having registered office at Bengaluru, set up by 4 persons having shareholding of 25% each. It had a subsidiary in the US which had a share pattern of 52% and 48% by Soft Solutions and four shareholders respectively.
- In order to revive the US Co., the shareholders took a loan from FLB India which is the subsidiary of a US bank. FLB India gave a loan of INR 200 Cr. to the Indian Co. directly and USD 20 million for the US Co. through LC.
- The shareholders stood as guarantors for the loans granted to the Indian Co. and for the loan granted to the US Co., Indian Co. and shareholders stood as guarantors wherein shareholders barred their personal assets to include as surety.
- The Companies could not make repayment after expiry of the maturity period & as a result, FLB India after six months declared the loans granted to the companies as NPAs on October 31, 2014 and for the same SARFAESI Act came into play.
- After IBC was enacted, FLB India filed two applications on February 1, 2018 before NCLT, for initiation of CIRP against both the companies.
- The Hon'ble NCLT rejecting the plea of limitation and moratorium, admitted both the applications of the bank and declared CIRP period from March 01, 2018.
- In the appeal made by the Indian Co. against the decision of NCLT, The Hon'ble NCLAT dismissed the appeal holding that the Limitation Act does not apply to the Code but held that PG are entitled to moratorium.
- In the appeal made to the Hon'ble Supreme Court by the Indian Co., the Court held that Limitation Act applies to IBC but the PG are not entitled to benefit of moratorium.
- The judgments were not acceptable to the both the parties as there were certain aspects which were not rightly appreciated by the Supreme Court and hence, both the parties filed the Review Applications.

STATEMENT OF ISSUES

[ISSUE 1] WHETHER THE REVIEW APPLICATION NO. 1 OF 2019 FILED UNDER ORDER XLVII, RULE 1 OF CPC IS MAINTAINABLE?

[ISSUE 2] WHETHER THE SUPREME COURT SHOULD HAVE APPLIED THE LIMITATION ACT RETROSPECTIVELY TO IBC?

[ISSUE 3] WHETHER THE SUPREME COURT IS CORRECT READING THE RIGHTS OF PG U/S 94-101 INTO § 14 AND APPLYING THE AMENDMENT TO § 14 OF IBC RETROSPECTIVELY?

[ISSUE 4] WHETHER THE PERSONAL GUARANTORS ARE LIABLE FOR LOANS GRANTED TO THE INDIAN COMPANY?

[ISSUE 5] WHETHER FLB INDIA CAN APPLY IBC AGAINST THE INDIAN COMPANY?

[ISSUE 6] WHETHER THE BANK HAS COMMITTED ANY ERROR IN DECLARING THE LOANS OF THE COMPANIES AS NPA?

SUMMARY OF ARGUMENTS

[ISSUE 1] The review application filed by FLB is maintainable as the Hon'ble SC has the power to review its judgment if it results in miscarriage of justice and the facts of the present case constitute a sufficient reason for review under Order XLVII Rule 1 of CPC.

[ISSUE 2] The Hon'ble SC should not have applied the LA retrospectively as it would take away their vested right and delay, if any, on the part of FLB is liable to be condoned u/s 5 of LA.

[ISSUE 3] The Hon'ble SC was correct in applying the amendment to § 14(3) retrospectively and reading the rights of the PG u/s 94-101 into § 14 would not have been desirable as a literal interpretation needs to be given to § 14 and the liability of PG is co-extensive with that of the CD.

[ISSUE 4] The PG are deemed to be liable in the event of extending guarantee on behalf of the company as stated in the FEMA Regulations and the concerned authorities enjoy abundant autonomy in such decision making.

[ISSUE 5] The issuance of LC by the bank engenders the right of remuneration against the Indian Company and further FLB can go against the Indian Company.

[ISSUE 6] The bank has not committed any error in declaring the loans of the company as NPA as the RBI guidelines mandates the bank to do the same and therefore there exists no contention on the same.

ARGUMENTS ADVANCED

[ISSUE 1] THAT THE REVIEW APPLICATION NO. 1 OF 2019 FILED BY FLB UNDER ORDER XLVII, RULE 1 OF CPC IS MAINTAINABLE.

¶ 1 The Counsel humbly submits before the Hon'ble Supreme Court of India that Article 137 of the Constitution of India provides for the review of judgments or orders made by the Supreme Court and Order XLVII, Rule 1 of CPC provides for an application for review of judgment on the basis of discovery of new evidence or on account of some mistake or error or 'for any other sufficient reason'. Further, Part IV, Order XLVII of Supreme Court Rules, 2013 also deals with review and provides that no application for review shall be entertained in a civil proceeding except on the grounds mentioned in Order XLVII, Rule 1 of CPC.

¶ 2 The Supreme Court has the power to reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice.[1] The expression 'for any other sufficient reason' has to be given a wide interpretation and it would include a misconception of fact or law by a Court. A RA may be necessitated by invoking the doctrine '*actus curiae neminemgravabit*' which means that an act of the Court shall prejudice no one.[2]

¶ 3 In the present case, there has been an error on the part of the Court in applying the LA retrospectively to IBC which shall lead to injustice by jeopardizing the huge debts due to FC even when applications for their recovery have been filed before the Amendment. Hence, it is argued that the RA No. 1 preferred by FLB is maintainable. At the same time, the RA No. 2 preferred by the PG is not maintainable as the grounds on which the said RA has been preferred do not amount to any error/mistake on the part of the Court or any other sufficient reason on the basis of which the RA may be entertained.

[1] O.N. Mohindroo v. District Judge, Delhi, (1971) 3 S.C.C. 5.

[2] B.C.C.I. v. Netaji Cricket Club, A.I.R. 2005 S.C. 592.

[ISSUE 2] THAT THE SUPREME COURT SHOULD NOT HAVE APPLIED THE LIMITATION ACT RETROSPECTIVELY TO IBC.

¶ 4 The Counsel humbly submits before the Hon'ble Supreme Court of India that it ought not to have applied the LA retrospectively to IBC so as to jeopardize the interests of financial creditors who filed applications prior to the IBC (Second Amendment) Act, 2018 as it would take away their vested right and delay, if any, on their part ought to be condoned.

[2.1] That prospective application should be given to the provisions of the Limitation Act.

¶ 5 It is humbly submitted that every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation.[3] If a remedy suddenly becomes barred as a result of prescription of a shorter LP, the same would not govern a case as it would deprive the suitor of an accrued right.[4] Also, retrospective amendments must not be unreasonable or harsh.[5]

¶ 6 It is argued that § 238A does not entail any express or necessarily implied retrospectivity and doing so would be rather unreasonable, adversely affecting the accrued vested rights of the affected parties. If a vested right exists, a new LOL cannot suddenly extinguish it although generally, the LOL which is in vogue on the date of commencement of action governs it.[6] In the present case, even on the date of commencement of action, the LA was not applicable to IBC but became applicable when an appeal was pending before the SC. In a recent decision, the SC has gone to the extent of saying that the law of limitation is a substantive law having definite consequences on the rights and obligations of a party.[7]

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[3] Keshavan Madhava Menon v. State of Bombay, A.I.R. 1951 S.C. 128.

[4] Vinod Gurudas Raikar v. National Insurance Co. Ltd., (1991) 4 S.C.C. 333.

[5] National Agriculture Cooperative Marketing Federation of India Ltd. v. Union of India, (2003) 5 S.C.C. 23.

[6] New India Insurance Co. Ltd. v. Shanti Misra, (1975) 2 S.C.C. 840.

[7] Balwant Singh v. Jagdish Singh, (2010) 8 S.C.C. 685.

[2.2] That the present case should be exempted from retrospective application of the LA.

¶ 7 It is submitted that FLB India had filed two applications against SSPL u/s 7 of IBC to initiate CIRP on 01.02.2018, i.e. before the enactment of the Second Amendment. Before addition of § 238A, the LA was not applicable for initiation of CIRP and in cases of long delay, the AA could give an opportunity to the applicant to explain the delay.[8] IBC is a complete code in itself and exhaustive of the matters dealt with therein.[9] It is submitted that there was nothing on record to show that the LA is applicable to IBC before 06.06.2018[10] and it was a settled position that even if applicable, the LP u/a 137 of the LA or the 'right to apply' would accrue only from 01.12.16 when IBC commenced.[11] Time for filing an application cannot be deemed to have started running before the remedy is made available.[12]

¶ 8 It is further submitted that it was a widely accepted position that LA applies only to proceedings before 'courts' and not to quasi-judicial tribunals unless a relevant special statute contains an express provision in this regard[13] and if the legislature intended to provide for any LP, it would have said so specifically in the Act itself and nothing can be added to the its language.[14] Also, § 433 of the Companies Act can be said to prescribe a LP for the NCLT and the NCLAT for deciding cases only under the Companies Act and not IBC as it would otherwise result in absurd situations and §433 has not been amended to make it a part of IBC as other sections u/s 255 of IBC.

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[8] Speculum Plast Pvt. Ltd. v. P.T.C. Techno Pvt. Ltd., Company Appeal (A.T.) (Insolvency) No. 47 of 2017.

[9] Innoventive Industries Ltd. v. I.C.I.C.I. Bank, (2018) 1 S.C.C. 407.

[10] Neelkanth Township & Construction Pvt. Ltd. v. Urban Infrastructure Trustees Ltd., Company Appeal (A.T.) (Insolvency) No. 22 of 2017.

[11] Sanjay Bagrodia v. Sathyam Green Power Pvt. Ltd., Company Appeal (A.T.) (Insolvency) No. 193 of 2017; Black Pearl Hotels Pvt. Ltd. v. Planet M. Retail Ltd., Company Appeal (A.T.) (Insolvency) No. 91 of 2017.

[12] New India Insurance Co. Ltd. v. Shanti Misra, (1975) 2 S.C.C. 840.

[13] Sakuru v. Tanaji, (1985) 3 S.C.C. 590.

[14] State of Jharkhand v. Shivam Coke Industries, (2011) 8 S.C.C. 656.

¶ 9 It is argued that when IBC came into force, a 'vested right' was created in favor of FLB to initiate proceedings under it. If the same would have been done, they would also have been well-within the LP of 3 years as prescribed u/a 137 of the LA and had not become time-barred. Also, IBC was grappling with jurisprudence at that time and it was quite prudent to consider that the LOL would not be applicable to it. Hence, at least the subsequent addition of § 238A should not be allowed to affect the vested right of such applicants and even if retrospectivity to LA is given, they should be exempted from its application.

[2.3] That delay, if any, on the part of FLB ought to be condoned under § 5 of the LA.

¶ 10 It is humbly submitted that even if the LA is applied retrospectively and no exemption is provided to FLB by the SC although it is undesirable, the applications filed by FLB under IBC are not time-barred as part-payments of the debts were being done at intervals by SSPL and its US subsidiary while requesting extensions, thereby renewing the LP u/s 19 of the LA.

¶ 11 It is further argued that the delay of 9 months on the part of the bank should be condoned u/s 5 of the LA as FLB had sufficient cause for not making the application within the prescribed period of 36 months. The IBC came into force on 01.12.16 when around 31 months had elapsed since the default had taken place and this left FLB with very little time to proceed under IBC. Further, the ramifications of IBC were also unclear and the applicability of the LA to it was also unlikely. Moreover, the proceedings under the SARFAESI Act against SSPL and the guarantors were still pending and FLB was expecting that these proceedings would soon yield results. It against the Principle of Equality enshrined u/a 14 of the Indian Constitution to provide FLB with a mere 5 months for filing an application under IBC and providing 36 months to parties whose right of action accrued after 01.12.16.

¶ 12 The courts should not adopt an injustice-oriented approach in rejecting the application for condonation of delay.[15] A liberal, pragmatic, justice-oriented, non-pedantic approach

[15] Brijesh Kumar v. State of Haryana, (2014) 11 S.C.C. 351.

needs to be adopted.[16] The expression 'sufficient cause' is adequately elastic to enable the courts to apply the law in a meaningful manner which sub-serves the ends of justice.[17] Therefore, it is requested that the circumstances of FLB which caused delay on its part, if any, be held to constitute 'sufficient cause' and the delay be accordingly condoned.

[ISSUE 3] THAT THE SUPREME COURT WAS CORRECT IN NOT READING THE RIGHTS OF PG U/S 94-101 INTO § 14 AND APPLYING THE AMENDMENT TO § 14 OF IBC RETROSPECTIVELY.

¶ 13 The Counsel humbly submits before the Hon'ble Supreme Court that it was right in applying the substitution of § 14(3) by the IBC (Second Amendment) Act, 2018 retrospectively and reading the rights of the PG u/s 94-101 of IBC into § 14 would not have been proper and desirable.

[3.1] That § 14 of IBC provides for a moratorium only for the 'Corporate Debtor' and not the 'Personal Guarantor'.

¶ 14 It is submitted that on a bare reading of § 14 of IBC, it is clear that on the insolvency commencement date, the AA has to prohibit proceedings by or against the CD only and not a third party such as a PG. On a perusal of § 3(7), 3(8) & 5(22) of IBC, it is clear that an individual or a PG does not come under the definition of CD and the IBC itself contemplates that a PG is a separate person from a CD. Further, the language of § 14 is absolutely clear and unambiguous and there is no scope for adding words to it under the guise of interpretation.[18]

¶ 15 It is argued that a PG can only claim the protection of moratorium u/s 94-101 of Part III of IBC when insolvency proceedings are initiated against him and he cannot get the benefit of moratorium in favour of the CD. It is also contended that the protection of moratorium u/s 96 & 101 is much wider than u/s 14 as these sections prohibit legal

[16] Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy, (2013) 12 S.C.C. 649.

[17] Collector (Land Acquisition) v. Katiji, (1987) 2 S.C.C. 107.

[18] Commisioner of Customs (Import) Mumbai v. Dilip Kumar & Co., (2018) 9 S.C.C. 1.

proceedings in respect of the debt itself and not merely the debtor and therefore, the rights of PG u/s 96 & 101 cannot possibly be read into § 14.

¶ 16 It is further submitted that § 22 of SICA, a provision similar to § 14 which stalled legal proceedings against the sick company and the guarantors had been abused in the past[19] and the Legislature was aware of this fact while enacting § 14 on the same date on which SICA was repealed and it is quite understandable that it particularly chose to remedy the mischief caused by § 22 of SICA by enactment of § 14.[20] This argument is fortified by the conditions prevailing before the enactment of § 14 of IBC when the Parliament was veering around from wanting to rehabilitate sick companies to giving credence to recovery of public monies and was seeking to exclude § 22 of SICA from subsequent enactments.[21]

¶ 17 Further, taking a literal interpretation of § 14, the NCLAT has held that § 14 does not bar proceedings against third party assets.[22] The tribunal held that the word 'its' used in the section refers to the CD only. Reiterating this decision, the NCLAT held in a subsequent case that the SARFAESI Act would come within the ambit of moratorium only if the action is in respect of the property owned by the CD.[23] Therefore, it is urged that a broad interpretation need not be given to § 14 as it could not have been the intention of the legislature to extent the benefit of moratorium to the PG.

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[19] Ministry of Law, Jusitce & Company Affairs, *Report of the High Level Committee on Law Relating to Insolvency & Winding up Companies* 34 (2000).

[20] Sicom Investments & Finance Ltd. v. Rajesh Kumar Drolia, (2017) S.C.C. OnLine Bom. 9725.

[21] Madras Petrochem Ltd. v. B.I.F.R., (2016) 4 S.C.C. 1.

[22] Alpha & Omega Diagnostics (India) Ltd. v. Asset Reconstruction Company of India, Company Appeal (A.T.) (Insolvency) No. 116 of 2017.

[23] Schweitzer Systemtek India Pvt. Ltd. v. Phoenix A.R.C. Pvt. Ltd., Company Appeal (A.T.) (Insolvency) No. 129 of 2017.

[3.2] That the liability of the PG is co-extensive with that of the CD.

¶ 18 It is humbly submitted that u/s 128 of the ICA, the liability of a surety is co-extensive with that of the principal debtor and the creditor has the right of proceeding, either against the principal debtor or the surety or both in no particular sequence.[24] It is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, unless expressly stipulated for.[25] The very object of guarantee shall be defeated if the creditor is asked to postpone his remedies against the surety.[26] Hence, it can be said that the liability of surety is co-extensive but not in the alternative and both the principal debtor and the surety are liable at the same time to the creditor.[27] It is incomprehensible how pendency of CIRP against the CD would bar proceedings against the PG because if the creditor realises his debt from the PG, he will not proceed any further against the CD and vice versa.[28]

¶ 19 Further, a principal debtor may be discharged by operation of law in bankruptcy but this would not absolve the surety of his liability and the Creditor would be very much entitled to recover the residuary claim from the guarantors.[29] Therefore, it is argued that FLB should be allowed to proceed against the PG to recover its debts while the CD is undergoing CIRP and the benefit of moratorium u/s 14 should not be extended to the PG as it would result in a violation of legal right of the Creditor, i.e. FLB.

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[24] Chokalinga Chettiar v. Dandayunthapani Chattiar, A.I.R. 1928 Mad. 1262.

[25] 20 *Halsbury's Laws of England* 87 (4th ed.).

[26] Bank of Bihar v. Damodar Prasad, A.I.R. 1969 S.C. 297.

[27] Industrial Investment Bank of India Ltd. v. Biswanath Jhunjhunwala, (2009) 9 S.C.C. 478.

[28] Bank of India v. Gupta Infrastructure (India) Pvt. Ltd., [2018] 144 C.L.A. 194; Maharashtra State Electricity Board, Bombay v. Official Liquidator, High Court, Ernakulam, (1982) 3 S.C.C. 358.

[29] Jagannath Ganeshram Agarwale v. Shivnarayan Bhagirath, A.I.R. 1940 Bom. 247.

[3.3] That § 31 and § 60 of IBC cannot be relied upon to provide moratorium to the PG.

¶ 20 It is contended that § 31 of IBC merely makes a RP, approved by the COC, binding on the CD as well as the guarantor once it takes effect. This also prevents the guarantor from escaping liability u/s 133 of the ICA and the RP may include provisions as to payments to be made by such guarantors. Moreover, this is also the reason that I&B Rules and Regulations require information as to personal guarantees to be given when insolvency proceedings are initiated against the CD.

¶ 21 It is further argued that § 60 solely states that the AA for insolvency resolution and liquidation for CP including both CD and PG shall be the NCLT having territorial jurisdiction over the place where the registered office of the CP is located and when a CIRP or liquidation proceeding of a CD is pending before NCLT, an application relating to the insolvency resolution or bankruptcy of a PG shall also be filed before the same NCLT and if it is already pending in any court or tribunal, it shall be transferred to it. Also, proceedings under the SARFAESI Act cannot be termed as 'bankruptcy' proceedings. Therefore, § 2(e) of IBC as amended by the IBC (Amendment) Act, 2017 while referring to the applicability of IBC to PG applies only for the limited purpose enshrined in § 60.

[3.4] That there shall be no violation of § 14(1)(b) of IBC if the benefit of moratorium is not given to the PG.

¶ 22 It is humbly contended that according to § 14(1)(b), transferring, encumbering, alienating or disposing of '*by the corporate debtor*' any of its assets or any legal right or beneficial interest therein is prohibited during the moratorium period. However, if the FC recovers his debt from the PG and for the sake of argument, it is agreed that the PG possess the 'Right of Subrogation' u/s 140 of the ICA, a charge shall '*automatically*' get created on the property of the CD. Hence, this cannot be said to be a violation of § 14(1)(b) as the transfer of the legal right or beneficial interest cannot be said to have been made by the CD.

¶ 23 It is further submitted that the promoters of a CD, also acting as the PG, cannot be Creditors because the IBC prohibits the promoters who contribute to the insolvency of the CD from deriving benefit through the CIRP at the expense of the Creditors.[30] Moreover, PG cannot claim to be 'Financial Creditors' of the CD u/s 5(7) read with § 5(8) of IBC for payment made by them to the FC as the debt amount cannot be said to have been disbursed against the consideration for the time value of money.[31] Therefore, it can be concluded without doubt that the recovery of outstanding dues by the FC from the PG would not create a charge on the assets of the CD and result in violation of the provisions of IBC.

[3.5] That the SC was correct in applying the amendment to § 14(3) retrospectively.

¶ 24 It is humbly submitted that the amendment to § 14(3) has been done to clear confusion and clarify that the assets of guarantors would be outside the scope of moratorium.[32] When an amendment is merely declaratory or curative and seeks to clarify the law so as to remove doubts leading courts to delivering conflicting decisions, it must be held to be retrospective.[33] A legislature has the authority to pass a declaratory Act to set aside what it considers to have been a judicial error in the interpretation of a statute.[34] Further, this also serves as a necessary implication that the Amendment has to be given retrospective operation. Lastly, no vested right of PG to avail the benefit of moratorium u/s 14 existed before the Amendment was brought into force, as also affirmed by the Hon'ble Courts and Tribunals time and again, which can be said to have been adversely affected by the Amendment.

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[30] Lalit Mishra v. Sharon Bio Medicine Ltd., Company Appeal (A.T.) (Insolvency) No. 164 of 2018.

[31] Neeraj Bhatia v. Davinder Ahluwalia, Company Appeal (A.T.) (Insolvency) No. 142 of 2017.

[32] Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* 34 (2018).

[33] C.I.T. v. Shelly Products, (2003) 5 S.C.C. 461.

[34] C.I.T. v. Vatika Township Pvt. Ltd., (2015) 1 S.C.C. 1.

[ISSUE 4] THAT THE PG ARE LIABLE FOR LOANS GRANTED TO THE US COMPANY.

¶ 25 It is humbly contended that the PG are liable for the loans granted to the US Company as the same is affirmed by the RBI through its Circulars.

[4.1] That the FEMA Regulations apply to the PG for extending guarantees.

¶ 26 It is contended that the PG can give personal guarantee for the loans issued to the US Joint Venture. RBI in exercise of power conferred under § 6 (3)(j) and § 47 (2) of FEMA deliberated that a company in India may give guarantee to or on behalf of an Overseas Indian JV,[35] provided that the conditions stipulated in FEMA (Transfer & Issue of Foreign Security) Regulations are complied with. Further, as per the above Regulation an 'Indian Party' may extend guarantee provided that the Indian Party has made investment by way of contribution to the equity of the JV.

¶ 27 It is contended that with the view to grant operational flexibility RBI has issued circular so as to permit PG to extend guarantees on behalf of JV by stating that the Indian Entities may offer either personal or corporate guarantees.[36]

¶ 28 Now, the term 'Indian Party' includes any entity as may be notified by the RBI[37] and further, personal guarantee of an Indian Entity would mean promoters/directors of the company. Additionally, the term 'Personal Guarantor' as per section 5(22) of IBC is an individual who is the surety in the contract of guarantee to a corporate debtor. Further, the same proposition as in circular, 2006 was reflected in Master Circular, 2010.[38] Additionally, there is no doubt on the willingness of the Directors as PG and therefore the directors are liable as PG of the Company.

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[35] Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 Reg. 5(b).

[36] R.B.I./2005-06/ 338, A.P. (D.I.R. Series) Circular No. 29, *Overseas Investment – Liberalization* (Mar. 2006).

[37] Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 Reg. 2(k).

[38] R.B.I./F.E.D./2015-16/10, Master Direction, *Master Circular on Direct Investment by Residents in Joint Ventures/Wholly Owned Subsidiaries Abroad* (Jul. 2010).

[4.2] That the RBI Guidelines permit the PG to extend guarantee.

¶ 29 It is contended that the Personal Guarantee by the promoters when stake-holding is below 51% in the Overseas Subsidiary Company is permitted. The same is contended after reading Regulation 6 (4) of FEMA (FEMA (Transfer or Issue of Any Foreign Security) Regulations, 2004) which is silent on the minimum threshold of equity contribution.[39]

¶ 30 Further, it is contended that the loan by the Bank could have been granted only when the holding of the Indian Company is more than 51% in the Overseas Indian Company[40] and therefore there cannot be a contention of a guarantee where the percentage of the guarantor be 51% or more to be personally liable as the same is not possible to obtain bank loans.

¶ 31 Therefore, reading Notification, 2007 with Circular, 2006 it is proved that the PG are liable for the guarantee and further the threshold of 51% stake-holding by the PG is not viable and so the their contention stands futile.

[4.3] That interference by the Supreme Court is undesirable.

¶ 32 It is contended that RBI as a measure to provide better operational flexibility brings these policies and they should be viewed broadly. The court need not interfere in these economic matters.[41] Further, the legislature has to deal with complex problems in the matters of economic issues and there is no straightjacket formula for the same. So, a greater say is to be given to legislature in these matters and as RBI acts as an agent of the legislature in these matters, its policies should not be interfered in oblivion.[42]

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[39] Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 Reg. 6(4).

[40] R.B.I./2015-16/279, *Extension of Credit Facilities to Overseas Step-down Subsidiaries* (Dec. 2015).

[41] Sitaram Sugar Co. Ltd. v. Union of India, (1990) 3 S.C.C. 223.

[42] Bhavesh D. Paresh v. Union of India, (2000) 5 S.C.C. 471.

[ISSUE 5] THAT FLB CAN PROCEED AGAINST THE INDIAN COMPANY UNDER IBC.

¶ 33 It is contended that FLB India by issuing LC has a right to reimbursement and a co-extensive liability of the guarantor and therefore there shall be application of IBC.

[5.1] That Default by the US Company engendered FLB's Right to Reimbursement.

¶ 34 It is contended that FLB India issued Letter of Credit (LC) for the US Company. A LC is an arrangement made by a bank for a customer in which the bank agrees the total sum with the customer, debits its account in advance, and guides the 'corresponding bank' to avail cash on demand by charging the sum to the debit of the issuing bank.[43] Here, in this case, FLB India is the "Issuing Bank" and the US bank is the "Corresponding bank." When a LC is issued, the amount is debited to the customer's account and credited to a 'Letter of Credit' account. Also, it is well settled that the relationship between the issuing bank and the confirming bank is that of principal and agent and there is no privity between the beneficiary (US Company) and the confirming bank (US Bank).[44]

¶ 35 As LC holds great importance in International Trade, the courts need not interfere with its mechanism[45] and should only be restrained if there is a serious dispute and a *prima facie* case of fraud.[46] Further, LC constitutes a sole contract and therefore FLB has a right to claim reimbursement of the amount paid to the 'beneficiary' from Indian Company.[47] The Issuing bank (FLB) has a right to reimbursement (Subrogation) from the Indian Company for the obligations under the LC,[48] and therefore, the issuance of LC makes FLB India a lawful creditor who has a right to get reimbursement of the amount lent.

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[43] 2 S.N. Gupta, *The Banking Law*, 1081-1082 (Universal Law Publishing Co., 5th ed. 2010).

[44] Swiss Bank Corporation v. Jai Hind Oil Mills Co., (1989) 66 Comp. Cas. 241.

[45] Tarapore & Co. Madras v. V.O. Tractors Exports, Moscow, (1969) 1 S.C.C. 233.

[46] Raunaq International Ltd. v. National Aluminium Co. Ltd., (1993) 78 Comp. Cas. 54.

[47] Hira Lall & Sons v. Lakshmi Commercial Bank, (2002) 6 S.C.C. 389.

[48] U.B.S. A.G. v. State Bank of Patiala, (2006) 5 S.C.C. 416.

[5.2] That there exists a Co-Extensive liability of the Guarantor.

¶ 36 It is contended that there exists a co-extensive liability of the Guarantors. SSPL being the guarantor for the loan to the US Company automatically makes FLB India as the 'Financial Creditor' of US Company as inferred from clause (h) of Section 5 (8) of IBC.[49] Further, the guarantor is liable u/s 128 of ICA and has no right to restrain the action of the creditor.[50] The execution of decree by the bank is joint and several against all the defendants including guarantors even without subjecting the Principal Debtor.[51] The creditor is also the 'Financial Creditor' qua 'Corporate Guarantor'[52] and therefore, it is always open to the Financial Creditor to open CIRP proceeding directly against Corporate Guarantor without initiating any CIRP against the Principal Corporate Debtor.[53] Meaning thereby, there is no requirement of exhausting the remedy against one before proceeding against the other.[54]

[5.3] That the 'FC' under IBC is broad enough to include Foreign Financial Creditor.

¶ 37 It is contended that the definition of "Financial Creditor" u/s 5 (7) states that *"any person to whom a financial debt is owned and includes a person to whom debt is assigned"* and "Person" u/s 3 (23) includes a company resident outside India. Thus, a non-resident can also be considered as a Financial Creditor. The same is also accepted by the 'Report of Insolvency Law Committee on Cross Border Insolvency' that creditors include foreign creditors.[55]

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[49] Vishnu Kumar Agarwal v. M/s Piramal Enterprises Ltd., Company Appeal (A.T.) (Insolvency) No. 347 of 2018.

[50] Bank of Bihar v. Damodar Prasad, A.I.R. 1969 S.C. 297.

[51] State Bank of India v. M/s Indexport Registered, (1992) 3 S.C.C. 159.

[52] Ferro Alloys Corporation Ltd. v. Rural Electrification Corporation Ltd., Company Appeal (A.T.) (Insolvency) No. 92 of 2017.

[53] Vishnu Kumar Agarwal v. M/s Piramal Enterprises Ltd., Company Appeal (A.T.) (Insolvency) No. 347 of 2018.

[54] Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* 34 (2018).

[55] Ministry of Corporate Affairs, *Report of Insolvency Law Committee on Cross Border Insolvency* 28 (2018).

[5.4] That the US Company and the Indian Company should be construed as Single Entity.

¶ 38 It is contended that the US Company and the Indian Company should be construed as a Single Entity, further, a restrictive definition cannot be used as a measure to evade the liabilities, especially when the parent company's management has a steering interference with the subsidiary's core activities that the subsidiary can no longer be regarded to be performing its activities independently.[56] Even keeping separate legal entity concept intact, in proper cases of "lifting of corporate veil", the parent and subsidiary can be construed as single entity.[57] The companies should be construed as single entity not because of the complete shareholding but due to the fact that the company relied on the parent company's financial standing and later, at the time of repayment is taking the defence of 'Separate Entity' is a sham, especially, when the entire structure of the company is held by the parent company and in the beneficial interest of the directors itself.

¶ 39 Thus, if there is abuse of organizations' form without reasonable business purpose so as to evade obligations it is to be determined by court by considering all facts and circumstances. It is in these cases that the principle of corporate veil or doctrine of substance over form arises which gives a prerogative to the court to totally ignore the separate existence of company. Therefore, in the light of the present facts and circumstances it is the task of the court to look at the entire transaction as a whole and not to adopt a dissecting approach.[58]

¶ 40 Further, it is contended that under certain circumstances when a Subsidiary is used as an adjunct, agency or instrumentality of the owning company, in such situations the court will not permit itself to be blinded by mere corporate form, but will in a proper case disregard the corporate entity and treat the two corporations as one, or at least as responsible for each

[56] Vodafone International Holdings v. Union of India, (2012) 6 S.C.C. 613.

[57] *Id*. at 676.

[58] *Id*. at 670.

other.[59] It is also contended that since India is not a signatory to the UNCITRAL Model laws on Insolvency it is not an exhaustive authority to bind this Hon'ble Court. Therefore, since FLB India has a right to reimbursement against the company jointly and severally.

[ISSUE 6] THAT THE BANK HAS NOT COMMITTED ANY ERROR IN DECLARING NPA.

[6.1] That RBI guidelines were duly followed.

¶ 41 It is contended that a bank cannot declare any asset as NPA on its whim and fancies but has to abide by the guidelines laid down by the authorities.[60] Here, FLB has complied with the RBI guidelines and declared the account as NPA after 180 days of default[61] which is more than as laid down by the RBI considering the good reputation of the company.

¶ 42 It is further contended that RBI considering the recommendations made from Bank reforms committee on increase in number of NPAs further reduced the period from 180 days to 90 days so as to match with the international norms[62] and the same has been implemented by the RBI. Further, the constitutionality of the same cannot be questioned as once the law is upheld as valid, it cannot be subsequently challenged.[63] The year when NPA was declared by the bank was in accordance to the RBI circular dated July 1 2013.[64] Therefore, it will be wrong to say that FLB declared NPAs against RBI guidelines in fact the court has considered the same circular as 'beneficial in nature.'[65]

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[59] Henry W. Ballantine, *Separate Entity of Parent & Subsidiary Corporations*, 14 CA. L. REV. (1925).

[60] Holystar Natural Resources Pvt. Ltd. v. Union of India, (2015) 191 Comp. Cas. 482.

[61] Moot Proposition, ¶ 6.

[62] Mardia Chemicals Ltd. v. Union of India, (2004) 4 S.C.C. 311; R.B.I. Circular, *Monetary and Credit Policy Measures 2001-2002* (Jul. 2001).

[63] Deccan Chronicles Holdings Ltd. v. Union of India, (2015) 191 Comp. Cas. 557.

[64] R.B.I./2014-15/25, Master Circular, *Income Recognition, Asset Classification, Provisioning* (Jul. 2013).

[65] Holystar Natural Resources Pvt. Ltd. v. Union of India, (2015) 191 Comp. Cas. 482.

PRAYER

Wherefore, in the light of facts of the case, issue raised, arguments advanced and authorities cited, this Hon'ble Supreme Court may be pleased to declare and adjudge that:

In the case of FLB Ltd. vs. SSPL represented by its shareholders (RA No. 1):

1. The RA No. 1 of 2019 filed by FLB under Order XLVII, Rule 1 of CPC is maintainable.
2. The Limitation Act, 1963 would apply prospectively to IBC and if there is any delay on the part of FLB in filing applications under IBC, it is condoned u/s 5 of LA.

In the case of Shareholders of SSPL vs. FLB Ltd. (RA No. 2):

1. The RA No. 2 of 2019 filed by the Personal Guarantors under Order XLV11, Rule 1 of CPC is not maintainable.
2. The benefit of moratorium u/s 14 of IBC would not extend to Personal Guarantors and the Amendment to § 14(3) would operate retrospectively.
3. The Personal Guarantors are liable for loans granted to the US Company as FEMA Regulations.
4. FLB can apply IBC against the Indian Company and the US Company co-extensively.
5. FLB has not committed any error in declaring the assets of the company as NPA.

And pass any other order in favour of Applicant that it may deem fit in the interest Justice, Equity and Good Conscience.

Sd/-

- *Respectfully submitted by the Counsel for the Applicant*