

TEAM CODE:

17TH SURANA & SURANA NATIONAL CORPORATE LAW

MOOT COURT COMPETITION

BEFORE THE HON'BLE SUPREME COURT OF INDIA

AT NEW DELHI

REVIEW APPLICATION NOS. 2 OF 2019

(FILED UNDER ORDER XLVII RULE 1 OF CPC)

AGAINST CIVIL APPEAL NOS. 10000 & 10001 OF 2018

FIRST TO LEND BANKING LTD REVIEW APPLICANT

V.

SOFT SOLUTIONS PVT LTD REP BY ITS SHAREHOLDERS RESPONDENT

AND

SHAREHOLDERS OF SOFT SOLUTIONS PVT LTD REVIEW APPLICANT

V.

FIRST TO LEND BANKING LTD RESPONDENT

MEMORIAL ON BEHALF OF THE RESPONDENT

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MEMORIAL ON BEHALF OF THE RESPONDENTLIST OF ABBREVIATIONS

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

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

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1. Ashok Hurra v. Ashok Hurra	AIR 2002 SC 1771
2. Arjan Singh v. State of Punjab	AIR 1970 SC 703
3. Avtar Singh Sekhon v. Union of India	AIR 1980 SC 2041
4. Alkash Ali v. Nath Bank Ltd.	AIR 1951 Assam 56
5. Bank of Baroda vs Krishna Ballabh	AIR 1975 Raj 1
6. Bradford v Gammon	1924]All ER Rep 766 (England)
7. C Gupta v. Glaxo-Smithline Pharmaceuticals Ltd.	(2007)7 SCC 171
8. Cauvert Water Dispute Tribunal , In. re.	AIR 1992 SC 522
9. CCE v. Madras Rubber Factory Ltd.	(1989) 3 SCC 238
10. Chandra kanta v. Shiek Habib	AIR 1975 SC 808
11. CIT v. Vatika Township Pvt. Ltd.	(2015) 1 SCC 1
12. Controller of Estate Duty, Gujarat v. H.H. Iqbal Mohomed Khan	[1967] 66 ITR 484 (SC)
13. CST v. Pine Chemicals	1995 SCC (1) 58.
14. Edward Mills Co. Ltd. v. State of Ajmer	AIR 1955 SC 25
15. Garikapati Veeraya v. N. Subbiah Choudhry	AIR 1957 SC 540
16. Gem Granites v. CIT	(2005) 1 SCC 229
17. Govind Das and Ors. v. The Income Tax Officer and Anr.	AIR 1977 SC 552
18. Gulab Chand v. Kudilal & Anr.	AIR 1966 SC 1734
19. Indian Aluminium Co. v. CIT	AIR 1972 SC 1880

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20. Janardan Reddy v. State	AIR 1951 SC 124
21. K. C. Arora v. State of Haryana	(1984) 3 SCC 281
22. Keshvan v. State of Bombay	AIR 1951 SC 128
23. Khardah Co. Ltd v. Raymon & Co. (India) Pvt. Ltd.	AIR 1962 SC 1810
24. Lloyd v. Dimmack	(1877)7 Ch D 398 (England)
25. M.P. Steel Corporation v. C.C.E.	(2015) 7 SCC 58
26. M/s Innoventive Industries v. ICICI Bank	AIR 2017 SC 4084.
27. Mahadeolal Kanodia v. Administrator General of W. B.	AIR 1960 SC 936
28. Meenakshi Sharma v. State Of J&K & Ors.	2018 SCC ONLINE J&K 406
29. Mithilesh Kumari and Anr. v. Prem Behari Khare	AIR 1989 SC 1247
30. Mithilesh Kumari v. Prem Bahadur Khare	AJR 1989 SC 1247
31. New India Insurance Co. Ltd. v. Shanti Mishra	(1975) 2 SCC 840
32. P. Suseela and Ors. v. Union Grants Commission	AIR 2015 SC 1976
33. PN Eswara Iyer v. Registrar	AIR 1980 SC 808
34. Purbanchal Cables & Conductors Pvt. Ltd. v. Assam State Electricity Board & Anr.	AIR 2012 SC 3167
35. Rafiquenessa (Mst.) v. Lal Bahadur Chetri	AIR 1964 SC 1511
36. Rama Iyen v. Venkatachalam Patter	
37. Ramaswamy Chettiar v. K. S. M. Manickam Chettiar	(1938) 1 MLJ 56
38. Re Lomplungh Iron Ore Co Ltd.	1926] All ER Rep682 (rates) (England)
39. S Nagaraj v. State of Karnataka	1993 (Supp-4) SCC

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40. Sanjeev Shriya v. State Bank of India	2017 (9) ADJ 723
41. SBI v. Ramakrishnan & Ors.	AIR 2018 SC 3876
42. Shyam Sundar v. Ram Kumar	AIR 2001 SC 2472
43. State Bank of India v. V. Ramakrishnan & Veasons Energy Systems	[2018] 146 SCL 597
44. State of Bombay v. Vishnu Ramchandra	AIR1961 SC 307
45. State of Madhya Pradesh v. Rameshwar Rathod	AIR 1990 SC 1849
46. Steel Authority of India v. Sutni Sangam	AIR 2010 SC 112
47. Thomas v. Notts Inc. Football Club Ltd.	[1972]1AllER1176 (England)
48. V Chandrashekharan v. Admin Officer	(2012) 10 SCR 603
49. Watt v. Mortlock	1963] 1 All ER 388 (England)
50. West v. Gwyne	(1911) 2 Ch.1 (U.K)
51. Zile Singh v. State of Haryana	AIR 2004 SC 5100

BOOKS REFERRED

1. 5 DD BASU, *COMMENTARY ON THE INDIAN CONSTITUTION* (8TH EDITION, 2009).
2. ASHISH MAKHIJA, *INSOLVENCY AND BANKRUPTCY CODE OF INDIA* , LEXIS NEXIS , 2018.
3. 1 AHARWALS, *LAW OF LIMITATAION* (3RD EDITION 2000).

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4. 1 POLLOCK & MULLA, *INDIAN CONTRACT & SPECIFIC RELIEF ACTS* (12TH EDITION).
5. AVTAR SINGH, *CONTRACT AND SPECIFIC RELIEF* (11TH EDITION).

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STATEMENT OF JURISDICTION

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

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

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

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

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

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SYNOPSIS OF FACTS

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

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STATEMENT OF ISSUES

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

I.

WHETHER THE REVIEW PETITION IS MAINTAINABLE.

II.

**WHETHER THE PERSONAL GUARANTORS ARE ENTITLED TO THE BENEFIT
OF MORATORIUM**

III.

**WHETHER THE BANK FUNDAMENTALLY ERRED IN PROCEEDING AGAINST
THE GUARANTORS FOR LOAN TO THE US COMPANY**

IV.

**WHETHER THE COURT COMMITTED AN ERROR IN DECLARING THE LOANS
AS NPA AT A MUCH EARLIER STAGE AGAINST THE RBI GUIDELINES**

V.

**WHETHER THE CLAIM OF BANK AGAINST THE INDIAN COMPANY AND THE
GUARANTORS TO RECOVER THE AMOUNT DUE IS HIT BY LIMITATION
PERIOD.**

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SUMMARY OF ARGUMENTS

ISSUE 1- THE REVIEW PETITION IS MAINTAINABLE

The review petition is maintainable because there has been an error apparent on the face of it by not giving the benefit of moratorium to the personal guarantors.

ISSUE 2 – THE PERSONAL GUARANTORS ARE ENTITLED TO THE BENEFIT OF MORATORIUM

That amendment act must not be applied retrospectively and the provisions of moratorium is given the IBC itself as personal guarantors are a part if the CIRP proceedings. Hence, they are entitled to the benefit of moratorium.

ISSUE 3- THE BANK FUNDAMENTALLY ERRED IN PROCEEDING AGAINST THE INDIAN GUARANTORS

The bank cannot proceed as the loan has not been assigned to the Indian bank and the rights of the personal guarantors as given in ICA 1872 will be jeopardized.

ISSUE 4 – THE COURT HAS ERRED IN DECLARATION OF NPA

The bank has wrongly declared the loan as NPA because there is merely a temporary default and there was no threat of loss.

ISSUE 5- THE CLAIM OF THE BANK AGAINST THE INDIAN CO. AND THE GUARANTORS TO RECOVER THE AMOUNT DUE IS HIT BY LIMITATION PERIOD

That the claim of banks against the guarantors and the Indian Company is hit by the Limitation period and section 238A of the code must be applied retrospectively here forth.

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PLEADINGS

ISSUE 1- THE REVIEW PETITION IS MAINTAINABLE

1. The petition is maintainable since there has been a miscarriage of justice¹ and an error apparent on the face of it .

1.1. THERE HAS BEEN AN ERROR APPARENT ON THE FACE OF IT

2. This court in **CST v. Pine Chemicals**² has held that interpretation of statute law at variance with clear and simple language, thereof, is an error apparent on the face of the record.
3. Further, it is an error apparent on the face of record if there is clear ignorance and disregard to the provisions of law³ and decision is inconsistent with earlier decisions delivered by a coordinate and a larger bench⁴ or there is a glaring omission or patent mistake⁵.
4. In **V Chandrashekharan v. Admin Officer**⁶, it was held that a misleading or an inaccurate statement in a petition only to achieve ulterior purpose, is abuse of power of the court. Moreover, a review petition may be accepted if the decision is passed '*per incuriam*' or if it is manifestly wrong⁷.

¹Rupa Ashok Hurra v. Ashok Hurra , AIR 2002 SC 1771

²CST v. Pine Chemicals, 1995 SCC (1) 58.

³PN Eswara Iyer v. Registrar, AIR 1980 SC 808, 5 DD BASU, COMMENTARY ON THE INDIAN CONSTITUTION, Page. 5936 (8th ed. 2009).

⁴5 DD BASU, COMMENTARY ON THE INDIAN CONSTITUTION, Page. 5942 Para 6 (Vol. 5 , 8th ed. 2009).

⁵Chandra kanta v. Shiek Habib AIR 1975 SC 808 , Avtar Singh Sekhon v. Union of India AIR 1980 SC 2041.

⁶V Chandrashekharan v. Admin Officer, (2012) 10 SCR 603.

⁷Cauvert Water Dispute Tribunal , In. re. AIR 1992 SC 522

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5. Review petition may be accepted if certain facts were not brought to the attention of the court or remained unnoticed, especially when it affects numerous persons.⁸
6. It is humbly argued that the close relationship between the corporate entity and the personal guarantors and how they will be affected by the CIRP proceedings⁹ has not been brought before the court. Moreover, the court's attention was not drawn towards the rights of the guarantors¹⁰ and how their right will be jeopardised if the creditors are allowed to proceed against the personal guarantors.
7. Further certain facts, such as, the bank has defaulted in considering the representation¹¹, there is an error in the declaration of NPA and that the director do not hold 51% stake in the US company as per the FEMA regulations have never seen the light of the day before the Hon'ble Court and therefore the review petition must be accepted.

1.2. THAT THE COURT HAS INHERENT POWER TO REVIEW ITS DECISION

8. The Supreme Court has inherent power to make such orders in the interest of justice¹² and prevent the abuse of power by the court.¹³ Review petition can be entertained taking into consideration the public importance of the issue involved¹⁴.
9. A matter of public importance is involved in the present case as the rights of the Indian guarantors, as enriched under the various provisions of the ICA, 1872, and specifically

⁸Indian Aluminium Co. v. CIT AIR 1972 SC 1880.

⁹Insolvency and Bankruptcy Code, 2016, S. 14, 30, 31 & 60.

¹⁰ Indian Contract Act, 1872, S. 140.

¹¹SARFAESI Act, 2002.

¹²S Nagaraj v. State of Karnataka , 1993 (Supp-4) SCC 595 .

¹³ DD BASU, COMMENTARY ON THE INDIAN CONSTITUTION, Page. 5935 Para 1 (8th ed. 2009),

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

¹⁴CCE v. Madras Rubber Factory Ltd., (1989) 3 SCC 238.

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provided in the IBC when the corporate debtor goes under CIRP are at stake because of the frivolous claims made by the foreign creditor.

10. it is humbly argued that certain important questions are still unsettled, and hence the review petition must be accepted.

ISSUE 2 – THE PERSONAL GUARANTORS ARE ENTITLED TO THE BENEFIT OF MORATORIUM

11. The personal guarantors are entitled to the period of moratorium since there was no provision in the IBC before the amendment, which prevented them from claiming moratorium, further their rights are protected under the various provisions of the IBC as well as the ICA, 1872.

2.1. RULE OF BENEFICIAL CONSTRUCTION

12. This submission is furthered on the premise that normally an enactment is prospective in nature, unless there is something in it to show that it means otherwise¹⁵. Furthermore, the enactment should expressly provide that it should be deemed to have come into effect from a past date, it is retrospective in nature.¹⁶
13. In **CIT v. Vatika Township Pvt. Ltd**¹⁷, it was held that, the legislature must expressly, in clear and unequivocal language, give retrospective operation to an enactment .
14. As per **Maxwell's Interpretation of Statutes**,¹⁸ no rule of construction is more firmly established than that a retrospective operation is not to be given to a statute so as to impair an

¹⁵Meenakshi Sharma v. State Of J&K & Ors., SWP no.953/2013 MP no.1344/2013, Date of order: 14 .11.2017

¹⁶GarikapattiVeeraya v. N. Subbiah Choudhury, AIR 1957 SC 540.

¹⁷CIT v. Vatika Township Pvt. Ltd,(2015) 1SCC1.

¹⁸SIR PETER BENSON MAXWELL,*INTERPRETATION OF STATUTES*, 202-205 (12thed.).

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existing right or obligation. Moreover, if the enactment is expressed in language, which is capable of either interpretation, it ought to be construed as prospective only.¹⁹

15. It was held in **West v. Gwyne**²⁰ that retrospective operation is one matter and interfering with the existing rights is another. Moreover, it is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation.²¹

16. Further, in the case of **Govind Das and Ors. V. IT Officer**, it was held that retrospective operation is not given to a statute, so as to impair an existing right. Moreover, if either interpretation is possible, it ought to be construed prospectively.²²

17. Therefore it is humbly submitted the amendment act that introduced clause 3 in section 14 of IBC only came on 06.06.18 and there is no provision in the amendment act which provides for its retrospective operations and hence must be applied from this date .

2.2. THE PERSONAL GUARANTORS ARE A PART OF THE CIRP

18. The NCLAT in **State Bank of India v. V. Ramakrishnan**²³, gave a broad interpretation of Section 14 and held that it would bar proceedings or actions against sureties through moratorium because these proceedings against the guarantors would affect the CIRP.

¹⁹Purbanchal Cables & Conductors Pvt. Ltd. v. Assam State Electricity Board & Anr., AIR 2012 SC 3167.

²⁰West v. Gwyne, (1911) 2 Ch.1, Page 11, 12 (U.K).

²¹Keshvan v. State of Bombay, AIR 1951 SC 128 ; Janardan Reddy v. State, AIR 1951 SC 124 ; Mahadeolal Kanodia v. Administrator General of W. B., AIR 1960 SC 936 ; State of Bombay v. Vishnu Ramchandra, AIR 1961 SC 307 ; Rafiquennessa (Mst.) v. Lal Bahadur Chetri, AIR 1964 SC 1511 ; Arjan Singh v. State of Punjab, AIR 1970 SC 703 ; K. C. Arora v. State of Haryana, (1984) 3 SCC 281 ; Mithilesh Kumari v. PremBahadurKhare, AIR 1989 SC 1247 ; State of Madhya Pradesh v. RameshwarRathod, AIR 1990 SC 1849 ; Shyam Sundar v. Ram Kumar, AIR 2001 SC 2472 ; Zile Singh v. State of Haryana, AIR 2004 SC 5100 ; Gem Granites v. CIT, (2005) 1 SCC 229 ; C Gupta v. Glaxo-Smithline Pharmaceuticals Ltd., (2007)7 SCC 171.

²²Govind Das and Ors. v. The Income Tax Officer and Anr., AIR 1977 SC 552.

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19. In **Sanjeev Shriya v. State Bank of India**²⁴, the Court took the view that until debt of the corporate debtor is crystallised, the guarantor's liability may not be triggered. A financial creditor cannot operate in a manner that imperils the value of the property of the personal debtor. In fact where, proceedings are pending for adjudication in two forums, it is not permissible to proceed against the personal guarantor.
20. Further as per Section 5(8) of the Code **financial debt** includes – (i) *the amount of any liability in respect of any of the guarantee*. Moreover information as to personal guarantees has to be given when a CIRP is initiated against the corporate debtor.²⁵
21. Lastly Section 60(2) and (3) read with Section 31 of the Code shows that the personal guarantors are a part of the CIRP and are bound by the resolution plan. Therefore it is humbly argued that personal guarantors are entitled to the moratorium benefit.

2.3. THE VALUABLE RIGHTS OF A SURETY ARE AFFECTED

22. After the corporate debtor has been proceeded against, the guarantor stands in the shoes of the creditor.²⁶ The guarantor is entitled to call upon the principal-debtor to pay the amount of the debt guaranteed, so as to relieve the guarantor from his obligation, even though the guarantor has paid nothing under the guarantee.²⁷

²³State Bank of India v. V. Ramakrishnan & Vecons Energy Systems, [2018] 146 SCL 597.

²⁴Sanjeev Shriya v. State Bank of India, 2017 (9) ADJ 723.

²⁵Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Annexure VI (e), Form 6. Regulation 36(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 also provides.

²⁶Indian Contract Act, 1872, S. 140.

²⁷Watt v. Mortlock [1963] 1 All ER 388 (England); Thomas v. Notts Inc. Football Club Ltd [1972] 1 All ER 1176 (England).

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23. This right is based on the general equitable rule that a person entitled to an indemnity may enforce his right to it, before he has suffered loss.²⁸ This right is available to the surety when the debt becomes payable by him.²⁹
24. The directors are the guarantors for the loan of the Indian as well as the US Company. It is thus argued that, the valuable rights of the guarantors will become useless if the creditors are allowed to simultaneously move against the guarantors along with the principal borrower and hence, moratorium must be given to the personal guarantors.

2.4. AN AMENDING ACT CANNOT TAKE AWAY THE EXISTING RIGHTS

AVAILABLE TO A PERSON

25. This Court in the case of **P.Suseela and Ors. v. UGC**³⁰ held that any regulation should not be given a retrospective effect such that it is prejudicial to the interest of any person.
26. Similarly, in the case of **Mithilesh Kumari and Anr. v. Prem Behari Khare**³¹, the Court held that the presumption against retrospective operation is strong in cases where a retrospective operation is to be given to a statute impairs an existing right or obligation and thus would be unjust and might be oppressive.
27. In **Steel Authority of India v. Sutni Sangam**³², the court held that a substantive right should prevail over the procedural aspects of the matter. Moreover, in **Gulab Chand**

²⁸Pollock and Mulla, Page 1891 ¶2, footnote 52.

²⁹Lloyd v. Dimmack (1877) 7 Ch D 398 (England); Bradford v Gammon, [1924] All ER Rep 766 (England).

³⁰P. Suseela and Ors. v. Union Grants Commission, AIR 2015 SC 1976.

³¹Mithilesh Kumari and Anr. v. Prem Behari Khare, AIR 1989 SC 1247.

³²Steel Authority of India v. Sutni Sangam, AIR 2010 SC 112.

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v.Kudilal&Anr³³, it was held that applying a statute retrospectively can never be left to a matter of presumption and it must be clearly stated.

28. Further in **Edward Mills Co. Ltd. v. State of Ajmer**³⁴, this Court has held that there is no difference between an "existing law" and a "law in force". Moreover, it is open for this court to interpret the law, even though they have not yet been brought into force.³⁵

29. There is no specific word in the amendment act to suggest its retrospective applicability. the rights of the personal guarantors have been clearly identified in the IBC and merely because they have not been notified, it cannot be said that the law is non existing.

30. it is most humbly submitted that denying of moratorium would be against the substantial rights of the surety given under the ICA and since the guarantors are so closely related to the corporate debtor , section 14(3) must not be applied retrospectively and the benefit of moratorium shall be given to them.

ISSUE 3– THAT THE BANK FUNDAMENTALLY ERRED IN PROCEEDING

AGAINST THE GUARANTORS FOR LOAN TO THE US COMPANY

31. Though section 234 and 235³⁶has provisions for cross border insolvency, however, the same are not sufficient.³⁷They have not been acted upon and so the foreign creditors cannot be allowed to proceed against the Indian parties.

3.1. THE LOAN HAS NOT BEEN ASSISGNEED TO THE INDIAN BANK

³³Gulab Chand v. Kudilal & Anr, AIR 1966 SC 1734.

³⁴Edward Mills Co. Ltd. v. State of Ajmer, AIR 1955 SC 25.

³⁵SBI v. Ramakrishnan and Ors, AIR 2018 SC 3876.

³⁶Insolvency & Bankruptcy Code, 2016, S. 234 & 235.

³⁷As observed in the BLRC report.

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32. A financial creditor can make an application for CIRP under section 7 if there is a default.³⁸ Financial creditor means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.³⁹
33. Assignment essentially means introduction of a new party into an existing contract, which amounts to a novation of the existing contract.⁴⁰
34. In the case of **Khardah Company Ltd. v. Raymond & Co. (India) Pvt. Ltd.**⁴¹ The SC held that there is an assignment of a contract by transfer of the rights or obligations.
35. Further as per section 130⁴², an actionable claim can be transferred on execution of an instrument in writing.⁴³ Though any particular form is not necessary the words should clear the intension.⁴⁴ An assignment must conform strictly to the provisions of this section, and there must be words of transfer in the instrument.⁴⁵
36. In the present case neither the debt is owed to the Indian Bank nor has the loan been legally assigned to them and hence they cannot proceed against the personal guarantors.

3.2. THE RIGHTS OF GUARANTORS AS PROVIDED IN INDIAN CONTRACT ACT,

1872, WILL BE JEOPARDIZED

³⁸Insolvency & Bankruptcy Code, 2016, S. 7.

³⁹Insolvency & Bankruptcy Code, 2016, S. 5 (7).

⁴⁰Indian Contract Act, 1872, S. 62.

⁴¹Khardah Co. Ltd v. Raymon & Co. (India) Pvt. Ltd., AIR 1962 SC 1810

⁴²Transfer of Property Act 1882

⁴³Krishnendu Kanungo & Pritisha Chakraborty, Assignment of Rights and its Practical Relevance in Financial Transactions : A lender's perspective.

⁴⁴Rama Iyen v. Venkatachalam Patter ; Ramaswamy Chettiar v. K. S. M. Manickam Chettiar, (1938) 1 MLJ 56; Controller of Estate Duty, Gujarat v. H.H. Iqbal Mohamed Khan, [1967]66ITR484(SC).

⁴⁵Balaram v. Gopinath, AIR 1954 Ori 44; Alkash Ali v. Nath Bank Ltd., AIR 1951 Assam 56.

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37. After the corporate debtor is proceeded against, the guarantor stands in the shoes of the creditor.⁴⁶ The guarantor is entitled to all the rights possessed by the creditor in respect of debt, default or miscarriage to which the guarantee relates.⁴⁷
38. The provision enables to keep alive for the surety's benefit any right of the creditor, under a security or otherwise, which would otherwise have been extinguished at law by the payment of debt or performance duty.⁴⁸
39. Moreover, a surety is entitled to the same priority, as the creditor, in the event of insolvency or winding up of the principal debtor.⁴⁹ In **Bank of Baroda v. Krishna Ballabh**⁵⁰, the court held that the surety is entitled to those benefits which arise out of the transaction which gave rise to his right or liability.⁵¹
40. When the debt becomes payable by the surety he can call upon the principal debtor to pay the amount.⁵² This right is based on the general equitable rule that a person entitled to an indemnity may enforce his right to it, before he has suffered loss.⁵³
41. It is humbly submitted that in the present case the valuable rights of the guarantors are affected if a foreign creditor is allowed to go against the Indian guarantors, without

⁴⁶Indian Contract Act, 1872, S. 140.

⁴⁷Halbury's laws of England, Page 1887 (Mulla), footnote 25.

⁴⁸Halbury's laws of England, Page 1887 (Mulla), footnote 26.

⁴⁹Re Iomplungh Iron Ore Co Ltd. [1926] All ER Rep 682 (rates) (England).

⁵⁰Bank of Baroda vs Krishna Ballabh, AIR 1975 Raj 1, ¶5.

⁵¹ Supra

⁵²Watt v. Mortlock, [1963]1 All ER 388 (England); Thomas v. Notts Inc. Football Club Ltd., [1972]1 All ER 1176 (England), Lloyd v. Dimmack, (1877)7 Ch D 398; Bradford v. Gammon, [1924] All ER Rep 766 (England).

⁵³Pollock & Mulla, page 1891, ¶ 2, footnote 52.

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proceeding against the principal debtor, whereas, the Indian parties will thereafter be unable to recover the money from the principal debtor.

**3.3. THAT THE PERSONAL GUARANTORS HAVE RAISED A DISPUTE AND
HENCE, A PROCEEDING UNDER THE IBC CANNOT BE INITIATED.**

42. This court in **M/s Innoventive Industries v. ICICI Bank**⁵⁴ has held that when an application is moved under section 7 of the IBC the corporate debtor has a limited right to dispute the fact that he is not liable to pay the debt.

43. In Para 28 the court has held that, a dispute may be raised regarding the liability to pay the debt if a debt is not payable in law or in fact.⁵⁵ In Para 30 the court has observed that it can reject an application under section 7 if it is shown that the debt is not due because it is interdicted by some law⁵⁶.

44. In the present case, various disputes have been raised by the personal guarantors and hence, until the disputes are settled the application under section 7 of IBC cannot be accepted.

**ISSUE 4 – THAT THE BANK COMMITTED AN ERROR IN DECLARING THE
LOANS AS NPA AT A MUCH EARLIER STAGE AGAINST THE RBI GUIDELINES.**

45. As per the master circular⁵⁷, Para 1.2 - the classification of assets of banks has to be done on the basis of objective criteria, which would ensure a uniform and consistent application of the

⁵⁴M/s Innoventive Industries v. ICICI Bank, AIR 2017 SC 4084.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Master Circular- Income Recognition, Asset Classification, Provisioning and Other Related Matters – UCBs, July 1, 2014.

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norms. It is important to point out that the bank has not declared the loan based on objective consideration.

**4.1. THAT THE BANK SHALL NOT DECLARE A LOAN AS AN NPA DUE TO
EXISTENCE OF TEMPORARY DEFICIENCIES⁵⁸**

46. Temporary deficiencies have been explained as - non-availability of adequate drawing power, balance outstanding exceeding the limit, non-submission of stock statements, etc.

47. The companies started to make the losses because of various economic reason, severe competition in the market and default of payment by customers.⁵⁹ However, the companies have put in sincere efforts to regain their lost businesses and to recover from the customers, but they could not make any huge impact to repay the dues.⁶⁰ Still they were in touch with the bankers and kept paying some portion of the interest amounts and were requesting extensions to pay the dues. Thus there was a bonafide act on the part of the guarantors and there was only a temporary deficiency in repayment. It is therefore humbly submitted that their bonafide act must not be used against the guarantors and that the bank has acted in a malafide manner, seeing the assets of the guarantors has declared the loan as NPA.

**4.2. AN ASSET SHOULD BE DECLARED AS AN NPA ONLY IF THERE IS
THREAT OF LOSS OR THE RECOVERABILITY IS IN DOUBT⁶¹**

48. It is important to point out that, the companies put sincere efforts to regain their lost businesses and had some success in it.⁶² Moreover the guarantors had already paid 25% of

⁵⁸ ¶ 2.2.1(i).

⁵⁹ ¶ 5, Moot Proposition.

⁶⁰ ¶ 8, Moot Proposition.

⁶¹ ¶ 2.2.1 (i).

⁶² ¶ 8, Moot Proposition.

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the dues along with an extension for 18 months⁶³ and, therefore, it is argued that the loan cannot be said to be in threat or that the recoverability was in doubt.

49. Moreover, the account should be regularized by repayment of overdue amount through genuine sources⁶⁴ a repayment is said to be from genuine sources if it is paid not by sanction of additional facilities or transfer of funds between accounts.⁶⁵

50. Hence it is humbly argued that in the present case the loan must have been regularized as per the master circular rather than filling of an application under section 7 of the IBC.

4.3 THAT THE BANK HAS DEFAULTED IN REPLYING TO THE REPRESENTATION MADE BY THE GUARANTORS

51. As per Section 13(3A)⁶⁶, the bank must respond to the representation of the guarantors within 7 days. This court in **Mardia Chemicals v. Union of India**⁶⁷, held that the requirements of this provision are mandatory, and their non-compliance will render the next steps as infructuous.⁶⁸

52. Further, in **ITC Limited v. Blue Coast Hotels Ltd. & Ors**⁶⁹ SC clarified that section 13(3A) of the SARFAESI Act, 2002 is not merely directory, but in fact mandatory in nature. Similar views have been held in several other cases.⁷⁰

⁶³Supra.

⁶⁴¶ 2.2.1 (ii).

⁶⁵¶ 2.2.1 (ii), Master Circular.

⁶⁶SARFAESI Act

⁶⁷Mardia Chemicals v. Union of India (2004) 136 Taxman 360 SC

⁶⁸ Mayank Cable Industries P. Ltd. v. The Nagpur District Central Co-operative Bank Ltd., (2005) III BC 229

⁶⁹ AIR2018SC3063

⁷⁰ M.R. gawai Enterprises v. Vidarbha Urban Co-operative Bank ltd., (2005) 57 SCL 290 (Bom).

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53. Moreover the bank has also included to attach the ancestral property if the guarantors and also imposed penal interest which was never agreed between the parties.⁷¹

Thus, it is argued that the bank cannot take further actions under the said act.

ISSUE 5- THAT THE CLAIM OF BANK AGAINST THE INDIAN COMPANY AND THE GUARANTORS IS HIT BY LIMITATION PERIOD

54. It is humbly submitted before the court that the claim of the bank against Indian Company to recover the amount due has been hit by limitation and hence they can't proceed under IBC for the same.

55. It is pertinent to note that section 238A that has been introduced vide IBC(Second Amendment)Act, 2018 invokes the provisions of the Limitation Act, 1963 to the code and is to be applied retrospectively in this case.

5.1. THAT THE CLAIM OF BANK IS HIT BY LIMITATION PERIOD.

56. It is humbly submitted that the applications filed before the NCLT were hit by limitation since more than three years had lapsed when the bank had declared the both the loans as NPA and the notices under the SARFAESI Act which required the Indian company to repay the dues expired on December 31, 2014 and January 31, 2015 respectively, whereas, the current applications were filed on February 01, 2018 which are more than three years period and hit by the Indian Limitation Act, 1963.⁷²

⁷¹Para 3 moot proposition .

⁷²¶ 10, Moot Proposition.

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**5.2. THAT THE AMENDMENT TO IBC INCORPORATING THE APPLICATION OF
LIMITATION ACT SHALL HAVE A RETROSPECTIVE EFFECT.**

57. It is humbly submitted before the court that section 238A of the IBC, being clarificatory of law and procedural in nature, must be held to be retrospective.

58. In **M.P. Steel Corporation v. C.C.E.**⁷³, it was held that periods of limitation are procedural in nature and would ordinarily be applied retrospectively.

59. As per the reports of Insolvency law Committee⁷⁴, the object of the amendment act was to clarify the law and thus shall have a retrospective application.

60. Also, referring to sections 3(11), 3(12) and 5(6) of IBC which define “claim”, “debt” and “default” show that in this case, a time-barred debt cannot be said to be due so as to trigger the code.

61. This court has further held in **GarikapatiVeerayav. N. Subbiah Choudhry**⁷⁵, and **New India Insurance Co. ltd, v. Shanti Mishra**⁷⁶ that every litigant has a vested right in a substantive law but no such right exists in procedural law.

62. Limitation Act is therefore applicable on IBC insofar as there is no vested right for the bank to recover a time barred debt.

63. Further, in **State of Kerala v. Kalliyankutty**, it was held that a wide interpretation of the term “amount due” so as to include time barred debts would destroy an important defence available to the debtor under art.14 of the Constitution of India.

64. According to G.P. Singh, “It is well settled that if a statute is curative or merely declaratory, a retrospective operation is generally intended.”⁷⁷

⁷³M.P. Steel Corporation v. C.C.E.

⁷⁴ Insolvency law Committee Report, March 2018.

⁷⁵Garikapati Veeraya v. N. Subbiah Choudhry, AIR 1957 SC 540.

⁷⁶ New India Insurance Co. Ltd. v. Shanti Mishra,(1975) 2 SCC 840.

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65. In this case, also, clearly the amendment of section 238A would not serve its object unless it is construed, as being retrospective, for the rights of guarantors shall not be overlooked.
66. It is therefore argued that the claim of the bank is barred by Limitation Period and the amendment to the code shall be applied retrospectively in furtherance of the same.

⁷⁷ G.P. Singh, Principles of Statutory Interpretation, 4th Ed., Page 291.

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PRAYER

Wherefore, in the light of the issues raised, arguments advanced and authorities cited it is most humbly and respectfully submitted that this Hon'ble court may adjudge and declare that:

1. **That the review petition is maintainable**
2. **That the personal guarantors are entitled to the period of moratorium when the principal debtors goes under CIRP.**
3. **That the bank cannot be allowed to proceed against the Indian guarantors for the loan given by the US Bank to the US company.**
4. **That the bank erred in declaration of the loans as NPA's and responding to the representations.**
5. **That the claim of the bank is beyond the limitation period and hence must not be entertained.**

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

All of which is respectfully affirmed and submitted.

Counsels on Behalf of the Respondent.