17TH SURANA & SURANA NATIONAL CORPORATE LAW MOOT COURT COMPETITION

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 THE CODE OF CIVIL PROCEDURE

IN THE MATTER OF
REVIEW PETITION (C) NO. 1 OF 2019.
ARISING OUT OF CIVIL APPEAL NO. 10000 OF 2018

FIRST TO LEND BANKING LTD.	V.	SOFT SOLUTIONS PVT LTD REP BY ITS SHAREHOLDERS
(REVIEW APPLICANT)		**(RESPONDENT)**

AND

IN THE MATTER OF
REVIEW PETITION (C) NO. 2 OF 2019.
ARISING OUT OF CIVIL APPEAL NO. 10001 OF 2018

SHAREHOLDERS OF SOFT SOLUTIONS PVT. LTD.	V.	FIRST TO LEND BANKING LTD
(REVIEW APPLICANT)		**(RESPONDENT)**

UPON SUBMISSION TO THE HON'BLE CHIEF JUSTICE OF INDIA AND HIS COMPANION JUSTICES OF THE HON'BLE SUPREME COURT OF INDIA

-MEMORIAL FOR REVIEW APPLICATION NO. 2 PREFFERED BY THE COMPANY-

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LIST OF ABBREVIATIONS

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

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

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

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1.	TRAYNER'S LATIN MAXIMS (4TH ED. 2006).
2.	HALSBURY'S LAWS OF INDIA – CONSTITUTIONAL LAW II (VOL 3. 18TH ED. 2015).
3.	HALSBURY'S LAWS OF INDIA – CIVIL PROCEDURE (VOL 35. 1ST ED. 2007).
4.	SUPREME COURT ON CONTRACT AND SPECIFIC RELIEF (VOL 2.)
5.	POLLOCK AND MULLA THE INDIAN CONTRACT AND SPECIFIC RELEIF ACTS (VOL 2. 14TH ED. 2015).
6.	IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW (2ND ED. 2005).
7.	MP JAIN, THE CODE OF CIVIL PROCEDURE (4TH ED. 2016).
8.	BLACK'S LAW DICTIONARY (9TH ED. 2009).
9.	TANNAN'S BANKING LAW AND PRACTICE IN INDIA (26TH ED. 2017).
10.	TOTTEL'S INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION (1ST ED. 2009).

VII. WEB RESOURCES

SERIAL NO.	NAMES
1.	*www.manupatrafast.com* (MANUPATRA)
2.	*www.delhihighcourt.nic.in* (DELHI HIGH COURT OFFICIAL)

3.	*www.judis.nic.in* (SUPREME COURT OF INDIA OFFICIAL)
4.	*www.jstor.org* (JSTOR)
5.	*www.scconline.com* (SCC ONLINE)
6.	*www.westlaw.india.com* (WEST LAW INDIA)
7.	*www.bombayhighcourt.nic.in* (BOMBAY HIGH COURT OFFICIAL)

VIII. REGULATIONS

SERIAL NO.	NAME
1.	Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances, 2015, Reserve Bank of India Master Circular

STATEMENT OF JURISDICTION

The Review Applicant No. 2 most humbly and respectfully submits to the jurisdiction of this Honourable Court under Article 137 of the Constitution of India read along with Order XLVII of the Supreme Court Rules, 2013.

Article 137 of the Constitution envisages:

> ***"Article 137: Review of judgements or orders by the Supreme Court.***
>
> *Subject to the provisions of any law made by the parliament or any rules made under article 145 the Supreme Court shall have power to review any judgement pronounced or order made by it."*

STATEMENT OF FACTS

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

HENCE THIS REVIEW APPLICATION.

STATEMENT OF ISSUES

I. **WHETHER THE REVIEW APPLICATION FILED BY THE PERSONAL GUARANTORS AGAINST THE JUDGEMENT OF THE SUPREME COURT IS MAINTAINABLE OR NOT?**

II. **WHETHER THE PERSONAL GUARANTORS ARE ENTITLED FOR MORATORIUM U/S 14 OF THE INSOLVENCY BANKRUPTCY CODE, 2016?**

III. **WHETHER THE BANK COMMITTED AN ERROR IN DECLARING THE LOAN OF THE COMPANIES AS NON-PERFORMING ASSETS?**

IV. **WHETHER THE US BANK SHOULD HAVE INITITATED IN THE JURISDICTION OF THEIR COURT REGARDING THE DEFAULT COMMITTED BY THE US SUBSIDIARY?**

SUMMARY OF ARGUMENTS

I. The review application filed by the personal guarantors is maintainable.

[1.1] Jurisdiction can be invoked under Article 137 of the COI and O47 of CPC, 1908

[1.2] "any other sufficient reason" occurring in is wide enough to include a misconception of fact or law by a court

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

II. The Supreme Court ought to have held that personal guarantors are entitled for moratorium.

[2.1] Personal Guarantors are entitled for moratorium as the Second Amendment Act is prospective in Nature.

[2.2]The amendment ordinance not being inclusive of the surety to fall under the umbrella protection of §14 defeats the purpose and intention of the act to redeem debts of a corporation under one single mechanism.

III. The debt was declared as NPA contrary to the guidelines laid by the RBI

[3.1] Wrongful categorization of Assets.

[3.2] Abstention from following mandatory norms laid down in §13(3A) of SARFAESI Act, 2002

IV. The bank ought to have proceeded against the US subsidiary company in US court.

[4.1] Home base rule is attracted in absence of an exclusive jurisdiction clause

[4.2] Cause of action has arisen in the US and hence remedy will lie under the same jurisdiction.

I. THE REVIEW APPLICATION FILED BY THE PERSONAL GUARANTORS AGAINST THE JUDGEMENT PASSED BY THE SUPREME COURT OF INDIA IS MAINTAINABLE.

"If there is an error due to human failing, it cannot be permitted to be perpetuated and to defeat justice"[1]

1. Review literally and even judicially means re-examination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility.[2] Rectification of an order thus, stem from the fundamental principle that justice is above all.[3] The position of law in this regards is that an aggrieved party has been given by any express enactment of the Indian legislature two possible but separate and distinct remedies to which he can have recourse on the fulfilment of certain conditions.[4] A review is perfectly distinct from an appeal, the primary intention of granting a review was a reconsideration of the same question by the same Judge, as contradistinguished to an appeal which is a hearing before another tribunal.[5] In this regard we observe the facts and issues of the instant case referring to O47 R1 of the CPC, 1908. An application for review may be necessitated by way of invoking the doctrine *'actus curiae neminem gravabit'*.[6] Even though it is not specified in the statute as to what specific reasons

[1] Halsbury, Laws of India – Civil Procedure (2nd ed. 2013).

[2] Halsbury, Laws of India – Constitutional Law II (1st ed. 2007).

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

[4] Pyari Mohan Kundu v. Kalu Khan, 1917 AIR 4 (Cal.) 29.

[5] Moheshur Singh v. Bengal Government, (1859) 7 MIA 283 (India).

[6] Board of Control of Cricket of India v. Netaji Cricket Club, AIR (2005) SC (592) (India).

would be for the maintainability of the particular review petition, some clarity may be derived from precedent set in various cases in the Privy Council, Supreme Court and the federal courts. As per the statute[7] and conditions set by court, circumstances under which a review application shall be entertained and deemed fit to be maintainable, are as follows:

I. Cases in which no appeal lies [8]

II. Cases in which appeal lies but not preferred, hence ambit of review is limited.[9]----

III. Decision on reference on court of small causes.[10]

IV. Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him.[11]

V. Subsequent event may be taken into consideration by the Court, while exercising review jurisdiction.[12]

VI. Error apparent on the face of the record.[13]

VII. Under exceptional circumstances in furtherance of ends of justice.

VIII. Any other sufficient reason.

[7] The Code of Civil Procedure, No. 5 of 1908, O47, R1 r/w §114, INDIAN CODE (1908).

[8] The Code of Civil Procedure, No. 5 of 1908, O47, R1 [A], INDIAN CODE (1908).

[9] The Code of Civil Procedure, No. 5 of 1908, O47, R1 [B], INDIAN CODE (1908).

[10] The Code of Civil Procedure, No. 5 of 1908, O47, R1 [C], INDIAN CODE (1908).

[11] Kamlesh Verma v. Mayawati, (2013) 8 SCC 320 (India).

[12] Board of Control of cricket in India v. Netaji Cricket Club, AIR (2005) SC (592) (India).

[13] Union of India v. Namit Sharma, (2013) 10 SCC 359 (India).

2. After specifying some grounds on which a review can be applied for, the legislature added a further ground in the words "for any other sufficient reason".[14] The legislative intent for the same must be taken into consideration for the sake of justice and this instant case. The words "sufficient reason" occurring in Order 47 Rule 1 is wide enough to include a misconception of fact or law by a court or even an advocate. A review of a judgement is a serious step and reluctant resort to it is called for only where glaring omission, patent mistake or grave error has crept in earlier by judicial fallibility.[15] Hence based on the circumstances laid from (i-viii), we can analyse the instant case to fit the grounds for maintainability of a review petition as follows:

- Firstly, we observe the various precedents and statutes stated in light of the available facts. It will be noticed that the power of review which has been conceded to an aggrieved party is different in nature from that which the Court possesses under Order 41, Rule 25 which gives a Court power to frame issues and refer them for trial to the Court against whose decree the appeal has been preferred. As per (I) (i) of the SSPL memorandum, review arises from cases for which appeal does not lie. In the instant case, there does not lie an appeal that can be preferred against the Judgement by the Supreme (Dated: 30/06/2018). Thus, not only is the review of the same maintainable but also necessary under a strict interpretation of the statute to forward the ends of justice. Hence maintainable.
- Secondly, in light of points (I) (IV), (VI) and (VII) of the applicant memorandum it is further elaborated that present petition is maintainable as various issues has not been considered while the Appeal no. 10001 of 2018 was decided on. It shall also be stated that issues were apparent on the face of the record and did not require to be fished out.

[14] Harnam Das v. State of UP, AIR (1961) SC (1662) (India).

[15] Sow Chandra Kanta v. Sheikh Habib, (1975) 1 SCC 674 (India).

Referring to para 12 of the proposition, it is mentioned that the Supreme Court as a matter of fact did not provide clarity on other merits of the case. For this purpose the following issues be considered as not dealt with and henceforth giving rise to the applicability of review in the present scenario:

a) Whether the bank defaulted in declaring the NPA?

b) Whether the personal assets of the shareholders had any protection?

c) What is the treatment of law where the recovery instruments are identical for the debt and the guarantee?

d) Whether the Indian company is to be treated as a corporate debtor with respect to the loan given to its subsidiary in the US?

e) Issues raised regarding application of FEMA regulations

f) No light shed on how the recovery of the loans shall eventually happen.

- Thirdly, with respect to points (I) (V) (VIII), it is to be noted that the words any other sufficient reason must mean a reason sufficient on grounds, at least analogous to those specified in the rule.[16] For the purpose of same, the words shall be construed liberally to extend to a situation where the court had failed to consider a material issue, fact or evidence.[17] Thus, the counsel brings attention to factual and legal fallacies (points (a)-(f)) of the previous impugned judgement and contends that the same to be qualified as 'any other sufficient reason' under the provisions of existing laws for the time being in force.

3. In the light of the arguments presented the counsel for the respondent 1 contends that this instant application is maintainable to be tried within the jurisdiction of the Supreme Court of India.

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

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

II. THE SUPREME COURT OUGHT TO HAVE HELD THAT PERSONAL GUARANTORS ARE ENTITLED FOR MORATORIUM.

'A procedural Statute should not generally speaking be applied retrospectively, where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.'[18]

1. The contention regarding the issue of moratorium can only be expressed while taking in consideration the intent of the legislation with respect to consolidating proceedings of insolvency within the ambit of the IBC. In this particular issue wherein, excluding guarantors from receiving protection of moratorium under the Code, is against the intent of legislation.
2. The amendment ordinance not being inclusive of the surety to fall under the umbrella protection of §14 defeats the purpose and intention of the act to redeem debts of a corporation under one single mechanism. Firstly we know that the IBC, 2016 is a consolidated act, making it clear that the true intention of the act is to amalgamate debt recovery procedures and make them homogeneous and speedy in nature. Thus, the counsel contends that clearly a normative heterogeneity is bound to arise when if §14 is not extended to guarantors. Secondly, the act brings guarantors under the purview of § 60 and hints at moratorium extended to guarantors under the meaning of the word "corporate persons"[19]. While referring to the legislation we see that under the ambit of §60(1) adjudicating authority under the resolution process clearly has provisions for a guarantor. If these guarantors don't fall under the ambit of moratorium envisaged in §14, it will be nothing but a miscarriage of justice.

[18] Videocon International and Ors v. Securities and Exchange Board of India and Ors. (2017) 4 CompLJ 111 (Bom.)

[19] The Insolvency Bankruptcy Code, No. 31 of 2016, §60, INDIAN CODE (2016).

3. Furthermore it is brought to the attention of the Hon'ble Court that the final liability of the corporate debtor is only decided after the end of the insolvency proceedings and is binding on the guarantor. The point of law with this regard is enshrined in §30 of the IBC, which clearly mandates the resolution plan on the guarantor. Hence liability of the guarantor only arises after the end of the proceedings. Thus, it is inferred that the intention of the framers with regards to liability of a personal or corporate guarantor arising out of a default of corporate debt to be inclusive in the code and that it be only brought, after such liability is finalized. Keeping the same in mind, we observe the following three propositions delivered In ***A.R. Antulay v. R.S. Nayak***[20] with respect to the concept of speedy trial that flows through Art.21:

   (1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the social interest also, does not make it any less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

   (2) Right to speedy trial flowing from Article 21 encompasses all the stages namely the stage of investigation, inquiry, trial, appeal, revision and re-trial.

   (3) The concerns underlying the right to speedy trial from the point of view of the accused are: The worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal.

[20] A.R. Antulay v. R.S. Nayak, (1992) CriLJ 2717 (India).

4. The same principle can be used to substantiate that not applying moratorium will only impede the procedure for appeal and deny the guarantor his right to fair trial enshrined under article 21.
5. The next contention is that the ordinance amendment (Dated 06th June, 2018), alters the rights that were previously vested with the guarantors prior to the same. Lord Denning in this regards explains the rule while deciding retrospective application of the law and states that "an act of Parliament is not to given retrospective effect applies only to statutes which affect vested rights"[21]
6. Further, it is stated with reference to ***Shyam Sunder and others. v. Ram Kumar and Anr***[22], that Amending Act is prospective in operations and does not affect the rights which had accrued to the pre-emption suit on the date of the suit or on the date of passing of the decree by the court of first instance. An appellate court's jurisdiction is strictly limited to deciding the question whether decision of the lower court was valid or not. Thus, if the appellate court takes in account any subsequent event, which is beyond its ambit, will cause prejudice against his vested right and result in one ended justice. Therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective.[23] In light of the arguments above, the following is thus contended:

[21] Blyth v. Blyth (1966) 1 All ER 524 (United Kingdom).

[22] Shyam Sunder and others. v. Ram Kumar and Anr, (2001) 8 SCC 24 (India).

[23] Rendezvous Sports World and Ors. v. The Board of Control for Cricket in India and Ors. (2017) 2 BomCR 113 (India).

a. Personal Guarantors are entitled for moratorium as the Second Amendment Act (dated 06.06.2018) is prospective in Nature.

b. The Supreme Court should allow Moratorium to personal guarantors under Part III of the Code.

III. THE DEBT WAS DECLARED AS NPA CONTRARY TO THE GUIDELINES LAID BY THE RBI

1. Grading the quality of assets is one of the major problem that continues to lurk within Indian banks and affect industrial prosperity. Efficient and effective trade laws are meant to promote ease of doing business and dual ended profitability. The status quo regarding the relevant NPA regulation effective in this application is provided Master Circular - Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances[24]. The intent of declaring an account as NPA is to categorize the same and begin proceeding under SAERFASI to redeem the debt. It is a necessary mandate to declare an account as NPA to move the court under SAERFASI for debt recovery. As per RBI Master Circular[25], the policy of income recognition should be objective and based on record of recovery rather than on any subjective considerations. Likewise, 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 norms. Also, the provisioning should be made on the basis of the classification of assets based on the period for which the asset has remained non-performing and the availability of security and the realisable value thereof.

[24] Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances, 2015, Reserve Bank of India Master Circular (India).

[25] Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances, 2015, Reserve Bank of India Master Circular, Regulation 1.2 (India).

2. The definition of NPA as provided in the master circular as a leased asset that stops generating income for the bank.[26] Further for a term loan a non performing asset (NPA) is a loan or an advance where interest and/ or instalment of principal remains overdue for a period of more than 90 days from the prescribed time. Even though prima facie, the above regulation validates the declaration of the NPA; these regulations are subjected to further regulations laid under Regulation no. 4.2.4(Accounts with temporary deficiencies) and 4.2.5. As per categorization of NPA given in Guideline no. 4.1, NPAs are categorized as "***Substandard***", "***Doubtful***" and "***Loss***" assets. 4.1.1 Of same regulation defines substandard assets as:

   With effect from March 31, 2005, a substandard asset would be one, which has remained NPA for a period less than or equal to 12 months. Such an asset will have well defined credit weaknesses that jeopardise the liquidation of the debt and are characterised by the distinct possibility that the banks will sustain some loss, if deficiencies are not corrected.

3. Thus clearly, after the bank first declared the loan as NPA, it had to be classified under Substandard Asset, until the payment of the 25% dues by the applicant before completion of one year from declaration of NPA. The counsel relies on the same RBI Master circular[27] (Regulation no. 4.2.4 and 4.2.5) and draws parity between the instant case and the judgement delivered in Rakesh Sharma v. CBI Ghaziabad Branch[28] to justify the same. Relying on para no.9 of the judgement, specifically the following:

[26] Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances, 2015, Reserve Bank of India Master Circular, Regulation 2.1 (India).

[27] Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances, 2015, Reserve Bank of India Master Circular (India).

[28] Rakesh Sharma v. CBI Ghaziabad Branch, (2015) 112 ALR 131 (India).

From the aforesaid, it is clear that a substandard asset is one, which has remained NPA for a period less than or equal to 12 months. The guidelines provide that such asset will have well defined credit weakness that jeopardies the liquidation of the debt and are characterised by the distinct possibility that the banks will sustain some loss, if deficiencies are not corrected, meaning thereby that if the borrower corrects the deficiency then the substandard asset would be upgraded to a standard account as per para 4.2.5 of the RBI guidelines, which provide that if arrears of interest and principal is paid by the borrower, the account would no longer be treated as non-performing and would be classified as a standard account. In this regard, the Court further finds from a reading of para 4.2.4 of the guidelines that the classification of an account as NPA must be done by Bank based on the record of recovery and that the Bank could not classify an account as NPA merely due to the existence of some deficiencies which are temporary in nature such as balance outstanding exceeding the limit temporarily.

4. The stance of law on this issue is very clear. Thus, in the present scenario the same applies and hence it is further argued that after part payment of the due amount, the debt account of the Applicant should have been categorized as a Standard account. Thus, on the event of second default the Bank would have to reclassify the same as NPA before filing for debt recovery.
5. Even though the code is procedural in nature, but yet a high level of good faith is required to be exercised while following these norms as any contravention in the same would result in massive losses and a total miscarriage of justice. The bank with this regard has not only has failed to follow the statute but also shown bad faith while recovering the due amount by servicing early notices (Dated. 31/10/2014) under § 13(2) to which the applicant objected through notice u/s 13(3A). The bank did not reply to the same, which is a mandate. The creditor is then expected to consider such

representation and communicate his views on the same within fifteen days. The Supreme Court[29] held that § 13(3A) of the SARFAESI Act is mandatory The Supreme Court, held that while recovering secured property from Non-Performing Assets (NPAs), a secured creditor should mandatorily consider the debtor's representation under § 13 (3A), after the initiation of proceedings under § 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. In pursuant to the same FLB acted against the applicant in bad faith in order to recover money. They tried hastening through the procedure. It is also observed in the fact sheet para 10, that the NCLT also spotted a discrepancy in the declaration of NPA. Further the counsel states that the Supreme Court of India in the matter of Mardia Chemicals judgment states, "Liquidity of finances and flow of money is essential for any healthy and growth oriented economy. But certainly, what must be kept in mind is that the law should not be in derogation of the rights which are guaranteed to the people under the Constitution. The procedure should also be fair, reasonable and valid, though it may vary looking to the different situations needed to be tackled and object sought to be achieved."[30]

6. Thus, the applicant contends that the bank had not only made a gross error while declaring the account as NPA but also did not consider the applicant's representation making the entire initiation process to be void and violative of the principles of natural justice.

[29] ITC Ltd. v. Blue Coast Hotels Ltd and Ors, (2018) SCC Online SC 237 (India).

[30] Madria Chemicals and Ors v. Union of India and Ors, (2004) 4 SCC 311 (India).

IV. THE BANK OUGHT TO HAVE PROCEEDED AGAINST THE US SUBSIDIARY COMPANY IN US COURT.

1. The instant case is peculiar to its nuances. Further issues arising out of the instant case are:

a. How the judgement of the Supreme Court is binding on the US Company in absence of an exclusive jurisdiction clause, restricting the jurisdiction of any suit arising out of the arrangement to be decided under Indian laws?

b. Where the cause of action arises, with regards to the loan granted by the US bank to the Indian Subsidiary Company?

2. The dispute in discussion; loan provided to the US Company; the applicable law while adjudicating such cases is seen in many light to reveal its appropriate jurisdiction. First of the many is the 'Home base'[31] rule and the application of general jurisdiction. In the instant case, a forum is not specified while resolving dispute arising out of the contract. Thus, in such a case, we see that the US court happens to be the *forum competens*, whereas the Indian court is an incompetent forum when the following are considered:

i. The US subsidiary is a company incorporated under the US company compliances.

ii. Loan was disbursed and recoverable in US.

iii. The loan was disbursed in dollars.

iv. The default, or the cause of action that has caused injury arises in the US.

v. The US Company has assets with it and are entitled to invoke US bankruptcy code[32].

3. Inconvenience will usually be minimal at an individual domicile or at a corporation's headquarters.[33] For personal jurisdiction purposes, a company can properly be sued in

[31] Twitchell, Mary, The Myth of General Jurisdiction, Vol 1, Harvard Law Review, VOL 1. (1988)

[32] Title 11, Bankruptcy, Pub. L. 95–598, title I, §101, Nov. 6, 1978, 92 Stat. 2549

[33] Goldberg v. Southern Builders, 184 F.2d 345 (1950)

the place of its incorporation and the location of its principal place of business.[34] The counsel humbly submits to the Hon'ble Court that with regards to principal place of business, stated in the Para 1 of the fact sheet, majority of the clientele that the company had were in US and hence it is clear that the above precedent shall apply in respect to the jurisdiction of the remedial suit. The counsel in this light observes (IV)(i). Cause of action as defined in ***State of Rajasthan v. Swaika Properties***[35], is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief.[36] The general rule to determine jurisdiction under the contract is decided either by looking into where the cause of action arises or having an expressly mentioned forum selection clause or an exclusive Jurisdiction clause. Unless, a demand upon the primary debtor is necessary in order to establish the primary debtor's own liability to the creditor, it is not necessary for the creditor before proceeding against the guarantor, to request the primary debtor to pay.[37] The counsel further contends with this view that the final liability of the debtor can only be established if the same is not disputed. It is brought froth that unless proceeding against the US Company is initiated in US court to pass a decree finalizing the amount of liability, the debtor cannot move against the guarantors directly. Thus, for all these above reasons, the counsels contends that to meet the ends of justice and expedite the process, the jurisdiction of the court lies in the US with regards to the cause of action arising out of the default of the term loan.

[34] Ashleigh E. Edward, When a Corporation Is "At Home" Personal Jurisdiction over Out-of-State Defendants

[35] State of Rajasthan v. Swaika Properties, (1985) 3 SCC 217 (India).

[36] Eastern Book Company, Concise Law Dictionary, (1st ed. 2015).

[37] Ugo Mattei, Comparative Law and Economics, (1999).

PRAYER

In the lights of the facts stated, issues raised, arguments advanced and authorities cited, the Shareholders of Soft Solutions Pvt. Ltd. (SSPL) most humbly & respectfully pray that,

In Review Petition (C) No. 2 OF 2019 arising out of Civil Appeal No. 10001 of 2018

a. That the review application instituted by the bank is not maintainable and hence, be quashed.
b. That the protection of moratorium be awarded to extend to include personal guarantors under its ambit.
c. That the declaration of the debt account as NPA be declared erroneous due to failure by the bank in the following due diligence
d. That an anti-suit injunction be awarded against the bank to stop proceeding against the guarantor unless the liability amount is finalized.

All of which is most humbly & respectfully submitted.

S/d_____

COUNSEL FOR SHAREHOLDERS OF SOFT SOLUTIONS PVT. LTD.