
17TH SURANA AND SURANA NATIONAL CORPORATE LAW

MOOT COURT COMPETITION 2019

BEFORE THE HON'BLE SUPREME COURT OF INDIA

AT NEW DELHI

REVIEW APPLICATION NOS. 1 & 2 OF 2019

(FILED UNDER ORDER XLVII RULE 1 OF CPC)

AGAINST

CIVIL APPEALS NOS. 10000 & 10001 OF 2018

IN THE MATTER OF:

FIRST TO LEND BANKING LTD

... REVIEW APPLICANT

VERSUS

SOFT SOLUTIONS PVT. LTD

REP BY ITS SHAREHOLDERS

... RESPONDENT

AND

SHAREHOLDERS OF SOFT SOLUTIONS PVT. LTD.

...REVIEW APPLICANT

VERSUS

FIRST TO LEND BANKING LTD

... RESPONDENT

MEMORIAL ON BEHALF OF RESPONDENTS

THE TABLE OF CONTENTS

THE INDEX OF AUTHORITIES	5
CASES	5
➤ INDIAN CASES	5
➤ NCLAT CASES	6
➤ INTERNATIONAL CASES	7
JOURNALS AND REPORTS	7
STATUTES	8
RULES AND REGULATIONS	9
BOOKS	9
LIST OF ABBREVIATIONS.....	11
THE STATEMENT OF JURISDICTION	13
THE STATEMENT OF FACTS	14
THE STATEMENT OF ISSUES	15
THE SUMMARY OF ARGUMENT	16
THE ARGUMENT ADVANCED.....	I
[ISSUE 1]. THAT THE REVIEW APPLICATION NO. 2 BY THE COMPANY IS MAINTAINABLE BEFORE THE HON’BLE COURT.....	I

[ISSUE 2]. THAT THE PROCEDURE UNDERTAKEN BY THE BANK TO DECLARE THE LOANS AS NPAS WAS NOT AS PER THE LAW..... II

2.1 THAT THE BANK DID NOT HAVE THE RIGHT TO DECLARE THE DUES ON BEHALF OF US SUBSIDIARY COMPANY AS NPAS..... ii

2.2 THAT THE BANK DECLARE THE LOANS OF THE COMPANIES AS NPAS AT A MUCH EARLIER STAGE AGAINST THE RBI GUIDELINES. iv

[ISSUE 3]. THAT THE RETROSPECTIVE APPLICATION OF LIMITATION ACT BY THE HON’BLE SUPREME COURT WAS JUSTIFIED..... V

[ISSUE 4]. THAT THE US BANKRUPTCY LAWS SHOULD BE INVOKED..... VIII

[ISSUE 5]. THAT THE PERSONAL GUARANTORS SHOULD BE ENTITLED FOR MORATORIUM BENEFIT UNDER THE I&B CODE, 2016..... X

5.1 THAT SUBSTITUTING SUB-SECTION (3) TO SECTION 14 OF THE I&B CODE SHOULD NOT HAVE A RETROSPECTIVE EFFECT..... X

5.2 THAT PART III OF THE CODE HAS NOT YET BEEN NOTIFIED, AND UNTIL THEN THE PERSONAL GUARANTORS SHOULD BE ENTITLED TO THE BENEFITS OF MORATORIUM UNDER THE I&B CODE..... xii

5.2.1. SECTION 14 R/W SECTION 60 OF THE I & B CODE PROVIDES FOR BENEFIT OF MORATORIUM TO BE EXTENDED TO PERSONAL GUARANTORS. xii

5.2.2. I & B CODE IS COMPLETE IN ITSELF, THE RIGHTS OF PERSONAL GUARANTORS ARE BUT NOT LIMITED TO PROVISIONS OF PART III..... xiii

5.2.3 *IN ARGUENDO*, THE OTHERWISE CONSEQUENCE OF THIS WOULD GO AGAINST THE
OBJECT AND PURPOSE OF THE CODE..... xiii

**[ISSUE 6]. THAT THE PERSONAL AND ANCESTRAL (UNSECURED) PROPERTIES
OF THE SHAREHOLDERS-CUM-DIRECTORS CANNOT BE ATTACHED FOR THE
DUES OF INDIAN COMPANY AND US SUBSIDIARY COMPANY.....XIV**

THE PRAYER.....XVI

THE INDEX OF AUTHORITIES

CASES

➤ **SUPREME COURT CASES**

1. Ajit Kumar Rath v. State of Orissa & Ors., AIR 2000 SC 85 i, xiv, xv
2. Ashok Mahajan v. State of U.P. & Ors, 2007(2) D.R.T.C.696 (SC)..... iii, xi, xv
3. Axis Bank v. SBS Organics Private Limited and Ors., AIR 2016 SC 2024..... xv
4. B.K. Educational Services Private Limited v. Parag Gupta and Associates, AIR 2018 SC 5601..... vi
5. BD and P Hotels (India) (P) Ltd. v. District Judge, Jhunjhunu and Ors., AIR 2011 (Raj) 25 xv
6. Chitra Sharma and Ors. v. Union of India and Ors., 2018 5 AWC 4829 SC xii
7. Dayawati v. Inderjit, AIR 1966 SC 1423..... xi, xii
8. Garikapati Veeraya v. N.Subbaiah Choudhry, AIR 1957 SC 540..... xi, xii
9. Government of Maharashtra & Ors. v. Deokar's Distillery, AIR 2003 SC 1216..... x
10. Hindustan Sugar Mills v. State of Rajasthan, AIR 1981 SC 1681 (India)..... i
11. Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 SCC 602..... xi, xii
12. Hrushikesh Panda v. Indramani Swain and Anr., 2018 (362) ELT 933 (S.C.)..... xiv
13. K.S. Paripoornam v. State of Kerala, (1994) 5 SCC 593..... xi, xii
14. Madhya Pradesh and Anr. v. Bhailal Bhai and Ors., (1964) 6 SCR 261 viii
15. Mardia Chemicals Ltd. & Ors. v. U.O.I. & Ors., (2002) Transfer Petition (Civil) No. 724-727 of 2002 v
16. Modern Dekor Painting Contracts Private Ltd. v. Jenson and Nicholson (India) Ltd., (1985) 58 Comp Cas 257..... vii

17. Monnet Ispat and Energy Ltd. and Ors. v. Union of India (UOI) and Ors., (2012) 11 SCC 1 xi
18. Rajinder Singh v. Santa Singh, AIR 1973 SC 2537 vii
19. Rameswar Prasad Kejriwal & Sons Ltd. v. M/s. Garodia Hardware Stores, (2002) 108 Comp
Cas 187..... vii
20. Rita Bagga & Ors. v. Union of India and Ors, 2015 (111) ALR 190 v
21. Sanjeev Shriya v. State Bank of India and Ors., (2018) 2 All LJ 769 xi
22. Sanjeev Shriya v. State Bank of India, 2017 (125) ALR 430..... xiii
23. State Bank of India v. V. Ramakrishnan & Ors., AIR 2018 SC 3876..... xiii
24. State of Kerala and Ors. v. Mar Appraem Kuri Co. Ltd. and Anr., AIR 2012 SC 2375 xiii
25. Tamil Nadu Arasu Kooturuvuthurai v. M.R.Srinivasan, (2015) 7 MLJ 49..... i
26. The Jayabharat Credit Limited. v. Jalgaon Re-Rolling Industries Ltd., (1997) 99 (1) Bom LR
521..... vii
27. Thirumalai Chemicals Ltd. v. Union of India, AIR 2011 SC 1725 vi
28. United Bank of India v. Satyawati Tondon & Ors., AIR 2010 SC 3413..... xv
29. Vijayalakshmi Art Productions v. Vijaya Productions (P) Ltd., (1997) 88 Com Cases 353.. vii
30. Vijayalakshmi Rice Mills, New Contractors Co. and others v. State of Andhra Pradesh,
(1976) 3 SCC 37 xi
31. Vodafone International Holdings v. Union of India &Anr.,(2012) 6 SCC 613..... ix

➤ **NCLAT CASES**

1. Export Import Bank of India v. CHL Limited, Company Appeal (AT) (Insolvency) No. 51 of
2018..... iii, ix, x

2. Ferro Alloys Corporation Ltd. v. Rural Electrification Corporation Ltd. Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 (India)..... iii
3. In Re: Leo Duct Engineers and Consultants Ltd., (2017) 139 CLA 109..... xv
4. M/s Deem Roll-Tech Limited v. R.L. Steel & Energy Ltd. Order dated 31 March 2017 in C.A. No. (I.B) 24/ PB/ 2017 vii
5. M/s. Speculum Plast Pvt. Ltd. v. PTC Techno Pvt. Ltd., [2018] 142 CLA 165..... vi
6. State Bank of India v.V. Ramakrishnan and Veeson Energy Systems, NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 213/2017 xiii
7. State Bank of India, Colombo v. Western Refrigeration Pvt. Ltd., C.P. (I.B) No. 17/7/NCLT/AHM/2017 vi

➤ **INTERNATIONAL CASES**

1. Gardner v. Lucas, (1878) 3 AC 582..... vi
2. In Re:Slamans, 69 F.3d 468 (10th Cir. 1995)..... iii
3. John Rembelance v. Octagon Assets, [2009] EWCA Civ 581 ix
4. Re, Pulborough Parish School Board Election, Bourke v. Nutt, (1894) 1 QB 725 xi
5. Tudor Dev. Group, Inc. v. U: S. Fidelity & Guar. Co., 968 F.2d 357 (3d Cir. 1991). iii

JOURNALS AND REPORTS

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

2. INSOLVENCY COMMITTEE REPORT (2018), Ministry of Corporate Affairs, 36, 37
http://www.mca.gov.in/Ministry/pdf/ILRReport2603_03042018.pdf (accessed on 5:43 P.M.
 26th January, 2019); IBC, *supra* note 28, §2(e) read with §60. xiv
3. INSOLVENCY COMMITTEE REPORT (2018), Ministry of Corporate Affairs, 72
http://www.mca.gov.in/Ministry/pdf/ILRReport2603_03042018.pdf (accessed on 5:43 P.M.
 26th January, 2019)..... vi
4. INSOLVENCY COMMITTEE REPORT (2018)..... vii
5. James J. White, *Rights of Subrogation in Letters of Credit Transactions*, 41 St. Louis U. L. J.
 47-74 (1996)..... iii

STATUTES

1. The Code of Civil Procedure, 1908. i, vii
2. The Companies Act, 2013..... vii
3. The Constitution of India, 1950..... i
4. The Foreign Exchange Management Act, 1999
5. The Insolvency and Bankruptcy Code, 2016. iv, xi
6. The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018,..... xi
7. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security
 Interest Act, 2002.

RULES AND REGULATIONS

1. Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, dated 30th November 2016, http://www.mca.gov.in/Ministry/pdf/InsolvencyRules_01122016.pdf (accessed on 10:38 A.M. 26th January, 2019)..... xiv
2. Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2017, dated 16th August 2017, https://ibbi.gov.in/CIRP_Amendment.pdf (accessed on 10:40 A.M. 26th January, 2019). ... xiv
3. RESERVE BANK OF INDIA - MASTER CIRCULAR, <HTTPS://RBI.ORG.IN/SCRIPTS/NOTIFICATIONUSER.ASPX?ID=9908&MODE=0> (Official website of RBI: free access to master circulars issued by RBI) (accessed on 6:36 P.M. 26th January, 2019). iv
4. Supreme Court of India Handbook on Practice and Procedure and Office Procedure, 2017. 26-27 i

BOOKS

1. ASHISH MAKHIJA, INSOLVENCY AND BANKRUPTCY CODE OF INDIA 382 (2018)..... xi
2. BLOOMSBURY’S THE INSOLVENCY AND BANKRUPTCY CODE, 2016 WITH RULES AND REGULATIONS 249 (2018). xi
3. G.P.SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 438 (9th ed. 2004)..... xi
4. G.P.SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 438 (9th ed. 2004)..... x
5. JYOTI SINGH, VISHNU SHRIRAM, INSOLVENCY AND BANKRUPTCY CODE, 2016 CONCEPTS AND PROCEDURE 741 (2016)..... x

- 6. NISHAKOSHAL, UNDERSTANDING LETTER OF CREDIT 87 (2017) iii
- 7. PETER BENSON MAXWELL, MAXWELL ON INTERPRETATION OF STATUTES 216 (11th ed. 2016).
..... viii
- 8. R.C. KOHLI, PRACTICAL GUIDE TO NPA RESOLUTION 423, 425 (4th ed. 2017). v
- 9. S.N. BIDANI, MANAGING NON-PERFORMING ASSETS IN BANKS 124 (2005)..... ii
- 10. SUKWINDER MISHRA, BANKING LAW AND PRACTICE 592 (2012). ix
- 11. V.S. DATEY, GUIDE TO INSOLVENCY AND BANKRUPTCY CODE 2016 436 (7th ed. 2019)..... xii
- 12. V.S. WAHI, TREATISE ON INSLOVENCY AND BANKRUPTCY CODE 1243 (2nd ed. 2018)..... xiv

LIST OF ABBREVIATIONS

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

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

THE STATEMENT OF JURISDICTION

The applicant by this review application invokes the review jurisdiction of the Supreme Court under Article 137 of the Constitution of India and prays to review the final judgment decided in civil appeal no. 10001 of 2018 passed by this Court. Article 137 empowers the Supreme Court to review any judgment pronounced or made, subject to the provisions of any law made by Parliament or any rule made under Article 145 of the Constitution.

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

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

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

THE STATEMENT OF FACTS

BACKGROUND:

1. Soft Solutions Pvt. Ltd. is a company based in Bengaluru. The company has subsidiary in USA in which it holds 52% shares and rest of the shares are held by the directors. FLB India is a major Indian Bank and is a subsidiary of a banking conglomerate of USA.
2. FLB India advanced loans to Soft Solutions directly. FLB India issued a Letter of Credit to the US bank for the subsidiary company on behalf of Indian Company.
3. The directors/shareholders accepted to secure immovable and movable assets earned through the company, for the said loan. The shareholders stood as guarantors for loan of Indian company and for US subsidiary company, shareholders and Soft Solutions were surety.
4. FLB India declared loans as NPA, six months post maturity and sent notice to Indian company for its under SARFAESI act on October 31, 2014. FLB India sent another notice on November 30, 2014 to Indian company for loans of subsidiary.

NCLT/NCLAT:

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

SUPREME COURT:

The appellants in the NCLAT matter appealed to the Supreme Court against the NCLAT order. The Supreme Court heard the matter on June 30, 2018 and adjudicated on issues of limitation and moratorium without going into other merits. Both the parties filed present review applications in Supreme Court.

THE STATEMENT OF ISSUES

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

THE SUMMARY OF ARGUMENT**THAT THE REVIEW APPLICATION NO. 2 BY THE COMPANY IS MAINTAINABLE**

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

THAT THE BANK DID NOT DECLARE NPAAS PER THE LAW AND ERRED IN ATTACHING THE PERSONALPROPERTY OF PERSONAL GUARANTORS. ALSO, THE S.C. WAS JUSTIFIED IN APPLYING LIMITATION ACT RETROSPECTIVELY

It is humbly submitted that The Bank could not have taken an action against The Company until property of the US Co. was sold off. Moreover, under the scheme of the loan, the first right of action should have been taken by the US bank for the default. So, The Bank does not have the authority to encroach upon directors' personal property, as their liability was not personal but only like a fiduciary duty towards the company. Finally, it was rightly held by this court that limitation act has to be applicable retrospective because the doctrine of laches allows for a favorable presumption of retrospective application and further there is also good public policy consideration behind it.

THAT THE US BANKRUPTCY LAWS SHOULD BE INVOKED FOR THE DUES OF THE U.S. COMPANY AND PERSONAL GUARANTORS BE ENTITLED FOR MORATORIUM UNDER IBC.

It is humbly submitted that the U.S. Bankruptcy law should be invoked against the US Co. for its dues because the US Co. and the U.S. bank are within the purview of the U.S. Bankruptcy law. Also moratorium period should be extended to the personal guarantors since the rights of personal guarantors are but not limited to provisions of Part III and also Section 14 r/w Section 60 provides for benefit of moratorium to be extended to personal guarantors.

THE ARGUMENT ADVANCED

1. THAT THE REVIEW APPLICATION NO. 2 BY THE COMPANY IS MAINTAINABLE BEFORE THE HON'BLE COURT.

(¶1) It is humbly submitted that this Hon'ble court has a power to review¹ and correct² a judgement made by it. Article 137 of the Constitution³ read with Order XLVII of the Rules of CPC⁴ and a conjoint reading of Section 114 and Order 47 of the Code of Civil Procedure, 1908⁵ states that an application for review shall be filed on the ground of discovery of new and important matter or evidence which was not within the knowledge or could not be produced by the petitioner at the time when the decree was passed⁶ or, for any other sufficient reason.⁷

(¶2) It is submitted that this court did not deal with other merits of the case and disposed of the appeals.⁸ The maintainability of the review application in the instant case cannot be questioned that it is an attempt at re-litigating the same issue over and over⁹ as the judgement of the court on Moratorium was *parimateria* in language and spirit to judgment in State Bank of

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

² *Ibid.*

³ India Const. art. 137.

⁴ O. XLVII Code Civ. Proc.

⁵ § 114 Code Civ. Proc.; *see* O. XLVII Code Civ. Proc.

⁶ Hindustan Sugar Mills v. State of Rajasthan, AIR 1981 SC 1681 (India) (¶12).

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

⁸ Case data, ¶12.

⁹ Tamil Nadu Arasu Kooturuvuthurai v.M.R.Srinivasan, (2015) 7 MLJ 49 (India) (¶24).

India v. V. Ramakrishnan & others and applied the amendment retrospectively.¹⁰ The court didn't decide on the point that FLB India Ltd. (*hereinafter* 'The Bank') could not have taken actions for the dues of the US Subsidiary Company (*hereinafter* 'US Co.')

and contention of the personal guarantors that they were not liable for the dues of US Co. following the requirements under FEMA¹¹ and that The Bank was against the law and RBI Guidelines in declaring NPAs for the dues of the companies.¹² These questions were important to be decided before the final disposal of the matter.

(¶3) The substantial and procedural rights of the personal guarantors and the companies enshrined in various laws will stand violated if these questions are left undecided¹³, and even this court has already permitted the parties to raise other issues and arguments to assist the court to lay down new jurisprudences that emerge out of the Insolvency and Bankruptcy Code, 2016¹⁴ (*hereinafter* 'The Code').

2. THAT THE PROCEDURE UNDERTAKEN BY THE BANK TO DECLARE THE LOANS AS NPAS WAS NOT AS PER THE LAW.

2.1 THAT THE BANK DID NOT HAVE THE RIGHT TO DECLARE THE DUES ON BEHALF OF US SUBSIDIARY COMPANY AS NPAS.

(¶4) It is humbly submitted that The Bank derived the power to declare NPA from the SARFAESI act¹⁵ and The Bank could not have taken an action against Soft Solutions Ltd.

¹⁰ Case data, ¶12; *see* State Bank of India v. V. Ramakrishnan & others, AIR 2018 SC 3876 (India).

¹¹ Case data, ¶2.

¹² Case data, ¶6.

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

¹⁴ Case data, ¶1, Reasons for review on behalf of personal guarantor.

¹⁵ S.N. BIDANI, MANAGING NON-PERFORMING ASSETS IN BANKS 124 (Orient Paperbacks, 2005).

(*hereinafter* ‘The Company’) and the personal guarantors until property of the US Co. is sold off.¹⁶ Moreover, they were guarantors to the ‘loans’ granted to the US Co.,¹⁷ which was given directly through US bank.¹⁸ Thus, the first right of action should be taken by the US bank for the default. Further, there existed a separate contract of guarantee by way of Letter of Credit (*hereinafter* ‘LC’) between The Bank and the guarantors and The Bank had primary liability to pay the due loan amount to its parent banking company in US,¹⁹ the moment there was default,²⁰ which cannot be shifted,²¹ and only after that could it enter the shoes of the creditor under the principle of subrogation and invoke the guarantee.²² The liability of the guarantors would have arisen only if demand would have been made by the US Bank.²³

(¶5) This obligation in this case has not been discharged by virtue of the fact that even after a default on the US Co.’s loan,²⁴ the partial payment of the dues was done to the bank in America.²⁵ Moreover, even after that the companies kept paying some portion of the interest

¹⁶ Ashok Mahajan v. State of U.P. & Ors, 2007 (2) D.R.T.C.696 (SC) (India) (¶8); *see* NISHAKOSHAL, UNDERSTANDING LETTER OF CREDIT 87 (Notion Press, 2017).

¹⁷ Case data, ¶5.

¹⁸ Case data, ¶2.

¹⁹ Driscoll, *The Role of Standby Letters of Credit in International Commerce: Reflections after Iran*, 20 Va. J. Int'l L. 459 (1980).

²⁰ James J. White, *Rights of Subrogation in Letters of Credit Transactions*, 41 St. Louis U. L. J. 47-74 (1996).

²¹ Ferro Alloys Corporation Ltd. v. Rural Electrification Corporation Ltd. Company Appeal (AT) (Insolvency) Nos. 92, 93 and 148 of 2017 (India) (¶23).

²² James J. White, *Supra* note 20; *see*, In Re: Slamans, 69 F.3d 468 (10th Cir. 1995); *see* Tudor Dev. Group, Inc. v. U: S. Fidelity & Guar. Co., 968 F.2d 357 (3d Cir. 1991).

²³ Export Import Bank of India v. CHL Limited, Company Appeal (AT) (Insolvency) No. 51 of 2018 (India) (¶12).

²⁴ Case data, ¶5.

²⁵ Case data, ¶8.

amounts to their respective banks.²⁶ Moreover, The Bank should not have been able to declare NPA as corporate guarantee cannot be invoked, since there is no fresh demand made by The Bank to the US Co. for this recalculated interest and consequently there is no debt that is due and/or payable.²⁷

2.2 THAT THE BANK DECLARE THE LOANS OF THE COMPANIES AS NPAS AT A MUCH EARLIER STAGE AGAINST THE RBI GUIDELINES.

(¶6) It is humbly submitted before this hon'ble court that *in arguendo*, if we agree that The Bank had the right to declare the dues on behalf of the US Co. as NPAs, it declared the loans as NPAs at a much earlier stage. In this case of interest payments, The Bank could classify the accounts as as sub-standard, doubtful assets²⁸ only if the interest due was not serviced fully within 90 days from the end of the quarter.²⁹ Then the account becomes sub-standard and NPA after 90 days but up to 12 months of non-payment of installments.³⁰

(¶7) It is humbly submitted that in this case the bank waited for 6 months and then declared NPAs.³¹ It is also submitted that The Bank also accepted that they have declared NPAs at an early stage.³² Even after declaration of NPA the shareholders agreed to pay 25% of the dues of

²⁶ Case data, ¶8.

²⁷ *Supra* note 23, (¶20).

²⁸ § 2(o), Insolvency and Bankruptcy Code, No. 31 of 2016, INDIA CODE (2016).

²⁹ RESERVE BANK OF INDIA - MASTER CIRCULAR, [HTTPS://RBI.ORG.IN/SCRIPTS/NOTIFICATIONUSER.ASPX?ID=9908&MODE=0](https://rbi.org.in/scripts/notificationuser.aspx?id=9908&mode=0) (Official website of RBI: free access to master circulars issued by RBI) (accessed on 6:36 P.M. 26th January, 2019).

³⁰ *Ibid.*

³¹ Case data, ¶6.

³² Case data, ¶7.

the US Co.'s loan³³ and were in touch with the bankers and kept paying some portion of the interest amounts and were requesting extensions to pay the dues.³⁴ Thus, even though defaults were made but they were making their efforts to pay the loan.³⁵ The Bank should not have classified an account as NPA merely due to some deficiencies which are temporary in nature.³⁶ The Bank is exercising arbitrary powers to decide the disputes relating to the demand, to be recovered from the borrowers.³⁷ The action thus cannot be in derogation of the rights which are guaranteed to The Company. The procedure should also be fair, reasonable and valid, it should be used differently in different situations.³⁸

3. THAT THE RETROSPECTIVE APPLICATION OF LIMITATION ACT BY THE HON'BLE SUPREME COURT WAS JUSTIFIED.

(¶8) It is humbly submitted before this Hon'ble Court that for considerations mentioned herein, the contentions of bank under review has to be rejected at the outset. It was rightly held by this court that limitation act has to be applicable retrospective because there is a presumption in favor of retrospective application (1) and the doctrine of laches allows for, (2) and further there is also good public policy consideration behind it. (3)

(¶9) Per section 238A of The Code, the provisions of the Limitation Act, 1963 shall, as far as may be, apply even to the appeals before the Adjudicating Authority.³⁹ Limitation act is

³³ Case data, ¶8.

³⁴ Case data, ¶9.

³⁵ Case data, ¶9.

³⁶ Rita Bagga & Ors. v. Union of India and Ors, 2015 (111) ALR 190 (India) (¶26); *see* R.C. KOHLI, PRACTICAL GUIDE TO NPA RESOLUTION 423, 425 (Taxmann, 4th ed. 2017).

³⁷ Mardia Chemicals Ltd. & Ors. v. U.O.I. & Ors., (2002) Transfer Petition (Civil) No. 724-727 of 2002 (India) (¶3).

³⁸ *Ibid.*

³⁹ IBC, *supra* note 28, §238A.

procedural in nature, and is presumed to be retrospective in nature unless such construction is textually inadmissible.⁴⁰ It has been held that while admitting an application under section 7 of the code the Doctrine of Limitation needs to be kept in mind.⁴¹ The object of the law of limitation is to prevent disturbance from what may have been lost by a party's own inaction, negligence or laches.⁴²

(¶10) It is submitted that in this case the NCLAT by departing from the traditional view that '*a time barred debt is not a debt at all*', is opening the floodgate of time barred debt due to the non-applicability of Limitation Act.⁴³ "The right to sue", accrues when a default occurs.⁴⁴ The default has occurred over three years prior to the date of filing of the application, in 2014 when The Bank sent notice and even realized that "neither the company nor the shareholders were in a position to pay even a part of the amount as mentioned in the notice"⁴⁵ thus, would be barred under Article 137 of the Limitation Act.⁴⁶

(¶11) The Insolvency Committee in its report stated that, "*...the intent was not to package the Code as a fresh opportunity for creditors and claimants who did not exercise their remedy under existing laws within the prescribed limitation period...*"⁴⁷ Intention was not to resuscitate stale and dead claims as it would lead to taking away of the management of the corporate debtor,

⁴⁰ Gardner v. Lucas, (1878) 3 AC 582; see Thirumalai Chemicals Ltd. v. Union of India, AIR 2011 SC 1725 (India).

⁴¹ M/s. Speculum Plast Pvt. Ltd. v. PTC Techno Pvt. Ltd., [2018] 142 CLA 165 (India).

⁴² State Bank of India, Colombo v. Western Refrigeration Pvt. Ltd., C.P. (I.B) No. 17/7/NCLT/AHM/2017 (India).

⁴³ B.K. Educational Services Private Limited v. Parag Gupta and Associates, AIR 2018 SC 5601 (India) (¶15).

⁴⁴ *Ibid*, (¶27).

⁴⁵ Case data, ¶6.

⁴⁶ *Supra* note 43.

⁴⁷ INSOLVENCY COMMITTEE REPORT (2018), Ministry of Corporate Affairs, 72 http://www.mca.gov.in/Ministry/pdf/ILRReport2603_03042018.pdf (accessed on 5:43 P.M. 26th January, 2019).

which may ultimately result in its corporate death.⁴⁸ Therefore, section 238A should be construed as being retrospective in nature.

(¶12) Under the Companies Act, 1956, a winding up could not be ordered where the recovery of the debt was barred by limitation.⁴⁹ Section 255 of the Code provides for various amendments to the Companies Act, 2013, in the manner provided under the Eleventh Schedule of the Code.⁵⁰ Since this Schedule⁵¹ does not provide for amendments to Section 433 of the Companies Act, there is no specific bar on the applicability of the Limitation Act to the Code.⁵² Thus, even before the amendment, the adjudicating authorities applied Limitation Act to the proceedings. The definition of “Adjudicating Authority” in Section 5(1) of the Code, read together with Sections 408, 424 and 433 of the Companies Act, 2013, clarifies that proceedings before the NCLT would be covered by the Limitation Act via Section 433 of the Companies Act from the very inception of the Code.⁵³

(¶13) It is submitted that The Bank only had the right to prosecution in the manner prescribed for the time being, and as, by an Act of Parliament the mode of prosecution is altered, they

⁴⁸ *Rajinder Singh v. Santa Singh*, AIR 1973 SC 2537 (India) (¶19, 20); *see* INSOLVENCY COMMITTEE REPORT (2018).

⁴⁹ *Vijayalakshmi Art Productions v. Vijaya Productions (P) Ltd.*, (1997) 88 Com Cases 353 (India) (¶21); *see* *Modern Dekor Painting Contracts Private Ltd. v. Jenson and Nicholson (India) Ltd.*, (1985) 58 Comp Cas 257 (India); *The Jayabharat Credit Limited. v. Jalgaon Re-Rolling Industries Ltd.*, (1997) 99 (1) Bom LR 521 (India); *Rameswar Prasad Kejriwal & Sons Ltd. v. M/s. Garodia Hardware Stores*, (2002) 108 Comp Cas 187 (India).

⁵⁰ IBC, *supra* note 28, §255.

⁵¹ Schedule 11, The Companies Act, No. 18 of 2013, INDIA CODE (2013).

⁵² *M/s Deem Roll-Tech Limited v. R.L. Steel & Energy Ltd.* Order dated 31 March 2017 in C.A. No. (I.B) 24/ PB/ 2017; *see also*, § 433 The Companies Act, No. 18 of 2013, INDIA CODE (2013).

⁵³ *Ibid.*

haveno other right than to proceed according to the altered mode.⁵⁴The general principle however, is that alteration in procedure are retrospective, unless there be some good reason against it"⁵⁵

(¶14) *In arguendo*, even on the assumption that the Limitation Act does not apply the applications filed by The Bank even though are beyond what is prescribed under the Limitation Act would be hit by the Doctrine of Laches⁵⁶.Finally, it is humbly submitted before this court that the amendment merely made the application of Limitation Act valid for The Code and as the Limitation Act came into force in 1963 itself, the question of its retrospective application should not even arise for a case is time-barred in 2018.

4. THAT THE US BANKRUPTCY LAWS SHOULD BE INVOKED.

(¶15) It is humbly submitted that the U.S. Bankruptcy law should be invoked against the US Co. for its dues. The US Co. and the U.S. bank are within the purview of the U.S. Bankruptcy law referred to as Title 11 of the United States Code.⁵⁷ The US Co.⁵⁸and the U.S. Bank⁵⁹qualifies as a debtor under this code.It is to be noted the loan amount was paid through U.S. bank to the US Co. making it the financial creditor.⁶⁰ Bankers of the U.S. Bank were separately in touch with the US Co. sending them ultimatums and reminders to repay its loan

⁵⁴ PETER BENSON MAXWELL, MAXWELL ON INTERPRETATION OF STATUTES 216 (Lexis Nexis, 11th ed. 2016).

⁵⁵ *Ibid* 217.

⁵⁶ Madhya Pradesh and Anr. v.Bhailal Bhai and Ors., (1964) 6 SCR 261 (India) (¶21).

⁵⁷ 11 U.S.C. § 101(13) (2012).

⁵⁸ *Ibid*.

⁵⁹ *Supra* note 57 § 101(10).

⁶⁰ Case data, ¶3.

amount,⁶¹ and were even accepting portions of repayments of the loan⁶² and The US company was putting efforts separately to pay back its dues.⁶³

(¶16) Both the companies being separate legal entities have their own assets.⁶⁴Initiating CIRP against The Company would result in non-utilization of US Co.'s assets for its own loan.⁶⁵ Thus, as the 'principal debtor' i.e. the US Co. has a claim for set off, then an insolvency process commenced only against The Company as 'corporate guarantor' would be unjust.⁶⁶Even British Courts have held that if the guarantor has co-extensive liability then the least it should have to be allowed to have similar treatment as the 'principal debtor',⁶⁷ which in this case is not happening as there are no proceeding of insolvency initiated against the US Co.

(¶17) Moreover, it is submitted that CIRP once set in motion, would lead to and serious consequences and is irreversible as it would lead to suspension of the Board of Directors of The Company, appointment of 'Interim Resolution Professional' etc. for the dues of a company which should be equally liable for its own default.The payment which would be made bythe guarantors,found payable upon reconciliation of accounts of the US Co., would mean that there never existed any debt which is due and payable or defaulted by the US Co. and the actions that

⁶¹ Case data, ¶5.

⁶² Case data, ¶8.

⁶³ Case data, ¶9.

⁶⁴ Vodafone International Holdings v. Union of India &Anr., (2012) 6 SCC 613 (India) (¶58); *see* SUKWINDER MISHRA, BANKING LAW AND PRACTICE 592 (S. Chand Publishing, 2012).

⁶⁵ *Ibid.*

⁶⁶ Export Import Bank of India v. CHL Limited, Company Appeal (AT) (Insolvency) No. 51 of 2018 (India) (¶12); *see* John Rembalance v. Octagon Assets, [2009] EWCA Civ 581.

⁶⁷ John Rembalance v. Octagon Assets, [2009] EWCA Civ 581.

would follow on allowing of this cannot be reversed and the guarantors cannot be compensated in any manner.⁶⁸

5. THAT THE PERSONAL GUARANTORS SHOULD BE ENTITLED FOR MORATORIUM BENEFIT UNDER THE I&B CODE, 2016.

(¶18) It is submitted before this Hon'ble Supreme Court that the personal guarantors should be entitled for moratorium benefit under the I&B Code, 2016 because [1] to extinguish the rights of personal guarantors the amendment which substitutes sub-section (3) to section 14 of the I&B Code has to be read retrospectively, which will be against the rule of interpretation and also against and [2] I& B Code is complete in itself, the rights of personal guarantors are but not limited to provisions of Part III. (2.1) and Section 14 r/w Section 60 provides for benefit of moratorium to be extended to personal guarantors (2.2). *In arguendo*, the otherwise consequence of this would go against the object and purpose of the Code (2.3).

5.1 THAT SUBSTITUTING SUB-SECTION (3) TO SECTION 14 OF THE I&B CODE SHOULD NOT HAVE A RETROSPECTIVE EFFECT.

(¶19) It is humbly submitted that for the amendment to have retrospective effect, the rules of interpretation allow only for, in cases of express stipulation.⁶⁹ To read the benefits of this amendment retrospectively would be to go against the (1) statutory rules of interpretation i.e. *'nova constitution futuris formam imponere debet non praeteritis'*⁷⁰ and (2) established judicial decisions. Pertinently, there is absence of any express deeming clause in the Amendment order

⁶⁸ Export Import Bank of India v. CHL Limited, Company Appeal (AT) (Insolvency) No. 51 of 2018 (India) (¶10).

⁶⁹ Government of Maharashtra & Ors. v. Deokar's Distillery, AIR 2003 SC 1216 (India) (¶59); see JYOTI SINGH, VISHNU SHRIRAM, INSOLVENCY AND BANKRUPTCY CODE, 2016 CONCEPTS AND PROCEDURE 741 (Bloomsbury India, 2016).

⁷⁰ G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 438 (Lexis Nexis, 9th ed. 2004).

which indicate that it is intended to have a retrospective effect⁷¹ and in the absence of such express words or appropriate language from which retrospectivity, may be inferred, the substitution should take effect from the date it was issued.⁷²

(¶20) Unless otherwise mentioned expressly the principle of '*nova constitution futuriformam imponere debet non praeteritis*' - a new law ought to regulate what is to follow not the past, should be followed.⁷³ Amendment to an act, is prospective in operation and should not create new obligations or impose new duties or affect substantive or vested rights of the parties in respect of transactions which were complete at the time the Amending Act came into force⁷⁴ and unless made retrospective either expressly or by necessary intendment.⁷⁵

(¶21) It is submitted that substitution of subsection (3) to section 14 is taking away some vested rights which were there with the personal guarantors under existing law, and is creating a new obligation and imposing a new duty upon them,⁷⁶ and it must be presumed that the amendment was to be intended not to have a retrospective effect.⁷⁷ The Bank cannot operate in a manner that imperils the value of the property of the personal guarantors⁷⁸ and thus, this Hon'ble Court as

⁷¹ The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, No. 26 of 2018, INDIA CODE (2018).

⁷² Vijayalakshmi Rice Mills, New Contractors Co. and others v. State of Andhra Pradesh, (1976) 3 SCC 37 (India) (¶5); see ASHISH MAKHJA, INSOLVENCY AND BANKRUPTCY CODE OF INDIA 382 (Lexis Nexis, 2018).

⁷³ BLOOMSBURY'S THE INSOLVENCY AND BANKRUPTCY CODE, 2016 WITH RULES AND REGULATIONS 249 (Bloomsbury India, 2018).

⁷⁴ *Ibid.*

⁷⁵ Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 SCC 602 (India) (¶25); see Garikapati Veerayav. N. Subbaiah Choudhry, AIR 1957 SC 540 (India); Dayawati v. Inderjit, AIR 1966 SC 1423 (India); K.S. Paripoornam v. State of Kerala, (1994) 5 SCC 593 (India); see G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 438 (Lexis Nexis, 9th ed. 2004).

⁷⁶ Case data, ¶1, Reasons for review on behalf of personal guarantor.

⁷⁷ Re, Pulborough Parish School Board Election, Bourke v. Nutt, (1894) 1 QB 725; see Monnet Ispat and Energy Ltd. and Ors. v. Union of India (UOI) and Ors., (2012) 11 SCC 1 (India) (¶123).

⁷⁸ Sanjeev Shrivastava v. State Bank of India and Ors., (2018) 2 All LJ 769 (India) (¶24).

court of appeal cannot have taken into consideration a new law brought into existence, after the judgment appealed from has been rendered because the rights of the parties in an appeal are determined under the law in force on the date of the suit.⁷⁹

(¶22) It is submitted that the main intention of the act was to initiate the insolvency process along with the benefit for the creditor.⁸⁰ If we will give an option to the creditor of approaching the guarantors and get back their loan then their interest in the proceedings will end and the purpose of the IBC will be defeated. Moreover, object and purpose of the amendment under section 14 The Code was to eliminate the mischievous practice. Thus, the amendment will bring inconsistency and absurdity and must not be construed as if it has been incorporated in the Act right from *ab initio*.⁸¹

5.2 THAT PART III OF THE CODE HAS NOT YET BEEN NOTIFIED, AND UNTIL THEN THE PERSONAL GUARANTORS SHOULD BE ENTITLED TO THE BENEFITS OF MORATORIUM UNDER THE I&B CODE.

5.2.1. SECTION 14 R/W SECTION 60 OF THE I & B CODE PROVIDES FOR BENEFIT OF MORATORIUM TO BE EXTENDED TO PERSONAL GUARANTORS.

(¶23) It is submitted that section 2(e)⁸² read along with section 14 (before amendment) &60⁸³ of The Code gives off the impression that moratorium should be made applicable to guarantors of corporate debtor. Proceedings against the guarantors is likely to adversely affect the CIRP and

⁷⁹ Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 SCC 602 (India) (¶25); see Garikapati Veeraya v. N.Subbaiah Choudhry, AIR 1957 SC 540 (India); Dayawati v. Inderjit, AIR 1966 SC 1423 (India); K.S. Paripoornam v. State of Kerala, (1994) 5 SCC 593 (India).

⁸⁰ Chitra Sharma and Ors. v. Union of India and Ors., 2018 5 AWC 4829 SC (India) (¶26).

⁸¹ V.S. DATEY, GUIDE TO INSOLVENCY AND BANKRUPTCY CODE 2016 436 (Taxmann, 7th ed. 2019).

⁸² IBC, *supra* note 28, §2(e).

⁸³ IBC, *supra* note 28, §60.

must consequently be barred by moratorium and therefore the interpretation of section 14 must be broad,⁸⁴till the time Part III of The Code, where the rights of the personal guarantors are enshrined⁸⁵, is brought into force, for the purpose of The Code.

5.2.2. I & B CODE IS COMPLETE IN ITSELF, THE RIGHTS OF PERSONAL GUARANTORS ARE BUT NOT LIMITED TO PROVISIONS OF PART III.

(¶24) It is humbly submitted before this hon'ble court that proceedings under The Code should be made applicable to personal guarantors as insolvency of the debtor would institute CIRP and until the resolution plan is not approved by the insolvency board, there would be an amount of uncertainty with regards to the liability of a personal guarantor.⁸⁶Moreover, The provisions in Part III of The Code is a law made by a legislature, even though not in force, would be a "law" on the statute book.⁸⁷ Therefore, as the Code is applicable on the personal guarantors and as per Section 101, the moratorium period shall be applicable to the whole debt which also includes the guarantors.⁸⁸

5.2.3 *IN ARGUENDO*, THE OTHERWISE CONSEQUENCE OF THIS WOULD GO AGAINST THE OBJECT AND PURPOSE OF THE CODE.

(¶25) It is humbly submitted that the objective of The Code amendment act, 2018 was to extend the provisions of the Code to personal guarantors of corporate debtors, to further strengthen the

⁸⁴ State Bank of India v.V. Ramakrishnan and Veeson Energy Systems, NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 213/2017 (India).

⁸⁵ IBC, *supra* note 28, Part III.

⁸⁶ State Bank of India v.V. Ramakrishnan &Ors., AIR 2018 SC 3876 (India) (¶28); *see* Sanjeev Shriya v. State Bank of India, 2017 (125) ALR 430 (India).

⁸⁷ State of Kerala and Ors. v. Mar AppraemKuri Co. Ltd. and Anr., AIR 2012 SC 2375 (India) (¶17).

⁸⁸ IBC, *supra* note 28, §101.

corporate insolvency resolution process.⁸⁹ Statutory forms which are contained in the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016⁹⁰ and in particular, to Annexure VI(e) to Form 6. Regulation 36(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016⁹¹ also provides, as did Annexure VI(e), that information as to personal guarantees have to be given in relation to the debts of the corporate debtor when an insolvency process is initiated against the corporate debtor.⁹² Thus, if while CIRP personal guarantees are considered then their properties should also be protected.

6. THAT THE PERSONAL AND ANCESTRAL (UNSECURED) PROPERTIES OF THE SHAREHOLDERS-CUM-DIRECTORS CANNOT BE ATTACHED FOR THE DUES OF INDIAN COMPANY AND US SUBSIDIARY COMPANY.

(¶26) It is humbly submitted before this Hon'ble Court that *in arguendo*, if the shareholder-cum-directors were liable as guarantors for the dues of US Co. and also that The Bank had the right to proceed against them simultaneously, still, The Bank does not have the authority to encroach upon their ancestral and personal property, as the liability attached to the director was not personal but only such that resembles a fiduciary duty of the directors towards the company.⁹³

⁸⁹ INSOLVENCY COMMITTEE REPORT (2018), Ministry of Corporate Affairs, 36, 37 http://www.mca.gov.in/Ministry/pdf/ILRReport2603_03042018.pdf (accessed on 5:43 P.M. 26th January, 2019); IBC, *supra* note 28, §2(e) read with §60.

⁹⁰ Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, dated 30th November 2016, http://www.mca.gov.in/Ministry/pdf/InsolvencyRules_01122016.pdf (accessed on 10:38 A.M. 26th January, 2019).

⁹¹ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2017, dated 16th August 2017, https://ibbi.gov.in/CIRP_Amendment.pdf (accessed on 10:40 A.M. 26th January, 2019).

⁹² V.S. WAHI, TREATISE ON INSLOVENCY AND BANKRUPTCY CODE 1243 (Bharat Law House, 2nd ed. 2018).

⁹³ Hrushikesh Panda v. Indramani Swain and Anr., 2018 (362) ELT 933 (S.C.) (India) (¶12).

(¶27) It is humbly submitted that this hon'ble court should note the fact that according to the loan contract which was entered by The Bank and the shareholder-cum-directors, only the assets which were earned through The Company were made available as surety for the loan amount.⁹⁴The loans were disbursed to them based on the above arrangements,⁹⁵ that the ancestral property will not be used as collateral.⁹⁶

(¶28) It was held by hon'ble NCLT that under the provisions of SARFAESI Act, during the resolution process, the personal properties of the directors/guarantors would neither be seized, attached or repossessed as the resolution professional shall only be concerned with the assets of the corporate debtor.⁹⁷The purpose of the SARFAESI being speedy recovery of dues, permits The Bank under section 13(2) of the act to proceed only against the secured assets of the guarantors.⁹⁸It has been held that the creditor bank has no bar in proceeding against the mortgaged properties, however, an exception is made for joint undivided family ancestral property.⁹⁹It is therefore submitted that in order to secure the loan amounts The Bank cannot attach the other personal assets which were owned by the personal guarantors through inheritance, gifts, etc.¹⁰⁰

⁹⁴ Case data, ¶3.

⁹⁵ Case data, ¶4.

⁹⁶ Case data, ¶3.

⁹⁷ In Re: Leo Duct Engineers and Consultants Ltd., (2017) 139 CLA 109 (India) (¶9).

⁹⁸ Axis Bank v. SBS Organics Private Limited and Ors., AIR 2016 SC 2024 (India) (¶15); *see* United Bank of India v. Satyawati Tondon & Ors., AIR 2010 SC 3413 (India).

⁹⁹ BD and P Hotels (India) (P) Ltd. v. District Judge, Jhunjhunu and Ors., AIR 2011 (Raj) 25 (India) (¶36).

¹⁰⁰ Case data, ¶3.

THE PRAYER

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

- a) The Review Application no. 2 is maintainable.
- b) The Applicant no. 2 is entitled to moratorium period provided under section 14 of Insolvency and Bankruptcy Code, 2016 [*hereinafter* 'IBC'] and the Second Amendment Act of the IBC which introduces changes to the section, inter alia, should be applied only prospectively.
- c) The Bank committed an error in declaring NPA at an early stage against the RBI guidelines and also erred in proceeding against the Indian company and Applicant no. 2 for the dues of the U.S. subsidiary company.
- d) The Bank violated the terms of the agreement by attaching the family and ancestral properties of the Applicant no. 2 which the Bank was not empowered by law to do.
- e) The proceeding for the dues of the U.S. subsidiary company should have been taken by the U.S. Bank in the U.S. invoking the U.S. Bankruptcy code.
- f) The rights provided to the personal guarantors under Part III of IBC which is not yet notified should be read into section 14 of the code in extending to them moratorium period.

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

All of which is respectfully submitted

On behalf of The Company and Personal Guarantors

Counsel for the Review Applicant No. 2