BEFORE THE HON'BLE SUPREME COURT OF INDIA

AT NEW DELHI

Review Application Nos. 1 & 2 of 2019

(Filed under Order XLVII, Rule 1 of CPC)

Against

Civil Appeal Nos. 10000 & 10001 of 2018

FIRST TO LEND BAKING LTD. ……..…… REVIEW APPLICANT

vs.

SOFT SOLUTIONS PVT. LTD.

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

AND

SHAREHOLDERS OF SOFT SOLUTIONS

PVT. LTD. ……..… REVIEW APPLICANT

vs.

FIRST TO LEND BANKING LTD……..… RESPONDENT

ON SUBMISSION TO THE HON'BLE SUPREME COURT OF INDIA

Memorial on behalf of Respondent

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LIST OF ABBREVIATIONS

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

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

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STATEMENT OF JURISDICTION

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

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

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

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

STATEMENT OF FACTS

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

STATEMENT OF ISSUES

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

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

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

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

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

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

SUMMARY OF ARGUMENTS

[ISSUE 1] The Review Application filed by PG is maintainable as the Hon'ble SC has the power to review a judgment if it has resulted in a manifest wrong or any contention made by a party has not been considered by the court.

[ISSUE 2] The Hon'ble SC was correct in applying the LA retrospectively as procedural laws have to be given retrospective operation and the delay on the part of FLB in filing applications under IBC is not liable to be condoned u/s 5 of LA.

[ISSUE 3] The Hon'ble SC court ought to have given a purposive interpretation to § 14 and read the rights of PG u/s 94-101 into § 14 as the denial of moratorium to PG would result in violation of provisions of IBC. Also, the SC should not have applied the amendment to § 14(3) retrospectively.

[ISSUE 4] The Bank cannot proceed under IBC against the Co. as the definition is restrictive, further, the jurisdiction falls under the US Laws. Also, the LC constitutes a sole contract which do not engender a right to sue under IBC per se.

[ISSUE 5] The application of FEMA regulations to make the PG liable for the guarantee is against the broad principles of Company Law and further the PG should be allowed to extend guarantee when the stake-holding is 51% or more.

[ISSUE 6] The immature declaration of NPA by the banks under the RBI guidelines is not desirable and further leads to the violation of the Fundamental Rights of the Shareholders by loss of control over the organization.

ARGUMENTS ADVANCED

[ISSUE 1] THAT THE REVIEW APPLICATION NO. 2 OF 2019 FILED BY THE PG UNDER ORDER XLVII, RULE 1 OF CPC IS MAINTAINABLE.

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

¶ 2 The Supreme Court has the power to reopen its judgment if it has resulted in a miscarriage of justice.[1] The expression 'for any other sufficient reason' has to be given a wide interpretation and it would include a misconception of fact or law by a Court. A RA may be necessitated by invoking the doctrine '*actus curiae neminemgravabit*'.[2] A judgment wherein the Court has failed to consider any contention made by a party is fit for review.[3]

¶ 3 In the present case, there has been an error on the part of the Court in applying the amendment to § 14(3) retrospectively. Also, the Court has failed to adjudicate upon the contentions of the PG relating to their eligibility of being the guarantors and the non-applicability of IBC to the loan granted to the US Company. Moreover, the Court has not laid down any law on the contention of the PG relating to NPA. Hence, it is argued that the RA preferred by the PG is maintainable while the RA preferred by the PG is not maintainable as the grounds on which the said RA has been preferred do not amount to any error on the part of the Court or any other sufficient reason on the basis of which the RA may be entertained.

[1] Suthenthirajraja v. State, A.I.R. 1999 S.C. 3700.

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

[3] Indian Charge Chrome v. Union of India, A.I.R. 2005 S.C. 2087.

[ISSUE 2] THAT THE SUPREME COURT WAS CORRECT IN APPLYING THE LIMITATION ACT RETROSPECTIVELY TO IBC.

¶ 4 The Counsel humbly submits before the Hon'ble SC that it was right in applying the LA retrospectively to IBC as procedural laws should be given retrospective operation and delay FLB's part in filing the applications is not liable to be condoned u/s 5 of LA.

[2.1] That procedural laws have to be given retrospective operation.

¶ 5 It is humbly submitted that it is a well-settled principle that procedural amendments to a law, after they come into effect, apply retrospectively and to all actions, even though an action may have begun earlier or the claim on which it is based may be of an anterior date.[4] Every litigant has a vested right in substantive law but not in procedural law and law relating to limitation is procedural in nature.[5] An aggrieved person cannot claim any vested right saying that he should be governed by the old provision pertaining to period of limitation.[6] If a procedural law is amended, cases although instituted under the old law but still pending would be governed by the amended procedure.[7]

¶ 6 It is also a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation.[8] The intent of IBC was not to give a new lease of life to time-barred debts and though it is not a debt recovery law, the trigger being 'default in payment of debt' renders the exclusion of limitation law counter-intuitive.[9] Hence, there is a clear and manifest implication that § 238A needs to be given retrospective application. This also implies that the expression

[4] Memon Abdul Karim Haji Tayab v. Dy. Custodian General, (1964) 6 S.C.R. 837.

[5] Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 S.C.C. 602.

[6] Thirumalai Chemicals Ltd. v. Union of India, (2011) 6 S.C.C. 739.

[7] Nani Gopal Mitra v. State of Bihar, A.I.R. 1970 S.C. 1636.

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

[9] Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* 72 (Mar. 2018).

'due and payable' u/s 3(12) of IBC refers to debts which are not time-barred. It is further contended that § 238A merely clarifies the legal position with respect to the applicability of LA to IBC and when an amendment is merely declaratory or curative and seeks to clarify the law so as to remove doubts leading courts to delivering conflicting decisions, it must be held to be retrospective.[10]

[2.2] That delay on the part of FLB is not liable to be condoned u/s 5 of the LA.

¶ 7 It is humbly contended that on reading § 5(1) of IBC along with § 408, 424 & 433 of the Companies Act, it was explicit that proceedings before the NCLT arising under IBC would also be covered by the LA from the very commencement of the Code and for the same reason, it was unnecessary to extend the application of the provision of CA dealing with limitation to IBC via the Eleventh Schedule.

¶ 8 Moreover,§ 60(6) of IBC specifically excluded the applicability of the LA while computing the period of limitation for any suit or application, by or against a corporate debtor for which an order of moratorium had been made. This provision would have been unnecessary and of no consequence if the LA would have been inapplicable to IBC because it is inevitable that an application is filed within the limitation period before the NCLT under IBC in order to file a suit or application within the period of limitation if the resolution of insolvency fails.

¶ 9 In the case of *Prowess International*, the NCLT held that the law of limitation has to be applied with all its rigour to the tribunal and it has no power to extend the limitation period.[11] The NCLT had also approved the applicability of the LA to IBC u/s 433 of the CA in the absence of any specific bar in the IBC as to the application of the LA to it[12] and

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

[11] Prowess International Pvt. Ltd. v. Action Ispat & Power Pvt. Ltd., C.A. No. (I.B.)18(P.B.)/2017.

[12] Deem Roll-Tech Ltd. v. R.L. Steel & Energy Ltd., (2017) S.C.C. OnLine N.C.L.T. 465.

because of the presence of § 60(6) in IBC.[13] The NCLT has also observed that on navigating through a number of fundamental laws, it would be clear that applicability of the LA has not been specifically mentioned therein but is invariably applied as its inapplicability would lead to opening the lid of uncertainty and giving a big hand to persons not diligent of their rights.[14] Even the Hon'ble Supreme Court had held the question of applicability of LA to IBC open.[15]

¶ 10 Hence, it is argued that almost until the end of the year 2017, there was not even a single decision of any tribunal or court or any other authority to suggest that the LA would not be applicable to IBC although there were sufficient authorities to suggest the contrary. The limitation period of 3 years u/a 137 of the LA was allowed to expire in April, 2017 by FLB while it was sleeping over its rights and it cannot be accepted even for the sake of argument that FLB failed to file the application as it took 14 months for it to understand the consequences of the new law or that it was expecting that the pending proceedings under the SARFAESI Act would yield results when the same had not happened since April, 2014. Therefore, it is contended that the facts of the present case do not amount to 'sufficient cause' for the purpose of condoning the delay u/s 5 of LA.

[ISSUE 3] THAT THE SUPREME COURT SHOULD HAVE READ THE RIGHTS OF PG U/S 94-101 INTO § 14 AND SHOULD NOT HAVE APPLIED THE AMENDMENT TO § 14 RETROSPECTIVELY.

¶ 11 The Counsel humbly submits before the Hon'ble Supreme Court that it ought to have read the rights of PG enshrined u/s 94-101 of IBC into § 14 in light of other provisions of IBC till the time Part III of IBC comes into effect and it was not correct in applying the amendment to § 14 retrospectively as it adversely affects the substantive rights of the PG.

[13] Sanjay Bagrodia v. Sathyam Green Power Pvt. Ltd., C.P. No. (I.B.)108(P.B.)/2017.

[14] Machhar Polymer Pvt. Ltd. v. Sabre Helmets Pvt. Ltd., [2017] 144 S.C.L. 511.

[15] Neelkanth Township & Construction Pvt. Ltd. v. Urban Infrastructure Trustees Ltd. [2018] 92 taxmann.com 177 (S.C.).

[3.1] That the benefit of moratorium needs to be given to the PG u/s 14 of IBC.

¶ 12 It is submitted that § 2(e) of IBC was substituted by the IBC (Amendment) Act, 2018 so as to include within the ambit of the Code 'personal guarantors to corporate debtors' and the same was one of the objectives of the amendment along with further strengthening the CIRP. It is further contended that as per § 31 of IBC, if the AA is satisfied that the RP meets the requirements of § 30(2), it shall approve the same which shall be binding not only on the CD but also on its employees, guarantors, etc. involved in the RP. In fact, the RP may include provisions as to payments to be made by the PG which is also the reason why I&B Rules and Regulations require information as to personal guarantees to be given when CIRP is initiated against the CD. Hence, it is incomprehensible why the order of moratorium would not apply on PG when the final RP would be binding on them and they are an important part of CIRP. Also, § 60 of IBC read with § 238 bars proceedings against the PG under SARFAESI or any other Act other than IBC when CIRP has been initiated against the CD.

¶ 13 It is further argued that it would not be prudent to equate SICA with IBC and compare § 22 of SICA with § 14 of IBC. § 12 of IBC provides effective safeguards to ensure a time-bound disposal of applications filed before the AA and it is very likely that the obstacle of delay which arose in proceedings under SICA would not arise in IBC. Further, SICA was an Act aimed at detection and revival of sick companies whereas IBC, though not a debt recovery law, is triggered by a mere default in payment of a debt. Also, in most cases, initiation of CIRP against CD is done by the FC u/s 7 of IBC unlike automatic referral of sick companies to the BIFR under SICA. Hence, at least in CIRP initiated u/s 7, it would be illogical to contend that providing the benefit of moratorium to PG would result in abuse as the PG may use the provision to shield their assets and stall debt recovery. Even when the CIRP is initiated u/s 10 by the CD with the intention to postpone debt recovery, § 12 shall come to the rescue of FC ensuring timely satisfaction of debts.

¶ 14 Also, it is hard to accept that the PG who are also the promoters/directors of a Company would be willing to make their Company undergo CIRP under IBC which may even lead to liquidation of the Company, merely to guard or stall proceedings against their own secured assets. Hence, the benefit of the order of moratorium should not be at least denied to the PG who are also the promoters/directors of the CD.

¶ 15 Furthermore, it is contended that even if, for the sake of argument, it is accepted that PG are not entitled to the benefit of moratorium u/s 14 of IBC, it should be taken into consideration that they had not agreed to secure their personal assets obtained through inheritance, gifts, etc. as they were too sentimental for them and accordingly, the Creditors cannot proceed against the ancestral properties of PG for the debt recovery.

[3.2] That denial of moratorium to PG would result in violation of § 14(1)(b) of IBC.

¶ 16 It is submitted that u/s 140 of the ICA, a surety upon payment of all that he is liable for, acquires all the rights which the creditor had against the principal debtor, i.e. he steps into the shoes of the creditor.[16] The Hon'ble Supreme Court has held that the 'Right of Subrogation' embodies the general rule of Equity and stands not merely on Contract but upon a Principle of Natural Justice.[17] Therefore, it is clear that if the FC is allowed to recover his dues from the PG during the order of moratorium in favour of the CD, a charge in favour of the PG on the property of the CD will get created and a transfer of security interest shall take place which would be against the purpose and object of the moratorium declared and in violation of § 14(1)(b) of IBC. Also, if the 'Right of Subrogation' which is a legal right of the Guarantors is denied, it would prejudice the sanctity of a 'Contract of Guarantee' while rendering debt recovery by the Guarantors extremely difficult. Hence, it would be prudent to

[16] Morgan v. Seymore, (1638) 1 Rep. Ch. 120.

[17] Amrit Lal Goverdhan Lalan v. State Bank of Travancore, A.I.R. 1968 S.C. 1432.

bring the PG within the ambit of moratorium u/s 14 and the Hon'ble NCLAT has also confirmed the applicability of the benefit of moratorium to PG based on this reasoning.[18]

[3.3] That absurd legal situations shall arise if moratorium is not given to PG.

¶ 17 It is argued that two split proceedings on the same cause of action should not be allowed to proceed before the DRT as well as NCLT although the liability of CD and PG is co-extensive since CIRP before NCLT is still in the fluid stage and the liability has not been crystallized.[19] The proceedings against the PG should rather be stayed until "the ultimate balance" due by the CD to the FC is determined.[20] Until the liability of the company has been determined, it would not be prudent to hold the guarantors liable.[21]

¶ 18 If CIRP against the CD has been initiated and the FC recovers some debt amount from the PG, its representation in the COC needs to reduce proportionately but a FC can only submit a claim until 90 days after the initiation of CIRP.[22] Hence, simultaneous proceedings against the CD and PG may result in an anomalous situation wherein it would be unclear as to how the liabilities of the CD shall be adjusted. Hence, it is clear that denying the moratorium benefit to PG may result in derailing the CIRP, thereby defeating the scope and purpose of IBC which certainly is not recovery of debts. Therefore, it is argued that a purposive interpretation should be given to § 14 and simultaneous proceedings against the CD and PG should be barred in line with the letter and spirit of IBC.

[18] State Bank of India v. D.S. Rajendra Kumar, (2018) S.C.C. OnLine N.C.L.A.T. 141; I.C.I.C.I. Bank Ltd. v. Vista Steel Pvt. Ltd., (2018) S.C.C. OnLine N.C.L.A.T. 230.

[19] Sanjeev Shriya v. State Bank of India, (2018) 2 All. L.J. 769.

[20] Punjab National Bank Ltd. v. Shri Vikram Cotton Mills, A.I.R. 1970 S.C. 1973.

[21] Oshi Foods Limited v. State Bank of India, A.I.R. 1997 (2) M.P.L.J. 643.

[22] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 Reg. 12(2).

[3.4] That the SC ought not to have applied the amendment to § 14(3) retrospectively.

¶ 19 It is humbly submitted that § 14(3) of IBC was substituted by the IBC (Second Amendment) Act, 2018 which effect from 06.06.2018 so as to exclude 'a surety in a contract of guarantee' from the applicability of § 14(1). However, the applications u/s 7 of IBC to initiate CIRP against the CD had already been filed on 01.02.2018. Hence, it is argued that the Amendment should not be made retrospectively applicable to such applications.

¶ 20 Law relating to moratorium is a substantive law as it regulates rights and liabilities and every litigant has a vested right in substantive law.[23] A statute which affects substantive or vested rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary implication.[24] The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed.[25] On the basis of the argument that the legislature has brought a provision into existence just to fill a lacuna in law, a provision cannot be construed as retrospective.[26] 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 existing right or obligation.[27] Therefore, it is argued that a prospective operation should be given to the Amendment to § 14(3) in the absence of any 'express' provision or 'necessary' intendment in the enactment conveying that it has to be given a retrospective effect.

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[23] Thirumalai Chemicals Ltd. v. Union of India, (2011) 6 S.C.C. 739.

[24] Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 S.C.C. 602.

[25] Garikapati Veeraya v. N. Subbiah Choudhry, A.I.R. 1957 S.C. 540.

[26] I.T.O. New Delhi v. Ekta Promoters Pvt. Ltd., (2008) 177 T.T.J. Del. 289.

[27] P.S.A Langan, *Maxwell's Interpretation of Statutes* (Sweet & Maxwell Ltd., 12th ed. 1969).

[ISSUE 4] THAT THE APPLICATION OF IBC IS NOT POSSIBLE BETWEEN FLB AND US CO.

[4.1] That the US Bankruptcy laws are applicable.

¶ 21 It is contended that the US Co. has a right to invoke the US Bankruptcy law. The 'Foreign main proceeding' pursuant to Art. 2(b) of UNCITRAL Model Law lies in the US since the 'Centre of Main Interest' (COMI) is in US. COMI as per UNCITRAL Legislative Guide and *Daistyek case*[28] means a place where the debtor conducts administration of its interests on regular basis, the ascertainment of which is important from the creditors' point of view. Further, in the absence of proof to the contrary, the debtor's registered office, is presumed to be the centre of debtor's main interests.[29]

¶ 22 In *Eurofood case*[30] it was held that the COMI of a subsidiary company in different country can be rebutted only if it is objective and ascertainable by third party in cases where the company is not carrying business at the registered office. Mere fact of control of parent company is not a presumption for rebutting the COMI at the registered office of the subsidiary. Also, the burden of proof to establish 'evidence to contrary' lies with the person who intends to rebut the presumption, not on the person supporting it.[31]

¶ 23 Further, it is contended that the US Bankruptcy Code is applicable. Chapter 15, USC deals with jurisdictional issues, incorporates Model Law on Cross border Insolvency.[32] Under the US laws as well, the capacity of debtor is that of a person who resides or has a place of business or property in US.[33] Further, "Person"[34] includes the corporation.

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[28] *In re* Daisytek-I.S.A. Ltd., [2003] All. E.R. (D.) 312.

[29] U.N.C.I.T.R.A.L. Model Law on Cross-Border Insolvency, 1997 art. 16(3).

[30] *In re* Eurofood I.F.S.C. Ltd., [2004] I.E.S.C. 45 (lr.); Angiotech Pharmaceuticals Ltd. (Re.), (2011) B.C.S.C. 115.

[31] *In re* Bear Stearns High-Grade Structured Credit Strategies, 389 B.R. 325 (S.D.N.Y. 2008).

[32] Bankruptcy, 11 U.S.C. § 1501 (2012).

[33] Bankruptcy, 11 U.S.C. § 109 (2012).

¶ 24 Further, India has long recognized that foreign creditors have the same right as Indian creditors. If a Co. carries on a business in the country other than in which it is incorporated, the court of that country has the power to conduct winding up proceedings in their countries.[35] Hence, the Indian courts have always supported the COMITY principle and as IBC, 2016 is its developing stage the ILC has already recommended for the same.[36]

[4.2] That SSPL being the guarantor of the US Company still cannot be assumed as CD.

¶ 25 It is contended that the Indian Bank being the FC cannot in any way proceed against the Indian Company due to the following two reasons: (*i*) The principal CD being the US Company; (*ii*) The Indian Company cannot be assumed as the CD under the Indian case laws on IBC.

¶ 26 It is contended that the loan was disbursed to the US Company and it does not fall under the definition of Corporate Debtor u/s 3(8) read with 3(7) of the IBC. Analyzing § 3(8) with 3(7), it is clear that a 'corporate person' is a company defined u/s 2(20) of the CA, 2013 and the US Company does not fall under the ambit of the CA,2013 and therefore IBC cannot be initiated against the US Company.

¶ 27 Further, it is contended that the Indian company being the guarantor of the US Company cannot be assumed as CD. There is no provision for the same and further the interpretation of the courts with regard to corporate guarantors being liable as corporate debtors in IBC is subject to the application of the definition of "corporate person" u/s 3 (8) which is not the case in the present scenario and therefore the *JM Financials case* has not relevance in the present circumstances. A Corporate Guarantor is a guarantor for the purpose of normal debt recovery proceedings but not under provisions of the IBC and the Indian bank

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[34] Bankruptcy, 11 U.S.C. § 101-41 (2012).

[35] Rajah of Vizianagaram v. Official Reciever of Vizianagaram Mining Co., A.I.R. 1962 S.C. 500.

[36] Ministry of Corporate Affairs, *Report of Insolvency Committee on Cross Border Insolvency* 51 (Oct. 2018).

is not restricted to go against the Indian Company for the recovery under any other laws but they are restricted to proceed against the Indian Company as well under the IBC.

[4.3] That the issuance of LC does not avail the right to proceed under IBC.

¶ 28 Further, it is contended that when one party is not subject to the Indian laws the parties may vest to a different jurisdiction.[37] Further, it is settled that contract of guarantee is an independent contract[38] and mere issuance of guarantee (either bank guarantee/letter of credit or corporate guarantee) within the jurisdiction of the court would not vest the territorial jurisdiction to entertain the plaint.[39]

¶ 29 LC constituting a sole contract may indeed make the Indian bank a Financial Creditor in certain circumstances but that does not answers the issue of jurisdiction of an Insolvency and Bankruptcy proceeding, especially when the parties involved at form different countries. Further, the Indian Subsidiary in US forms an Independent Entity as per *Vodafone Case*.[40]

¶ 30 Therefore, it is submitted that since the proceeding aptly falls under the US Bankruptcy Laws and the IBC is not applicable.

[ISSUE 5] THAT THE PG CANNOT BE HELD LIABLE FOR THE LOANS GRANTED TO THE US CO.

¶ 31 It is humbly contended before the Hon'ble Supreme Court that the PG cannot be held liable as they do not fall under the ambit of the Regulations and further the application of Guarantee under the loan agreement is *ultravires* the Company Law provisions.

[5.1] That the Regulations does not include PG for extending guarantees.

¶ 32 It is submitted that PG do not fall under the prescribed regulations to extend the guarantee. Reading regulation 5(b) of FEMA (Guarantees) Regulations, 2000, it states that term 'Company', which does not include resident individuals. Further, as per the proviso of

[37] Bharat Heavy Electricals Ltd. v. Electricity Generation Incorporation, A.I.R. 2018 Del. 38.

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

[39] Bharat Heavy Electricals Ltd. v. Electricity Generation Incorporation, A.I.R. 2018 Del. 38.

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

the above sub-regulation, the 'Indian Party' u/r 2(k) of FEMA (Transfer or Issue of Any Foreign Security) Regulations, 2004 does not include promoters. Hence, it is contended that the FEMA have been formulated for the issuance of share by the promoters as the individual residents but does not talks about the Personal Guarantees by the promoters of the Co.

[5.2] That Inclusion of PG by FEMA is ultravires the general principles of Company Law.

¶ 33 It is contended that the RBI Circular which includes promoters as PGs is against the principles of Company Law. The genesis of the concept of corporation was initiated by taking into consideration the concept of limited liability of the stakeholders. Also, it is well established proposition that the purpose of principle of Separate Corporate Personality[41] evolved to encourage industrialization and further the broad application of Doctrine of Piercing the Veil of Corporate Personality was a subjection to the same.[42]

¶ 34 Further, "Company Limited by Shares"[43] and § 4 (1) (d) (i) of Companies Act, 2013 states that the liability of its members is limited to the extent of amount unpaid. Additionally, Companies Act, 2013 expressly allows a holding company to give guarantee on behalf of the subsidiary company but it is silent on the issue of guarantee by the promoters of the company.[44] The same addition was made vide 2015 amendment, giving a strong inference that the legislature deliberately avoided the addition of personal guarantee by the directors in the provision so as to keep the concept of limited liability concept intact.

5.2.1 Acute contrast in the 'Relative Bargaining Powers' of the parties

¶ 35 Further, it is contended that the consent of directors is vitiated by the directives of the bank thereby creating an impaired contractual transaction where the directors are willing to

[41] The Companies Act, 2013 § 9.

[42] J.B. Exports Ltd. v. B.S.E.S. Rajdhani Power Ltd., (2006) 134 Comp. Cas. 106.

[43] The Companies Act, 2013 § 2(22).

[44] The Companies Act, 2013 § 185 (1)(d).

take up the 'uncalled-for/unwarranted' responsibility for the best interest of the company which is against the provisions of the Company Law and further grossly inadequate on account of unequal relative bargaining powers of the parties.

¶ 36 Lord Denning enunciated the 'Concept of Bargaining Powers' as transactions where the bargaining power of a party is grievously impaired by reason of his own needs and the other party moves solely by his own interest.[45] Therefore, it is settled proposition in law that in certain contracts there is no occasion for a weaker party to bargain or assume equal bargaining power and further, an irrational clause of contract is amenable to judicial review.[46] Thus, the law plays a role of a parent in such situations where a person gives away too much of his own liberty he must be protected, no matter how much rational he is.[47]

¶ 37 The Supreme Court has also recognized the theory of "distributive justice" which emphasizes on removal of economic inequalities and rectifying the injustice resulting from the transactions between the un-equals in the society also covering the notion of restoration of property to achieve such fair division.[48]

5.2.2 Interpretation of Statute when the law is silent

¶ 38 It is contended that the Financial Institutions arbitrarily developed a practice, without the authority of law, to execute personal guarantee agreements with the directors of the company which is against the principle of limited liability.[49] The assumption forming part of banking practice is against the principle of limited liability of the directors cannot be construed lawful as the construction of a statute would not depend upon a contingency. A statute must be interpreted having regard to the constitutional provisions as also human

[45] Lloyds Bank Ltd. v. Bundy, [1974] E.W.C.A. 8.

[46] L.I.C. of India v. Consumer Education & Research Centre, (1995) 5 S.C.C. 482.

[47] Anthony T. Kronman, *Paternalism & the Law of Contracts*, 92 YALE L.J. 763-798 (1983).

[48] Lingappa Pochanna Appelwar v. State of Maharashtra, (1985) 1 S.C.C. 479.

[49] N.K. Sharma, *Director's Personal Guarantee: A Void Agreement*, P.L. March S-9 (2011).

rights.[50] In these cases where the court has to weigh between a right of recovery and protection of a right, the court would generally lean in favor of the person who is deprived.[51]

5.2.3 The Supreme Court has absolute powers to shun Administrative Powers.

¶ 39 It is contended that the SC may shun the administrative decisions if they go against the boarder principles of a substantive law. In the *Ganesh Bank of Kurundwad Ltd. case* it was stated that when an administrative authority in exercise of its statutory function commits any error in exercise those power then the remedy lies with the court to interfere in the matter and set aside such power[52] or even bring such action in the realm of Judicial Review.[53]

***[5.3] Application only under certain circumstances*.**

¶ 40 It is contended that Application of RBI Circular, 2006 on PGs of company should be done only when the domestic company have less than 51% stakes in the overseas Indian subsidiary company so as to keep the general principles of Companies Law intact. The same is possible as the term 'Joint Venture' does not mean that there should be 51% shareholding of parent company and just talks about 'control'. Further, only when the promoter has 51% or more shareholding in the overseas subsidiary company as then can it be said to be a interest which optimally avails the promoters to make profits out of such investments, which is not in the best interest of the company and a stake-holding by Promoters below 51% should not be a criterion for availing guarantee.

[ISSUE 6] THAT THE SC OUGHT HAVE LAID DOWN LAWS ON MERIT REGARDING NPA.

¶ 41 It is contended that the declaration of NPA after 90 days of default is irrational and not justified. The RBI with the view of moving towards 'international best practices' and to

[50] Karnataka State Financial Corporation v. N. Narashimahaiah, (2008) 5 S.C.C. 176.

[51] Karnataka State Financial Corporation v. N. Narashimahaiah, (2008) 5 S.C.C. 176.

[52] Ganesh Bank of Kurundwad v. Union of India, (2006) 10 S.C.C. 645.

[53] State of U.P. v. Renusagar Power Co., (1988) 4 S.C.C. 59.

ensure greater transparency decided to adopt the 90 days norm.[54] It is argued that the international market alone cannot be a criterion to fix "Non-Performing Asset" without considering the local conditions.[55]

¶ 42 It is contended that the immature take-over of control and management thereby depriving the decision making power of the Directors of the company who have been entrusted by the shareholder is in violation of Article 19(1) (g) of the Indian Constitution.[56] The fortunes of corporate enterprise are liable to fluctuate with the recessionary cycles, therefore, the law should be slow to retard or impede the discretion of the enterprise to adapt itself to the needs of changing times.[57] Further, an average duration of a business cycle comes down to about 7 to 15 quarters. Hence, an optimum opportunity to the directors of the company at the time of contingencies is inevitable to devoid the stakeholders of the company of the FRs under the Constitution.

¶ 43 Further, it is contended that there is a constant increase in the gross NPA[58] so reduction in the duration of declaration of NPA cannot be said to be a measure to reduce NPA it rather back-fires and create a negative impact. Also, such stringent schemes of NPA should be for the wilful defaulter[59] which is not the scenario in the present case. Also, the company was mandated to form JLF and initiate CAP which was not done on their part. Hence, mere declaration of NPA creates strategic contingencies for the business to rejuvenate and is against the broad principles of law and violative of the FR of the stakeholders.

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[54] R.B.I. Circular, *Monetary & Credit Policy Measure 2001-2002* (2001).

[55] Moot Proposition, ¶ 2.

[56] Bennett Coleman & Co. v. Union of India, (1972) 2 S.C.C. 788.

[57] *In re* Ion Exchange (India) Ltd., (2002) 1 Mah. L.J. 411.

[58] R.B.I. W.P.S. No. 3, *Re-emerging Stress in the Assets Quality of Indian Banks* (2014).

[59] R.B.I./2015-2016/100, *Master Circular on Wilful Defaulters* (2015).

PRAYER

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

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

1. The RA No. 1 of 2019 filed by FLB under Order XLVII, Rule 1 of CPC is not maintainable.
2. The Limitation Act, 1963 would apply retrospectively to IBC and the delay on the part of FLB in filing applications under IBC is not condoned u/s 5 of LA.

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

1. The RA No. 2 of 2019 filed by the Personal Guarantors under Order XLVII, Rule 1 of CPC is maintainable.
2. The benefit of moratorium u/s 14 of IBC would extend to Personal Guarantors as well and the Amendment to § 14(3) would operate prospectively.
3. The Personal Guarantors do not fall under the ambit of FEMA Regulations and further personal liability is against the principles of company law.
4. FLB cannot proceed against the Companies under IBC.
5. FLB has committed an error in pre-maturely declaring NPA.

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

Sd/-

-Respectfully submitted by the Counsel for the Respondent