**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 Banking 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***

1. Soft Solutions Pvt Ltd. (the Indian company or the company) is company incorporated under the Companies Act, 1956 on April 01, 2000 and has its registered office in Bengaluru, Karnataka. The company is into the development of computer Soft. The company was set up by four former IITians and the equity shareholding of the company was 25% for each promoter-cum-shareholder. One of them was appointed as the managing director of the company and the other three were directors. The shareholders also did their higher studies in computer science, electronics and telecommunication fields from elite American Universities. So, majority of their clients were from the US and they had significant Indian clients as well. The Indian company and the shareholders had set up a subsidiary in the US which had a share pattern of 52% by Soft Solutions Pvt Ltd. and the remaining 48% shares were held equally by the four shareholders of Soft Solutions Pvt Ltd. The Indian company had at least 1,000 employees and it had assets worth INR 100 crores as per the book value of the company as on March 31, 2014. The US company had around 100 employees and assets worth INR 50 crores.

2. The company did exceptionally well in garnering major clients both in India and the US especially during the first decade of the millennium upto the economic meltdown in the US in 2008. Thereafter, the company managed to do a decent business in India. However, the US business saw a slump and was at the verge of collapsing. In order to bail out the US company and to rejuvenate its business, the Indian company and the shareholders thought it fit to pump in more capital and financial aid by recruiting more employees for the US company and to invest more in its infrastructure so that they can tap some joint ventures projects in the US. In spite of the US

meltdown, the Indian company enjoyed credible reputation especially due to its enormous exports success during the early years of setting up of the company. With the help of this reputation, the company and its directors set up an appointment in March 2011 with one of the major Indian banks, namely, First to Lend Banking Ltd (FLB India) which is a subsidiary of a US banking and financial conglomerate, to borrow money for expansion of the Indian and the US companies. The requirement for the expansion of the US company was USD 20 Million as of March 31, 2011 and for the Indian company it was INR 200 crores. The company had asked the bank to lend money as per their requirements for the Indian company directly and for the US company, through the parent company of the bank situated in US under the Foreign Exchange Management Act, 1999 (the FEMA) and applicable FEMA Regulations.

3. FLB India was willing to provide the loan directly to the Indian company and a Letter of Credit (LC) for the US company. However, since the assets of these companies were not sufficient enough to cover the amount being lent, it had asked the directors of the Indian company to be guarantors for the total loan amount. Since the directors were affluent persons especially due to huge amount of remuneration received from the company since its inception and due to huge amount of dividends declared by the company over the years being shareholders also, they were willing to be surety. They accepted to secure their immovable and movable assets towards the loans to be granted to the Indian and the US companies by FLB India directly and for its LC. The assets secured were the assets which were earned through this company. They did not agree to secure their other personal assets which were owned by them through inheritance, gifts, etc. These shareholders-cum-directors had significant amount of ancestral and family gifted properties standing in their names which were not used as collateral for the loans secured by the company. They wanted to ensure that even if the company collapses and their properties are taken over by the banks, their family properties would be ring fenced as they were too sentimental for them.

4. The loans were disbursed to them based on the above arrangements on April 30, 2011 by way of entering into an agreement dated April 30, 2011. The maturity of the loans was for three years i.e. the loans have to be repaid after completion of three years i.e. April 30, 2014. The interest rate was fixed at 12% per annum. Since the minimum maturity period under the FEMA Regulations was three years, the same period was applied to the domestic loan obtained by the Indian company from the Indian bank. However, the loans have to be repaid once the maturity period is over i.e. three years from the date of disbursement of the loan.

5. The Indian company and the US company were granted the loans and the for the loan obtained by the Indian company, the shareholders stood as guarantors and for the loan obtained by the US company, the Indian company (being its parent company) and the four shareholders of the Indian company stood as guarantors. The initial few months went on well for both the companies after utilizing all the loan amounts for its capital expenditure and working capital purposes. However, subsequently, the businesses started to take a hit due to various economic reasons and due to severe competition in the market. Besides, many of the customers of both the companies did not clear the pending invoices, especially the ones in the US. Therefore, the companies started to make defaults in their interest repayments. The companies spoke to their bankers for accommodation of the delay in making the repayments and the bankers also accommodated them to the extent possible. However, after the completion of the maturity period i.e. three years from the date of grant of the loans, both the companies defaulted in making the payments of their principal amounts and the interest payments. The bankers in India and the US sent reminders and ultimatums to clear the dues but both the companies couldn't repay the same.

6. FLB India after waiting for six months declared the loans granted to the Indian company and the dues on behalf of the US company as NPAs on October 31, 2014. A notice pertaining to the Indian company's debt was sent by the bank on October 31, 2014 to repay the dues along with interest on or before December 31, 2014. The notice informed that steps under the SARFAESI Act would be taken if the specified dues are not paid within the specified date and the list of properties that will be attached if the dues are not paid within the specified timeline. In the list of properties, even the ancestral properties of the directors were mentioned stating that there is no difference between the secured assets and personal assets. Both the assets of the company and the guarantors were mentioned in the notice. Neither the company nor the shareholders were in a position to pay even a part of the amount as mentioned in the notice. Instead, the directors objected to the notice issued under section 13(2) of the SARFAESI Act and disputed the amount mentioned in the notice since it had also imposed penal interest which was initially not agreed between them. Further, they opposed to the attachment of the family and ancestral properties since they were not within the terms of the agreement. The bank did not reply to the objection / representation made by the company and the guarantors within the required time. Since there was no reply forthcoming from the bank, the company and the guarantors filed a writ petition before the Hon'ble Karnataka High Court relying on the flagship case law on this issue and the relevant provision in the Act stating that the mandatory procedure has not been followed by the bank hence the possession notices have to be stayed. Since the court was convinced that the procedural requirement was not followed by the bank in considering the representation, it granted an interim stay of the notice and injuncted the bank from proceeding further in taking possession of the properties under the Act.

7. With regard to the loan lent by the US bank to the US company which was also defaulted, FLB India sent a notice to the Indian company and the four personal guarantors to repay the loan and interest at the earliest failing which the Indian company and the shareholders will be proceeded directly without taking any recourse against the US company by the US bank. The Indian company and the personal guarantors again explained their situation to FLB India stating their stressful financial position and informed that they are expecting the current lull in their business would soon be over and they will resurrect from the crisis. However, given that the Indian company and the guarantors had approached the court for obtaining a stay, FLB India sent another section 13(2) notice under the SARFASIE Act on November 30, 2014 to repay the dues of the US company along with interest on or before January 31, 2015 failing which the recourse under the Act will be invoked. The guarantors (the Indian company and the four shareholders) again sent a representation objecting to the notice stating that it is unfair on the part of the bank to not to take any steps through its US bank against the US company in the US and to straightaway proceed against the guarantors. Further, the four shareholders held that as per FEMA, to be treated as a guarantor for a foreign company, one should hold at least 51% shares in the US company. Since all the four shareholders do not hold more than 48% shareholding, none of them could be treated as guarantors and at best only the Indian company be treated as the guarantor for the US company. This argument was taken by the shareholders to protect their personal properties from the burgeoning debts of the two companies. To this objection, this time the bank responded within three days stating that it is the prerogative of FLB India to go behind the principal borrower or the guarantors as permitted under the Indian Contract Act, 1872. The reply further stated that even the personal ancestral property of the shareholders will be taken possession if the dues aren't paid within the specified date. The notice further mentioned that *one should not complain about stinging after stirring up the hornet's nest!*

8. Against this notice too, the shareholders and the Indian company filed a writ petition to grant a stay. However, this time the court declined to entertain the petition as it found no error in the procedure followed by the bank. In order to protect the ancestral and personal properties, the shareholders

requested for a meeting with the bank officials and agreed to pay 25% of the dues of the US company's loan and asked the bankers for a quietus for some time. The bank agreed for the 25% payment and asked them to repay the remaining dues within a period of 18 months provided none of the assets of the company and of the shareholders were sold by them or otherwise created any charge on them to which the company and the shareholders accepted.

9. The Indian company and the US company put sincere efforts to regain their lost businesses in India and US and to recover their receivables from their customers, but they could not make any huge impact to repay the dues. They were in touch with the bankers and kept paying some portion of the interest amounts and were requesting extensions to pay the dues.

10. Under such circumstances, the Insolvency and Bankruptcy Code, 2016 (IBC or the Code) was enacted in December 2016. FLB India understood that the Indian company and the shareholders will not be in a position to settle the dues and therefore, wanted to proceed under the Code. While the new Code was grappling with the jurisprudence, the bank was waiting to understand the ramifications of the new law. However, learning that the dues of the Indian company and the US company can never be recovered in full from the principal borrowers and its guarantors, on February 01, 2018, the bank filed two applications against the Indian company under section 7 of the Code before the National Company Law Tribunal (NCLT), Bengaluru to initiate insolvency proceedings for its dues and US company's dues. Two applications were filed as a precautionary measure. The applications were numbered as CP (IB) No. 01/BB/2018 and CP (IB) No. 02/BB/2018 **(Application No. 1** and **Application No. 2)** for the dues of the Indian company and dues of the US company respectively. The NCLT issued notices to the Indian company for both the applications and heard both the matters together. One of the preliminary arguments of the Indian company against the applications was that the applications were hit by limitation since the more than three years had lapsed when the bank had declared the both the loans as NPA and the notices under the SARFAESI Act which required the Indian company to repay the dues expired on December 31, 2014 and January 31, 2015 respectively. Whereas the current applications were filed on February 01, 2018 which are more than three years period and hit by the Indian Limitation Act, 1963. To this, the bank vehemently objected by stating that the Limitation Act does not apply to the proceedings under the IBC being a special enactment and more specifically, there is no section in the Code which states that Limitation Act applies to the proceedings under the Code. It further, argued that the objective of the IBC is not mainly to recover money to treat the application as a money suit or as a suit to recover dues, but was to initiate insolvency proceedings which will have wider ramifications than just to recover the dues to the bank. The bank also argued that the notice under SARFAESI Act cannot determine the period of limitation as such a notice is only of the purpose of proceedings under the SARFAESI Act. The Indian company further argued that FLB India did not follow the RBI Guidelines and Circulars before declaring the debts as NPA and six months from the end of the maturity period was too early to declare the loans as NPA and therefore, there was no cause of action to initiate the current applications. To this the bank shot back stating that the company impliedly accepts that the limitation period is extended due to early declaration of the debts as NPA and therefore, the application was not hit by limitation. To this, the NCLT responded that the bank cannot take advantage of its own mistake and it has to either accept the loans as NPA or withdraw the applications and freshly declare the loans as NPA and then file fresh applications. To this the bank stated that it wants to stick to its stand that the loans be declared as NPA as on October 31, 2014 itself and that it is the prerogative of the banks to decide the capability of the repayment by the borrowers of the loans to declare as NPAs. Therefore, the declaration of the loans as NPAs as on October 31, 2014 was correct and requested to admit the application.

11. In the meantime, the individual guarantors i.e. the four shareholders/ promoters impleaded themselves as respondents in the applications and argued that in the event of the application being admitted, the moratorium period should also be applicable to them so that no separate proceedings under the SARFAESI Act could be pursued by the banks against their personal and ancestral properties. The Hon'ble NCLT after hearing the arguments rejected the plea of limitation and admitted both the applications of the bank and declared Corporate Insolvency Resolution Process (CIRP)/ moratorium period from March 01, 2018. With regard to the prayer of the individual guarantors were concerned, it held that they are not protected under section 14 of the Code as the moratorium is applicable only to the corporate debtor and not its guarantors. The Adjudicating Authority held that the other Parts, Chapters and provisions of the Code may come to the rescue to the personal guarantors but not section 14. With regard to the Indian company as a guarantor to the US is concerned, it argued that for the dues of the US company, the Indian company cannot be proceeded under the Code as it cannot be treated as a 'corporate debtor' for just being a guarantor to another foreign company. This argument too did not go well with the NCLT and rejected such arguments and held that even a corporate guarantor can be treated as a corporate debtor for the purpose of the Code, especially when such guarantee was given to a foreign borrower upon whom the recovery by an Indian bank may not be easy.

12. Against the orders of the NCLT, the Indian company through its shareholders and the personal guarantors/ shareholders appealed to the Hon'ble National Company Law Appellate Tribunal (NCLAT) at New Delhi against the admission of both the applications by the Adjudicating Authority. The primary argument of the Indian company was that the claim was hit by limitation and that of the personal guarantors was that they are also entitled for the cooling off period during moratorium. The NCLAT, on March 31, 2018, summarily dismissed the appeals holding that the Limitation Act does not apply to the Code and for the personal guarantors issue, the NCLAT held that they are entitled for the moratorium under section 14 of the Code and reversed the order of the NCLT to this extent. Against, the orders of the NCLAT, the Indian company through its shareholders and the bank went on appeal to the Hon'ble Supreme Court of India. The Supreme Court heard the matter in detail on June 30, 2018 and allowed the appeals of the Indian company holding that the Limitation Act applies even to applications made under the IBC. And, with regard to the appeal of the bank that personal guarantors cannot take the benefit of the moratorium, the Supreme Court held that they are not entitled for it since section 14 applies only to corporate debtors and not to non-corporate debtors. The fundamental reason for arriving at these two conclusions by the Supreme Court i.e. that the Limitation Act applies to IBC and that section 14 does not apply to personal guarantors was due to the amendment to the IBC vide the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 by the Parliament which came into force from June 06, 2018 which brought in a new section 238A which invokes the provisions of the Limitation Act, 1963 to the IBC and substitution of new subsection (3) to section 3 of the IBC which includes clause (b) that a surety in a contract of guarantee to a corporate debtor cannot take the benefit of moratorium. The Supreme Court however did not deal with other merits of the case and disposed of the appeals accordingly. The judgments passed by the Supreme Court were *pari materia* in language and sprit to that of the judgments in ***B.K. Educational Services Private Limited vs. Parag Gupta and Associates in Civil Appeal No. 23988 of 2017 decided on October 11, 2018*** (on limitation) and in ***State Bank of India vs. V. Ramakrishnan and Others in Civil Appeal Nos. 3595 and 4553 of 2018 decided on August 14, 2018*** (on personal guarantee).

13. The judgments in both the appeals were not acceptable to both the bank and the personal guarantors. They were concerned with the following aspects, which in their opinion, were not rightly appreciated by the Supreme Court of India and felt that a review of these judgments was necessary. So, both the

bank and the personal guarantors filed review applications respectively which were numbered as **Review Application No. 1** ***(of the bank)*** and **Review Application No. 2** ***(of the personal guarantors).*** The apparent reasons for reviewing the judgments according to the review applicants were as follows:

***<u>On behalf of the Bank</u>***

1. *The Supreme Court ought not to have applied the Limitation Act retrospectively since the Second Amendment Act to IBC itself clearly states that the amendments will be in force only from 06.06.2018. By applying the amendment retrospectively, huge amounts which are due to various financial creditors will be jeopardized even if they have filed the application prior to the amendment like in the current case of the bank which applied to the NCLT on February 2018 much prior to the amendment.*

2. *The Supreme Court ought to have appreciated that retrospectivity of an enactment should be either explicit or by necessary implication both of which were not satisfied in this case. Since a new section with a new implication is being introduced, it has to be read only prospectively.*

3. *The Supreme Court ought to have decided on the contention of the personal guarantors that they cannot be held liable for the loan granted to the US company since they did not hold 51% stake in the US company which is a requirement to be a guarantor under FEMA and that the bank has to take recourse only on the assets of the Indian company whatever is left after appropriating against loans directly granted to it.*

4. *The Supreme Court ought to have decided on the arguments of the Indian company and the guarantors that the Code does not apply to a loan granted to a foreign company by a foreign bank to which the Indian company only stood as a guarantor. Declaration of law on this standpoint was very important due to significant increase in cross border corporate guarantees given by the Indian companies to its foreign affiliates.*

***<u>On behalf of the Personal Guarantors</u>***

1. *The Supreme Court ought to have held that the personal guarantors are entitled for moratorium benefit especially when an amendment to that effect came into force only from 06.06.2018 by substituting subsection (3) to section 14 and the argument of the bank that a substitution will always have retrospective effect should have been negated.*

2. *The Supreme Court ought to have laid down the law on merits that the bank committed an error in declaring the loans of the companies as NPA at a much earlier stage against the RBI guidelines.*

3. *The bank fundamentally erred in proceeding against the Indian company and the personal guarantors to the US company who only stood as guarantors without asking its US bank to take action against the US company under the US laws in the US since the loans were actually disbursed in the US in foreign currency, especially when the US company has assets with it and has a right to invoke the US bankruptcy law.*

4. *The Supreme Court ought to have considered that Part III of the IBC has not yet been notified and until such time the valuable rights of the personal guarantors which are enshrined from sections 94 to 101 of the Code should have been read into section 14 especially when section 60 of the Code permits the personal guarantors to avail the benefit of moratorium when the corporate debtor to which they stood as guarantors undergoes CIRP.*

14. The Hon'ble Supreme Court agreed to hear the review applications filed by respective parties provided they satisfy the court on its maintainability and tagged both the review applications together and posted for final disposal on the same day. In addition to that, the court also permitted the parties to raise such other issues and arguments other than the ones outlined above to assist the court to lay down new jurisprudences that emerge out of the Insolvency and Bankruptcy Code, 2016.

***1. Note to the participants***

***The participants are requested to assume that the above mentioned two judgments are the ones which are being considered for review proceedings before the Hon'ble Supreme Court albeit with the dates and facts as mentioned in this proposition.***

***2. Note to the participants***

***Based on the facts it is clear that both the parties have preferred review applications. Hence, the review applicants will also be the respondents in the review application preferred by the other party (as arrayed in the cause title).***

***For ease of preparing the memorials, the same memorial shall be used for making arguments for the review application and also to oppose the review application preferred by the other party with words and pages limits as mentioned in the Rules. The memorial for the Bank shall be named as "Memorial for Review Application No. 1 preferred by the Bank" (LIGHT BLUE COVER) and the memorial for the Company shall be named as "Memorial for Review Application No. 2 preferred by the Company" (LIGHT PINK COVER).***

****For administrative convenience of the rounds, the Bank will be treated as Applicant & the Company, Respondent***