IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (LODGING) NO. 34701 OF 2023

Amit Gupta]
Adult, Indian Inhabitant,]
having office at 101, Kanakia Atrium,]
Cross Road A, Chakala MIDC, Andheri East,]
Landmark Behind Courtyard Marriot,]
Mumbai, Maharashtra-400059.].. Petitioner

Versus

1. Insolvency and Bankruptcy Board of India,]
7th floor, Mayur Bhawan,]
Connaught Place, New Delhi – 110001]
]
]
2. Union of India,]
through the Secretary,]
Ministry of Corporate Affairs]
100, Everest, Marine Drive,]
Mumbai - 400 002.]...Respondents

Mr.Sharan Jagtiani, Senior Advocate *a/w. Karl Tamboly, G. Aniruth Purusothaman, Anuj Desai, Joshua Borges & Aman Kacheria i/b Parth Shah, Advocate for Petitioner.*

Mr.Pankaj Vijayan *a/w. Sushmita Chauhan and Shyam Upadhyay, Advocate for Respondent No.1.*

Mr.Y.R. Mishra, *Advocate for Respondent No.2.*

CORAM : B.P. COLABAWALLA &
SOMASEKHAR SUNDARESAN, JJ.

Reserved on : February 01, 2024.

Pronounced on : April 04, 2024.

Shraddha Talekar PS

JUDGMENT: (Per, Somasekhar Sundaresan, J.) :

1. Rule. By consent, rule is made returnable forthwith, and the Writ Petition is taken up for final hearing and disposal.

Factual Matrix:

2. The challenge in this Writ Petition is to a Circular dated 28th September, 2023 ("***Impugned Circular***"), issued by Respondent No. 1, the Insolvency and Bankruptcy Board of India ("***IBBI***"), purporting to clarify the usage of certain terms contained in Regulation 4(2)(b) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("***LP Regulations***"). The challenge is primarily on the ground that in the garb of clarifying certain terms contained in Regulation 4(2)(b), the IBBI has effectively, by a back-door method, amended the LP Regulations by stipulating new substantial requirements, and that too, with retrospective effect. Put differently, it is alleged that the Impugned Circular is *ultra vires* the LP Regulations, which it purports to clarify, and that far from being clarificatory, it is an instrument that illegally amends the LP Regulations.

3. The Petitioner is a Chartered Accountant by profession and is registered as an 'Insolvency Professional' (**"*IP*"**) with the IBBI. In his

capacity as an IP, the Petitioner has acted as a liquidator in respect of a number of companies ("***Corporate Debtors***") under the Insolvency and Bankruptcy Code, 2016 ("***IBC***").

4. The IBBI issued to the Petitioner, a Show Cause Notice dated 14th March, 2023 ("***First Show Cause Notice***"), alleging that the Petitioner had charged excessive fees in the course of liquidating a company by the name Hindustan Dorr Oliver Limited ("***HDOL***"). The Petitioner replied to the First Show Cause Notice on 3rd April, 2023, and attended a personal hearing on 11th April, 2023. A Disciplinary Committee of the IBBI did not pass a final order on the First Show Cause Notice, but instead, the IBBI directed that a wider inspection of the Petitioner's assignments be conducted.

5. Accordingly, on 22nd May, 2023, the IBBI issued a notice to the Petitioner communicating its decision to inspect certain liquidation assignments handled by the Petitioner, and directed him to submit various documents in connection with such assignments. After inspection, a draft Inspection Report, dated 27th July, 2023 came to be served upon the Petitioner, seeking his comments. The Petitioner provided an issue-wise response on 4th September, 2023, and a final

Inspection Report dated 15th September, 2023 was prepared by the IBBI.

6. Thereafter, on 28th September, 2023, the IBBI issued the Impugned Circular, invoking Section 196 of the IBC, purporting to clarify the interpretation of the terms "*amount realised"; "other liquidation costs";* and *"amount distributed to stakeholders",* as used in Regulation 4(2)(b) of the LP Regulations. The Impugned Circular also purported to clarify how the time periods applicable for computing fees towards realization and distribution should be computed under Regulation 4(2)(b).

7. After the Final Inspection Report, and based on its findings, the IBBI issued to the Petitioner another Show Cause Notice dated 4th December, 2023 ("***Second Show Cause Notice***"). The Second Show Cause Notice found fault with eight liquidation assignments handled by the Petitioner. Although the Impugned Circular was issued after the Final Inspection Report, and the actions of the Petitioner assailed in it occurred prior to the issuance of the Impugned Circular, the Second Show Cause Notice relied on the Impugned Circular to interpret Regulation 4(2)(b) of the LP Regulations.

8. We have noted that the Second Show Cause Notice does not purport to supersede, amend or restate the First Show Cause Notice. In fact, it makes no reference at all to the First Show Cause Notice. The allegations in the Second Show Cause Notice, primarily relate to the following :

(a) excess fee charged in the liquidation assignments handled – *in the case of eight liquidation assignments handled by the Petitioner, including the liquidation of HDOL*;

(b) reduction in reserve price during liquidation – *in the case of Padmavati Wires and Cables Private Limited*;

(c) sale of stock without auction – *in the case of Nimit Steels and Alloys Private Limited*; and

(d) engagement of one ANAROCK Capital Advisors Pvt. Ltd. for assistance in the sale of assets – *in the case of HDOL*.

9. This Writ Petition primarily relates to the allegation in sub-para (a) above since that is the allegation connected with the Impugned Circular, which is challenged in the Writ Petition. The Impugned Circular has no relevance to the other three allegations. The fulcrum of

the Petitioner's grievance is that the fees for liquidation assignments charged well prior to the Impugned Circular, are being alleged to be violative, by relying upon the interpretation flowing from the Impugned Circular. In the context of the First Show Cause Notice being followed by the issuance of the Impugned Circular, reliance in the Second Show Cause Notice on the Impugned Circular, points to rules of the game being changed after the proceedings have commenced.

Provisions of Law:

10. Before delving into the contents of the Impugned Circular and their import, it is necessary to have a bird's eye view of the issues involved, the legal framework, and the scope of the controversy.

11. The LP Regulations govern the liquidation of Corporate Debtors under the IBC. A Corporate Debtor is subjected to liquidation when the Corporate Insolvency Resolution Process ("***CIRP***") is abandoned, with no likelihood of resolving and turning around the fortunes of the Corporate Debtor. The liquidation process is to be handled by an independent IP. The IP is entitled to fees as stipulated in Regulation 4 of the LP Regulations. The fees payable to the liquidator may either be decided upfront by the 'Committee of Creditors' ("***CoC***") that oversaw

the CIRP, or may be determined under the formula stipulated in Regulation 4(2)(b) of the LP Regulations. These LP Regulations are sought to be clarified by the Impugned Circular.

12. To understand the grievance of the Petitioner, it would be instructive and convenient to extract Regulation 4 of the LP Regulations in its entirety:

> *4. Liquidator's fee*
>
> *(1) The fee payable to the liquidator shall be in accordance with the decision taken by the committee of creditors under regulation 39D of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.*
>
> *(1A) Where no fee has been fixed under sub-regulation (1), the consultation committee may fix the fee of the liquidator in its first meeting.*
>
> *(2) In cases other than those covered under sub-regulation (1), and (1A), the liquidator shall be entitled to a fee--*
>
> *(a) at the same rate as the resolution professional was entitled to during the corporate insolvency resolution process, for the period of compromise or arrangement under section 230 of the Companies Act, 2013 (18 of 2013); and*
>
> *(b) as a percentage of the amount realised net of other liquidation costs, and of the amount distributed, for the balance period of liquidation, as under:*

Amount of Realisation / Distribution (in rupees)	*Percentage of fee on the amount realised / distributed*		
	In the first six months	*In the next six months*	*thereafter*
Amount of Realisation (exclusive of liquidation costs)			

On the first 1 crore	*5.00*	*3.75*	*1.88*
On the next 9 crore	*3.75*	*2.80*	*1.44*
On the next 40 crore	*2.50*	*1.88*	*0.94*
On the next 50 crore	*1.25*	*0.94*	*0.51*
On further sums realized	*0.25*	*0.19*	*0.10*
Amount Distributed to Stakeholders			
On the first 1 crore	*2.50*	*1.88*	*0.94*
On the next 9 crore	*1.88*	*1.40*	*0.71*
On the next 40 crore	*1.25*	*0.94*	*0.47*
On the next 50 crore	*0.63*	*0.48*	*0.25*
On further sums distributed	*1.13*	*0.10*	*0.05*

*Clarification : For the purposes of clause (b), it is hereby clarified that **where a liquidator realises** any amount, **but does not distribute** the same, **he shall be entitled to a fee corresponding to the amount realised** by him. **Where a liquidator distributes** any amount, **which is not realised by him**, he shall be **entitled to a fee corresponding to the amount distributed** by him.*

*(3) Where the fee is payable under clause (b) of sub-regulation (2), **the liquidator shall be entitled to receive half of the fee payable on realisation only after such realised amount is distributed**.*

*Clarification : **Regulation 4 of these regulations, as it stood before the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 shall continue to be applicable in relation to the liquidation processes already commenced before the coming into force of the said amendment Regulations**.*

[Emphasis Supplied]

13. The aforesaid version of Regulation 4 was introduced as part of a larger scheme of amendments to the LP Regulations that were given effect on 25th July, 2019 ("***2019 Amendments***"). The version of

Regulation 4 that was applicable prior to 25th July, 2019 is set out below :

> *"4. Liquidator's fee*
>
> *(1) The fee payable to the liquidator shall form part of the liquidation cost.*
>
> *(2) The liquidator shall be entitled to such fee and in such manner as has been decided by the committee of creditors before a liquidation order is passed under sections 33(1)(a) or 33(2).*
>
> *(3) In all cases other than those covered under sub-regulation (2), the liquidator shall be entitled to a fee as a percentage of the amount realized net of other liquidation costs, and of the amount distributed, as under:*

Amount of Realisation / Distribution (in rupees)	*Percentage of fee on the amount realised / distributed*			
	In the first six months	*In the next six months*	*In the next one year*	*thereafter*
	Amount of Realisation (exclusive of liquidation costs)			
On the first 1 crore	*5.00*	*3.75*	*2.50*	*1.88*
On the next 9 crore	*3.75*	*2.80*	*1.88*	*1.44*
On the next 40 crore	*2.50*	*1.88*	*1.25*	*0.94*
On the next 50 crore	*1.25*	*0.94*	*0.68*	*0.51*
On further sums realized	*0.25*	*0.19*	*0.13*	*0.10*
	Amount Distributed to Stakeholders			
On the first 1 crore	*2.50*	*1.88*	*1.25*	*0.94*
On the next 9 crore	*1.88*	*1.40*	*0.94*	*0.71*
On the next 40 crore	*1.25*	*0.94*	*0.63*	*0.47*
On the next 50 crore	*0.63*	*0.48*	*0.34*	*0.25*
On further sums distributed	*1.13*	*0.10*	*0.06*	*0.05*

> *(4) The liquidator shall be entitled to receive half of the fee*

> *payable on realization under sub-regulation (3) only after such realized amount is distributed."*

14. The extraction of the versions of Regulation 4 before and after 25th July, 2019 is important because the Impugned Circular purports to clarify the interpretation of ***terms contained in Regulation 4(2)(b)***, a provision that came into being only in the 2019 Amendments. In the earlier version, the computation of fees where the CoC had not fixed the fee entitlement, was contained in the erstwhile Regulation 4(3) of the *LP Regulations*. The manner of computation of the liquidator's fee before and after the 2019 Amendments varies. In both versions, the liquidator would be entitled to an incentive structure for the amounts realised and the amounts distributed, but prior to the 2019 Amendments, there were four time slabs with varying percentage fee rates, for the period over which the realisation, and the distribution, is effected. These were: (i) *the first six months; (ii) the next six months;* (iii) *the next one year;* and (iv) *thereafter*. Such position changed with the 2019 Amendments. The time slabs for the period of realisation and distribution was reduced to three, namely, (i) *the first six months;* (ii) *the next six months;* and (iii) *thereafter*.

15. Depending on the amount realised or distributed over such periods of time, each of these structures enables computing the fee as a percentage of the amount realised, and as the case may be, distributed. The Impugned Circular does not even purport to deal with the incentive structures applicable prior to the 2019 Amendments. In clarifying the terms, it squarely extracts Regulation 4(2)(b) and sets out the three-slab incentive structure at the threshold, making it clear that it purports to clarify Regulation 4(2)(b), which came in with the 2019 Amendments.

16. Regulation 4(2)(b) explicitly provides that the percentage fee must be computed on the amount realised ***net of other liquidation costs***. The heading in the first part of the table of the incentive structure in Regulation 4(2)(b), deals with *"Amount of Realisation (exclusive of liquidation costs)".* Therefore, how a liquidator must understand the term "*liquidation costs*" is an important element of Regulation 4(2)(b), the Impugned Circular, and therefore, these proceedings.

17. The term, "*liquidation cost*" is defined – primarily, in Section 5(16) of the IBC, and secondarily, in the LP Regulations. The definition in Section 5(16) is extracted below:

*"**liquidation cost**" means **any cost incurred** by the liquidator*

> ***during the period of liquidation*** ***subject to such regulations****, as may be specified by the Board.*
>
> *[**Emphasis Supplied**]*

18. It will be seen that the term "liquidation cost" means ***any cost incurred*** by the liquidator during the period of liquidation. The term has been given a wide and expansive meaning by Parliament. It is noteworthy that the LP Regulations, which deal with the liquidation process, did not define the term "liquidation cost" until 1st April, 2018. During this period, the term was only governed by the general meaning accorded in Section 5(16) of the IBC. With effect from this date (i.e. 1st April, 2018), Regulation 2(1)(ea) was inserted between Regulation 2(1)(e) and Regulation 2(1)(f) of the LP Regulations, to provide the following definition :

> *"(**ea**) "**liquidation cost**" under **sub-section (16) of section 5** means-*
>
> *(a) **fee payable to the liquidator under regulation 4**;*
>
> *(b) **remuneration payable** by the liquidator under **regulation 7**;*
>
> *(c) **cost incurred** by the liquidator under **regulation 24**; and*
>
> *(d) **interest on interim finance** for a period of twelve months or for the period from the liquidation commencement date till repayment of interim finance, whichever is lower".*
>
> *[**Emphasis Supplied**]*

19. The aforesaid definition used the term "means" but used the phrase "under sub-section (16) of section 5" to list four elements of

liquidation costs. In the 2019 Amendments, with effect from 25th July, 2019, Regulation 2(1)(ea) was substituted by the following:

> *(ea) "liquidation cost" under clause (16) of section 5 means--*
>
> *(i) fee payable to the liquidator under regulation 4;*
>
> *(ii) remuneration payable by the liquidator under sub-regulation (1) of regulation 7;*
>
> *(iii) costs incurred by the liquidator under sub-regulation (2) of regulation 24;*
>
> *(iv) costs incurred by the liquidator for preserving and protecting the assets, properties, effects and actionable claims, including secured assets, of the corporate debtor;*
>
> *(v) costs incurred by the liquidator in carrying on the business of the corporate debtor as a going concern;*
>
> *(vi) interest on interim finance for a period of twelve months or for the period from the liquidation commencement date till repayment of interim finance, whichever is lower;*
>
> *(vii) the amount repayable to under sub-regulation (3) of regulation 2A;*
>
> *(viii) any other cost incurred by the liquidator which is essential for completing the liquidation process:*
>
> *PROVIDED that the cost, if any, incurred by the liquidator in relation to compromise or arrangement under section 230 of the Companies Act, 2013 (18 of 2013), if any, shall not form part of liquidation cost.*
>
> *[Emphasis Supplied]*

20. Sub-clauses (iv), (v), (vii) and (viii) of Regulation 2(1)(ea) were not found in the definition prior to the 2019 Amendments. The *proviso* to exclude costs incurred on a scheme of compromise or arrangement, too was not contained in the earlier version. However, the over-arching definition of "liquidation cost" provided in Section 5(16) of the IBC has remained unchanged since inception of the IBC. Between 1st December, 2016 (when the liquidation-related provisions of the IBC were brought into force) through 15th December, 2016 (when the LP Regulations took effect) and 1st April, 2018 (when Regulation 2(1)(ea) was introduced for the first time), the conceptual definition under Section 5(16) of the IBC for "*liquidation costs*" provided the core meaning.

21. The core issue that falls for our consideration in the judicial review involved in these proceedings is whether the Impugned Circular simply clarifies Regulation 4(2)(b), or whether it effects substantive amendments to the term in the garb of clarification. In dealing with quasi-judicial proceedings pursuant to the Second Show Cause Notice, whether the IBBI would be entitled to rely on the Impugned Circular to interpret Regulation 4(2)(b) of the LP Regulations, is a matter to be considered. In our judicial review, we refrain from passing judgment or expressing our opinion on the factual allegations levelled by the IBBI

against the Petitioner. In our opinion, the appropriate forum for answering questions of fact is the IBBI, in its *quasi*-judicial role, to be discharged in accordance with law.

22. Before we extract and deal with each of the five core contents of the Impugned Circular (Paragraph 2.1 to Paragraph 2.5 thereof), it is important to notice the preamble to the Impugned Circular, which is extracted below :

> ***"Subject: Clarification w.r.t. Liquidators' fee under clause (b) of sub-regulation (2) of Regulation 4 of IBBI (Liquidation Process) Regulations, 2016***
>
> *Regulation 4 of the IBBI (Liquidation Process) Regulations, 2016 (Liquidation Regulations) provides for Liquidator's fee. Sub-regulation (1) and (1A) provide that the fee payable to the liquidator be decided by the Committee of Creditors (CoC) or Stakeholders' Consultation Committee (SCC), as the case may be. If liquidators' fee is not fixed under sub-regulation (1) and (1A), clause (b) of sub-regulation (2) of Regulation 4 provides that the liquidator shall be entitled to a fee as a percentage of the* ***amount realised*** *net of* ***other liquidation costs****, and of the* ***amount distributed****, for the balance period of liquidation, as under:*
>
> *[*****]*[1]
>
> *2. Based on records examined during the inspections and investigations and interaction with stakeholders, it has been observed that different interpretations of terms highlighted above are being made by the liquidator which are being clarified below:-"*
>
> ***[<u>Emphasis in Original</u>]***

[1]*For convenience, the table as contained in Regulation 4(2)(b) is not repeated here.*

23. A plain reading of the foregoing preamble would show that what is sought to be clarified is the manner in which the terms *"amount realised"; "other liquidation costs";* and *"amount distributed"* ought to be interpreted by all IPs in order to be compliant. In Paragraph 3, the Impugned Circular contains a directional stipulation in the following words:

> *"3. The **IPs** who are currently handling or have handled in the past any liquidation assignment **shall ensure that the fee charged by them under Regulation 4(2)(b) is in accordance with above clarifications** and inform the same to the Board electronically on the website of IBBI. In cases, **where excess liquidator's fee is returned and distributed on or before 31st** October 2023 no disciplinary proceedings will be initiated on the ground that the excess fee was charged and has now been returned."*
>
> *[**Emphasis Supplied**]*

24. In short, it is the IBBI's explicit intention that IPs who are currently handling or have handled liquidation assignments must adhere to the positions stipulated in the Impugned Circular. This would extend even to past assignments already handled by them. Where the interpretation stipulated in the Impugned Circular leads to a conclusion that excess fees have been charged, such excess fee is required to be returned and distributed on or before 31st October, 2023, failing which, the wrath of disciplinary proceedings would be attracted.

25. Therefore, it is vital to examine if the Impugned Circular is merely clarificatory or of it introduces new standards. If it were purely clarificatory, it would only explain how Regulation 4(2)(b) ought to have always been understood. However, if it were to stipulate new legal standards, it would be a backdoor amendment of the LP Regulations without following the process of law and that too retrospectively.

Impugned Circular – Object and Source of Power:

26. Before analysing the core contents of the Impugned Circular, we think it is also necessary to consider the source of power to issue such circulars. The Impugned Circular invokes Section 196 of the IBC, which empowers the IBBI to perform various functions listed therein. Section 196(1)(t) empowers the IBBI to make regulations and guidelines on matters relating to insolvency and bankruptcy, including a mechanism for time bound disposal of the assets of the Corporate Debtors. Section 240(1) of the IBC empowers the IBBI to make regulations to carry out the provisions of the IBC. Section 240(2)(e) empowers the IBBI to make regulations in connection with *liquidation costs* while Section 240(2)(x) enables making regulations in respect of fees for conduct of liquidation proceedings. Therefore, the IBBI indeed has powers to make regulations and guidelines under Section 196. Any component of the

Impugned Circular that is not *ultra vires* the LP Regulations, would, in our view, constitute validly made "guidelines" to enable the world at large to appreciate matters of insolvency and bankruptcy. That said, such guidelines must necessarily be consistent with, and within the parameters stipulated in the IBC, or regulations made under the IBC.

27. As with any subordinate legislation created by an entity to which the Parliament has delegated power to legislate, the regulations made by the IBBI too are required to be tabled in Parliament (under Section 241 of the IBC), for thirty days when Parliament is in session. During such period, Parliament would have the power to modify or annul the subordinate legislation so made. The subordinate legislation would, upon expiry of the thirty-day tabling period, or upon completion of intervention by Parliament, become an integral element of law (subject of course, to judicial review on grounds of constitutional validity or a challenge to the *vires*).

Regulations to govern Regulation-Making:

28. The IBBI, laudably, has subjected itself to a higher standard by making regulations to govern how it would make regulations in the form of the Insolvency and Bankruptcy Board of India (Mechanism for

Issuing Regulations) Regulations, 2018 ("***Law-Making Regulations***"). These regulations entail a pre-legislative public consultation and economic analysis on the proposed draft regulations or draft amendments. The following provisions of the *Law-Making Regulations* are noteworthy:-

> ***4. Public Consultation.***
> *(1) **For the purpose of making regulations**, the **Board shall upload** the following, with the approval of the Governing Board, on its website **seeking comments from the public**-*
>
> > *(a) **draft of proposed regulations**;*
> >
> > *(b) the **specific provision of the Code under which** the Board proposes regulations;*
> >
> > *(c) a **statement of the problem** that the proposed regulation **seeks to address**;*
> >
> > *(d) an **economic analysis** of the proposed regulations **under regulation 5**;*
> >
> > *(e) a statement carrying **norms advocated by international standard setting agencies** and the **international best practices**, if any, **relevant to the proposed regulation**;*
> >
> > *(f) the **manner of implementation** of the proposed regulations; and*
> >
> > *(g) the **manner, process and timelines for receiving comments** from the public.*
>
> *(2) The Board shall allow at least twenty one days for public to submit their comments.*

*(3) The Board shall **consider the public comments** received and **upload the same** on its website along **with a general statement of its response on the comments**, not later than the date of notification of regulations.*

*(4) If the Governing Board decides to **approve regulations in a form substantially different** from the proposed regulations, it **shall repeat the process** under this regulation.*

*(5) The regulations shall be notified promptly after it is approved by the Governing Board and t**he date of their enforcement shall ordinarily be after thirty days from the date of notification** unless a different date is specified therein.*

*(6) Without prejudice to provisions in this regulation, **the Board may consult stakeholders and advisory committees**, as it may consider appropriate for making regulations.*

5. Economic Analysis.

*(1) The Board shall **cause an economic analysis** of the proposed regulations to be made.*

(2) The economic analysis shall cover the following:-

> *(a) **expected costs** to be incurred by, and the **benefits that will accrue** to, **the society, economy, stakeholders and the Board**, both directly and indirectly on account of the proposed regulation; and*
>
> *(b) **how the proposed regulations further strengthen** the objectives of the Code.*

6. Amendment of Regulations.

***An amendment to any regulations** shall be made **in compliance with the provisions of regulations 4 and 5**.*

8. Urgent regulations.

*Where the **Board is of the opinion that certain regulations are required to be made or existing regulations are required to be***

> ***amended urgently**, it **may make regulations or amend** the existing regulations, as the case may be, **with the approval of Governing Board, without following the provisions of regulations 4 and 5**.*
>
> *[**Emphasis Supplied**]*

29. Should the IBBI be desirous of amending the LP Regulations, it would have to comply with the *Law-Making Regulations* and not resort to the back-door route of issuing circulars. On the other hand, should the IBBI be desirous of issuing only clarificatory guidelines, it is free to do so in terms of Section 196(1)(t), as noticed above. Regulation 4(5) of the *Law-Making Regulations* stipulates that ordinarily a deferred prospective date would be fixed for giving effect to regulations and their amendments. Regulation 8 provides for how to handle urgent situations. None of this would be complied with if substantive provisions are made in the garb of clarificatory circulars.

30. Indeed, regulators, particularly those exercising power to issue registrations and licenses to professionals in practice, must be given a reasonable play in the joints to explain their regulatory framework and throw greater light on the standards expected in the law. Towards this end, the power to issue guidelines is an important one and must not be interfered with lightly. Any judicial intervention into such exercise of power should be sensitive to the need for providing regulatory clarity to

society even while being mindful to look for whether substantive stipulations of law are masquerading as clarificatory guidelines.

Key Contentions of the Parties:

31. The crux of the Petitioner's grounds of challenge (nearly 40 grounds, copiously arguing case law) can be broadly summarised thus:- That the Impugned Circular is beyond the scope of the IBBI's powers since Section 196 of the IBC does not enable the IBBI to introduce new definitions in the garb of clarifying existing legislation, and as such, demonstrates a violation of the *Law-Making Regulations*;

a) That the Impugned Circular is vague, uncertain, and retrospectively makes past actions of IPs illegal, demonstrating that the IBBI has exceeded and abused the powers conferred on it;

b) That the direction to refund any fees considered to be in excess of permissible thresholds (by applying the Impugned Circular) under threat of disciplinary proceedings, makes the Impugned Circular retrospective in its application, and therefore violative of Article 19(1)(g) and Article 20(1) of the Constitution of India;

c) That the Impugned Circular, being an instrument of subordinate legislation, cannot introduce a penal provision in the garb of a clarification, and therefore, at the very least, deserves to be read down; and

d) That the Impugned Circular vitiates the Petitioner's legitimate expectation that his fees would be computed as understood in the LP Regulations, without being curtailed by provisions that are retrospectively introduced in the garb of a clarificatory circular.

32. The IBBI has filed an affidavit dated 30th January, 2024, seeking to resist the Petition. The key contentions of the IBBI may be summarised thus:-

a) The Impugned Circular is a clarification aimed to remedy the unconscionable enrichment of liquidators who are not deducting *liquidation costs* incurred, particularly those relating to running of the business of Corporate Debtors as a going concern;

b) When assets of the Corporate Debtor are already liquid,

there is no effort involved in liquidating them, and therefore, the term "amount realised" should only relate to amounts realised in liquidating illiquid assets;

c) In 111 cases, liquidators have realised their mistake after reading the Impugned Circular and have refunded excess fees to the tune of Rs. 5.75 crores, while 630 liquidators have confirmed that their understanding was consistent with the IBBI's interpretation of Regulation 4(2)(b);

d) In contrast, the Petitioner has helped himself to an excess fee of over Rs. 6.29 crores, of which, a sum of Rs. 5.55 crores is attributable to the Petitioner not counting the cost of running businesses as a going concern, as "*liquidation costs*". Although the Petitioner has incurred and paid such costs in priority to all other costs, by showing them as *liquidation costs*, when complying with other provisions of the LP Regulations, he has not deducted them from the amounts realised from liquidation to compute his realisation fees;

e) The Petitioner has treated payments made to contractual counter-parties in the course of running the business as a going

concern, as "distributions" made to "stakeholders" (operational creditors), and thereby claimed fees as a percentage of such "distribution" in the course of liquidation;

f) The four components of *liquidation costs* added to the definition of the term in Regulation 2(1)(ea) have always been components that are paid in priority to all other stakeholders under Section 53 of the IBC and therefore, these were not new additions to the definition, but were merely clarificatory additions; and

g) Liquidators have been unilaterally excluding periods of time for which a court may have stayed the disposal of an asset, or a secured creditor may have delayed relinquishment of the asset, and computing the percentage applicable under the time slabs to their benefit. Any exclusion of time should only be with the stamp of judicial approval from the National Company Law Tribunal ("***NCLT***"), which is the 'Adjudicating Authority' that oversees resolution and liquidation, or as the case may be, the National Company Law Appellate Tribunal ("***NCLAT***").

Impugned Circular – Analysis of Legal Validity of Contents :

33. Against this backdrop, we proceed to analyse each of the five components of the Impugned Circular, to see if they are truly in the nature of clarificatory guidelines or whether they are substantive amendments of the requirements of law. We have extracted below, each of the paragraphs of the Impugned Circular, namely Paragraph 2.1 to Paragraph 2.5 thereof. We have dealt with whether or not the five components of the Impugned Circular are *ultra vires* the LP Regulations or the IBC.

34. Needless to say, we have approached the Impugned Circular with the presumption of constitutional validity. Where any portion of the Impugned Circular introduces elements alien to the LP Regulations (and by extension, to the IBC), we have ruled that those portions indeed introduce completely new ingredients, which could have only been done by way of substantive amendments to the LP Regulations. Evidently, the resort to issuance of circulars to introduce completely new stipulations in the law, would necessarily circumvent compliance with the due process mandated in the *Law-Making Regulations*.

35. As a result, Paragraph 2.1 and Paragraph 2.5 have been struck

down, as being ultra vires the LP Regulations and the IBC. They introduce completely new elements that are not found in the current legal framework. Where we have found that the contents of the Impugned Circular are only clarificatory and not new substantive stipulations, we have upheld the validity of such contents. Paragraph 2.2, therefore, withstands the scrutiny of judicial review. Where we have found that the Impugned Circular, despite the intention to clarify matters, may in fact create new confusion, we have interpreted such content of the Impugned Circular in the context of the LP Regulations, to save them from being struck down. As a result, Paragraph 2.3 and Paragraph 2.4, are interpreted and explained so that they are understood in a manner that would render such content legal and constitutional.

Paragraph 2.1 – Amount Realised:

36. The contents of Paragraph 2.1 of the Impugned Circular are extracted below:-

> *2.1 Amount realised:*
>
> *Regulation 4(2)(b) provides that the fee shall be "as a percentage of the amount realised net of other liquidation costs, and of the amount distributed, for the balance period of liquidation…."*
>
> *"**Amount realised**" means an **amount that is being realised from the sale of an asset where the asset changes form**. Where the **asset is already liquid** such as cash and bank balance including term deposits, mutual*

> *funds, and quoted shares,* ***there is no 'realisation'****, and* ***funds are readily available for distribution****. The amount realised, thus, implies the proceeds from the sale/realization from the liquidation of assets which are not liquid.* ***Therefore, the liquidator is not entitled to a fee on realisation for these liquid assets and is entitled to a fee only on distribution****.*
>
> ***Clarification****: "****Amount realised****" shall mean* ***amount realised from assets other than liquid assets*** *such as cash and bank balance* ***including term deposit, mutual fund, quoted share available on start of the process*** *after exploring compromise and arrangement, if any.*
>
> *[****Emphasis Supplied****]*

37. Even a plain reading of the contents of Paragraph 2.1 would show that they introduce completely new legal standards. Nowhere in the IBC or in the LP Regulations, is there a whisper of a basis to hold that liquidation fees are payable only for liquidating illiquid assets. The Impugned Circular and the IBBI's affidavit in reply, introduce a new standard of perceived effort or lack of it in the process of liquidation. The standard that an asset under liquidation has to "change form" is found only in the Impugned Circular and is not found in the LP Regulations or in the IBC. Even the notion that no effort would be involved in liquidating liquid assets could well be untenable – a pre-legislative consultation under the *Law-Making Regulations* would be warranted for introducing such a requirement. It therefore follows that Paragraph 2.1 indeed represents an over-reach, extending way beyond the LP Regulations and the IBC.

38. Paragraph 2.1 uses an inclusive approach to suggest that term deposits, mutual fund units and quoted shares are illustrative of what would be considered by the IBBI as being "liquid" assets. While such an inference may hold good for cash and bank balances held by a Corporate Debtor, Paragraph 2.1 by implication, extends to any and every asset that can subjectively be called "liquid". It explicitly includes "quoted shares" and "mutual fund" units. Such a stance is misconceived. Even for "quoted shares", significant effort and skill may be required to offload a substantial holding without eroding value. Merely because a share is quoted, it would not follow that it is a liquid asset. That is why securities regulations differentiate between "frequently traded" shares and "infrequently traded" shares. It is unreasonable and arbitrary to read into the term "amount realised", requirements of considering the "form" of the asset and the "effort" involved to liquidate the asset. Such a stipulation cannot be held to be merely clarificatory.

39. Using the term "liquid" as an adjective for an asset in the context of "liquidation" can at best be a word play. If it had been the intention of either Parliament (in making the IBC) or the IBBI (in making the LP Regulations) to make such a distribution, such a classification would have been found in the provisions of these legislations. Such

classification is introduced for the first time in the Impugned Circular, without any backing in the legislation. Therefore, to inflict the wrath of disciplinary proceedings, be it penal or remedial in nature, by introducing Paragraph 2.1 of the Impugned Circular in the midst of ongoing regulatory proceedings, without any backing for it either in the IBC or the LP Regulations, is manifestly arbitrary and unconstitutional. We have no hesitation in striking down Paragraph 2.1 of the Impugned Circular as being *ultra vires* the IBC and the LP Regulations.

40. We hasten to add that it would indeed be feasible for the IBBI, in its legislative wisdom, to propose the contents of Paragraph 2.1 as an amendment to the LP Regulations, in compliance with the *Law-Making Regulations*. Such an amendment would evidently take prospective effect, and would not be available to punish past actions. The pre-legislative consultation could present to the IBBI, propositions of how its thinking is misconceived. The IBBI would then be able to mould its proposal and mould its proposed legislative intervention appropriately. No such exercise, despite being mandated in the *Law-Making Regulations*, has been carried out.

41. As a result of the foregoing discussion, Paragraph 2.1 of the Impugned Circular is hereby struck down as being *ultra vires* the LP

Regulations and the IBC.

42. We may note here that regulatory agencies (such as the IBBI) are clothed with powers of all three arms of the State – the legislative, the executive and the judicial – and must be even more careful in issuing instruments of law. The notification of the *Law-Making Regulations* by the IBBI is a laudable measure of improving quality of legislative governance and it ought to be followed through in practice, without being allowed to become a dead letter of subordinate legislation.

Paragraph 2.2 – Other Liquidation Costs:

43. The contents of Paragraph 2.2 are extracted below:-

> *2.2 Other liquidation costs:*
>
> *The term "**Amount of Realisation (exclusive of liquidation costs)**" given in the table in Regulation 4(2)(b) mandates that all liquidation costs are to be deducted from the realisation amount. However, **as per regulation 4(2)(b), "other liquidation cost" is to be deducted from realisation**. There is a gap in understanding in the market about what components of the liquidation cost are to be excluded from the liquidation cost to derive "other liquidation cost".*
>
> *The **component that can be excluded is only that part of the liquidation cost which is itself dependent for its calculation on other liquidation costs** i.e., liquidator's fee. Including the same in "other liquidation cost" would entail a circular reference to the liquidator fee for the calculation of liquidator fee making the calculation very tedious and impractical. Hence, **all other components of liquidation cost apart from liquidator's fee shall be part of the "other liquidation cost"**.*

*In few cases, **liquidators are only considering process cost as "other liquidation cost" and thereby, exclude the cost incurred in preserving and protecting the assets of the CD, and running the CD as a going concern to calculate "other liquidation cost"**. Before amendment dated 25th July, 2019 to the Liquidation Regulations, the liquidation cost under Regulation 2(1)(ea) had four components. **To clarify the liquidation cost, through aforesaid amendment four new components of liquidation cost were added. In some cases, it is being wrongly interpreted that these newly added four components, inter-alia, such as going concern costs etc., are to not be considered as the liquidation cost in respect of all those cases where the liquidation process commenced before the aforesaid amendment**. Since **these four components are paid in priority to payment to stakeholders as per section 53 of the Code** by virtue of it being liquidation cost under section 53(1)(a), **these newly added components were always part of the liquidation cost** irrespective of the date of commencement of liquidation process. Any other interpretation would create **uncertainty about the priority of payment of these components of liquidation cost over payment to stakeholders**.*

*Furthermore, **the term "other liquidation cost" existed right from the inception of liquidation regulations** and thus could not have meant to exclude certain components of liquidation costs from "liquidation costs" which were added by a subsequent amendment in 2019.*

***Clarification**: The "**other liquidation cost**" in regulation 4(2)(b) shall mean **liquidation cost paid in priority under section 53(1)(a), after excluding the liquidator's fee**.*

*[**Emphasis Supplied**]*

44. We have already set out the legislative history and overall scheme of the IBC and the LP Regulations in connection with the definition and meaning of the term "liquidation cost". The term is primarily defined in Section 5(16) of the IBC. The LP Regulations are merely iterative of types of *liquidation costs* that flow from the over-arching definition in

the IBC (any cost incurred by the liquidator during the liquidation period). The initial version of the LP Regulations did not even have any definition of the term "*liquidation cost*". The definition was introduced in the LP Regulations only on 1st April, 2018, with four types of *liquidation costs*. Four more types of *liquidation costs* were added in the 2019 Amendments with effect from 25th July, 2019, including the costs of running the business as a going concern pending liquidation (which is the bone of contention in these proceedings).

45. The logic behind Section 5(16) providing an expansive and a conceptual definition, that would bring within its sweep, costs of running the business as a going concern, is not far to seek. If a business is preserved pending liquidation by running it as a going concern, the liquidator in management of the business would incur and pay costs before distributing the proceeds of liquidation to stakeholders such as workmen, secured creditors, unsecured creditors and the others (in accordance with Section 53 of the IBC). Regulation 4(2)(b) makes it abundantly clear that the amount realised must be reduced by the *liquidation costs* to arrive at the base amount on which, the liquidator's percentage fee would be payable. Therefore, there is no doubt in our mind that *liquidation costs*, as defined in Section 5(16) of the IBC,

would bring such costs within its sweep. The amount of such costs must necessarily be excluded from the liquidation proceeds realised, and the liquidator's fees would need to be computed on that net amount.

46. We say this because but for such a framework, the fee structure in the LP Regulations would not incentivise the liquidator to keep a firm control over the costs incurred during liquidation. A liquidator may then recklessly incur costs, with no implications on his own fees. On the other hand, a common-sensical application of Section 5(16) of the IBC to the situation, would lead to the logical inference that the liquidator is incentivised to keep costs down. The more frugal he is with costs in running the business, the higher his fee would be.

47. Mr. Sharan Jagtiani on behalf of the Petitioner, in connection with Paragraph 2.2 of the Impugned Circular, presented three legal arguments to buttress his submission that the Impugned Circular gives retrospective effect to the 2019 Amendments, and is thereby unconstitutional. *First*, he would submit that the 2019 Amendments were introduced on 25th July, 2019, and therefore, only liquidation assignments that commenced after that date should have to comply with the new definition contained in Regulation 2(1)(ea) of the LP

Regulations. *Second*, he would submit, the definition of "liquidation cost" in Regulation 2(1)(ea) uses the term "means" and it is therefore an exhaustive definition. The IBBI has consciously not chosen to use "includes" in the definition, and therefore, he would argue, any addition to the term as made in the 2019 Amendments cannot be regarded as clarificatory amendments. *Third*, Mr. Jagtiani alluded to a circular dated 26th August, 2019 issued by the IBBI after the 2019 Amendments , which purported to clarify that the 2019 Amendments would take prospective effect.

48. We find that each of the aforesaid contentions is misconceived. The definition of term "liquidation cost" in the LP Regulations does not operate in a vacuum. The IBC and the LP Regulations regulate what costs can be incurred by the liquidator. Section 53 of the IBC, which sets out the priority of distribution of the proceeds of realisation from assets liquidated, lists CIRP costs and *liquidation costs* as the very first permitted outflow (under Section 53(1)(a) of the IBC). Even if one ignores every reference to the term "*liquidation cost*" in the 2019 Amendments that casts obligations (as opposed to definitional amendments), it should be noted that the term "liquidation cost" has been used in the LP Regulations since inception (when the term was not defined anywhere outside Section 5(16) of the IBC). For example,

Regulation 42 of the LP Regulations, dealing with distribution, provides for deducting any *liquidation costs* before making distributions. If the costs incurred for running the business as a going concern were not to be regarded as a "liquidation cost" prior to 25th July, 2019 (the 2019 Amendments listed such costs within Regulation 2(1)(ea) of the LP Regulations), it would follow that such costs could never have been incurred and paid out in priority to all other payments. Such a reading would lead to an evident absurdity. The business would be run as a going concern to preserve value pending liquidation, but the costs incurred in doing so would not be capable of being legitimately paid out. Those transacting with the Corporate Debtor (say, a supplier of electricity) would have to wait in queue in line with the priority stipulated in the IBC, and not be paid despite dealing with the Corporate Debtor in the course of its running as a going concern during the liquidation process. In such a scenario, no right-minded person would deal with the Corporate Debtors during liquidation, and running the Corporate Debtors as a going concern would be rendered impossible.

49. Mr. Jagtiani would accept that the Petitioner indeed treated such costs incurred and paid for running the business as a going concern as a "liquidation cost" for purposes of priority in payments for the simple

reason that they were paid out in priority to all other stakeholders. However, for purposes of computing the liquidator's fee under Regulation 4(2)(b), he would argue, prior to 25th July, 2019, such costs not being listed in the definition in Regulation 2(1)(ea), a liquidator would be entitled to compute the fee on liquidation proceeds, without deducting such costs. The argument has to only be stated to be rejected. As seen above, the IBC defines the term "liquidation cost" as "any cost incurred by the liquidator" during liquidation. The costs of running the business as a going concern would evidently fall within its sweep. Besides, as stated above, Section 53 of the IBC read with Regulation 42 of the LP Regulations provide the basis for incurring and paying of such costs in priority over all else during liquidation. If the definition in Regulation 2(1)(ea) would impact Regulation 4(2)(b), so would it impact Regulation 42. It would mean that the liquidator was violating Regulation 42 by wrongly paying amounts in priority to all other payments.

50. Section 5(16) indeed uses the word "means" to define "liquidation cost". The definition in Regulation 2(1)(ea) too adopted the term "means" and not the term "includes" to provide the definition. Such a construct would not axiomatically make the definition in the LP Regulations an exhaustive one. In fact, Regulation 2(1)(ea) uses the

phrase "*liquidation cost* ***under clause (16) of section 5*** *means*". Therefore, this definition necessarily seeks to throw brighter light on the generic (and expansive) definition provided in Section 5(16) of the IBC. Regulation 2(1)(ea), therefore, is an elaboration and illustration of the conceptual definition in Section 5(16) and not one meant to curtail the meaning. In any case, it is trite law that subordinate law cannot circumscribe the parent statute. Any delegation of power that enables such circumscribing would be vulnerable and exposed to the charge of being unconstitutional, due to the vice of excessive delegation. When interpreting any provision of law, where an interpretation saves the constitutional validity of the provision, that interpretation would prevail over any other competing interpretation that undermines the constitutional validity.

51. It is also trite law that the mere usage of the word "means" would not necessarily render a definition to be exhaustive. A three-judge bench of the Hon'ble Supreme Court has explained this pithily in the case of *Executive Engineer, Southern Electricity Supply Company of Orissa Limited (Southco) and Anr. Vs. Sri Seetaram Rice Mill*[2] ("***SOUTHCO***"), where the Court was dealing with the term "*unauthorised use of electricity*", which was defined in Section 126 of the Electricity Act,

[2] *(2012) 2 SCC 108*

2003, as follows:-

> *(b) 'unauthorised use of electricity' **means** the usage of electricity –*
>
> *(i) by any **artificial means**; or*
>
> *(ii) by **a means not authorised** by the person or authority or licensee concerned; or*
>
> *(iii) through a **tampered meter**; or*
>
> *(iv) for **the purpose other than** for which the usage of electricity was **authorised**; or*
>
> *(v) for **the premises or areas other than those** for which the supply of electricity was **authorised**."*
>
> ***[Emphasis Supplied]***

52. The Hon'ble Supreme Court repelled arguments that any usage of electricity that is not covered by the definition of "unauthorised use of electricity" (that definition used the phrase "means") would fall outside the meaning of the term. The following extracts are instructive:

> *50. In other words, **the purpose sought to be achieved is to ensure stoppage of misuse/unauthorised use of the electricity as well as to ensure prevention of revenue loss**. It is in this background that the **scope of the expression "means"** has to be construed. **If we hold that the expression "means" is exhaustive** and cases of unauthorised use of electricity are restricted to the ones stated under Explanation (b) of Section 126 alone, then **it shall defeat the very purpose of the 2003 Act**, inasmuch as the **different cases of breach of the terms and conditions** of the contract of supply, Regulations and the provisions of the 2003 Act **would escape the liability sought to be imposed upon them** by the legislature under the provisions of Section 126 of the 2003 Act. **Thus, it will not be appropriate for the courts to adopt such an approach**.*

51. The primary object of the expression "means" is intended to explain the term "unauthorised use of electricity" which, even from the plain reading of the provisions of the 2003 Act or on a common sense view cannot be restricted to the examples given in the Explanation. The legislature has intentionally omitted to use the word "includes" and has only used the word "means" with an intention to explain inter alia what an unauthorised use of electricity would be.

52. The expression " means" would not always be open to such a strict construction that the terms mentioned in a definition clause under such expression would have to be inevitably treated as being exhaustive. There can be a large number of cases and examples where even the expression "means" can be construed liberally and treated to be inclusive but not completely exhaustive of the scope of the definition, of course, depending upon the facts of a given case and the provisions governing that law.

60. The expressions "means", "means and includes" and "does not include" are expressions of different connotation and significance. When the legislature has used a particular expression out of these three, it must be given its plain meaning while even keeping in mind that the use of the other two expressions has not been favoured by the legislature. To put it simply, the legislature has favoured non-use of such expression as opposed to other specific expression. In the present case, the Explanation to Section 126 has used the word "means" in contradistinction to "does not include" and/or " means and includes". This would lead to one obvious result that even the legislature did not intend to completely restrict or limit the scope of this provision.

61. Unauthorised use of electricity cannot be restricted to the stated clauses under the Explanation but has to be given a wider meaning so as to cover cases of violation of the terms and conditions of supply and the Regulations and provisions of the 2003 Act governing such supply. "Unauthorised use of electricity" itself is an expression which would, on its plain reading, take within its scope all the misuse of the electricity or even malpractices adopted while using electricity. It is difficult to restrict this expression and limit its application by the categories stated in the Explanation. It is indisputable that the electricity supply to a consumer is restricted and controlled by the terms and conditions of

supply, the Regulations framed and the provisions of the 2003 Act.

[Emphasis Supplied]

53. ***SOUTHCO*** presents precisely the framework in which to read the meaning of the term "liquidation cost" factoring in Section 5(16) of the IBC and Regulation 2(1)(ea) of the LP Regulations. While in ***SOUTHCO***, the Hon'ble Supreme Court used the common English meaning of the term "unauthorised use of electricity", the present case stands on an even superior footing, with the common meaning of the term "liquidation cost" actually being statutorily contained in Section 5(16) of the IBC as meaning "any cost" incurred by the liquidator. What "liquidation costs" are, is defined in an expansive manner in Section 5(16), by resort to the plain and commonsensical meaning of the term. No need was felt to provide any examples in the LP Regulations that initially took effect on 15th December, 2016. Evidently, Regulation 2(1)(ea) was introduced only with effect from 1st April, 2018 for illustrative clarity, with examples. Before and after this introduction, any costs incurred by the liquidator during the period of liquidation (including costs incurred to run the business as a going concern) would eminently fit within the meaning of the term "*liquidation costs*" as defined in Section 5(16) of the IBC. As a consequence, such costs were capable of being paid in priority to any distribution of liquidation proceeds. With

the 2019 Amendments, the IBBI expanded the illustrations of the term "liquidation cost". After the 2019 Amendments, any such costs (including costs incurred to run the business as a going concern) continued to be treated as *liquidation costs*.

54. Any other reading would make a mockery of the legal framework inasmuch as payments towards *liquidation costs* would need to be made in priority over all others under Section 53 of the IBC (and Regulation 42 of the LP Regulations), and yet, solely for purposes of computing the liquidator's fees, such costs, despite having been paid in priority, would be added back to the amounts realised on liquidation, to present a wider base on which the liquidator's percentage fee would be computed.

55. We, therefore, have no hesitation in rejecting the first two arguments against Paragraph 2.2, as canvassed by Mr. Jagtiani.

56. The third argument needs consideration only because of inelegant issuance of circulars by the IBBI. It is a matter of record that the IBBI issued a circular on 28th August, 2019 stating that the 2019 Amendments would have prospective effect. It is also a matter of record that by another circular dated 6th May, 2022, the IBBI clarified the

earlier clarification by stating that only the provisions of the 2019 Amendments that imposed obligations (provisions other than definitions) were meant to have prospective effect.

57. Needless to say, when conducting judicial review of the validity of an instrument of law issued by the IBBI, the views of the IBBI (whether or not they remained unchanged) would not be dispositive of constitutional validity of the instrument. Clumsiness on the part of authors of multiple circulars can present confusion and must truly be avoided. However, such clumsiness would not present any estoppel in the IBBI's ability to correct its mistakes. In any event, none of this can be of consequence to a constitutional court's judicial review of an instrument of law. We have analysed and explained above, our reasons for interpreting the term "liquidation cost" for purposes of all provisions of the LP Regulations, in a manner consistent with Section 5(16) of the IBC. Such reasoning would not stand varied or altered by the IBBI's issuance of the aforesaid two circulars.

58. Therefore, to conclude on Paragraph 2.2 of the Impugned Circular, we find that there is nothing objectionable or contrary to the IBC or the LP Regulations, in the IBBI's assertion in the Impugned

Circular, that the 2019 Amendments were clarificatory. We find no reason to interfere with the contents of Paragraph 2.2, which are not *ultra vires* the IBC and the LP Regulations. In fact, Paragraph 2.2 as read in the Impugned Circular is consistent with the scope and scheme of the IBC and the LP Regulations. Unlike Paragraph 2.1 of the Impugned Circular, Paragraph 2.2 of the Impugned Circular does not seek to legislate any new standard in the garb of a clarification.

59. We make it clear that we have restricted ourselves to ruling on the constitutional and legal validity of Paragraph 2.2 of the Impugned Circular. We have refrained from expressing our opinion on the application of the said contents to the specific facts of the Petitioner's case and the assignments handled by him. We also do not wish to foreclose the scope for the Petitioner to explain his *bonafides* in understanding the law and how he applied it in his assignments. We do not wish to foreclose the IBBI's regulatory response on what would represent the most appropriate regulatory reaction to such submissions on merits in the facts of the case. Therefore, we are not expressing our views on whether the doctrine of doubtful penalization would be available, although the same was canvassed on behalf of the Petitioner. The Petitioner is free to make such submissions to the IBBI, as advised.

The IBBI is free to formulate its regulatory response, in discharge of its quasi-judicial role in accordance with law.

Paragraph 2.3 – Amount Distributed to Stakeholders:

60. The contents of Paragraph 2.3 are extracted below:-

> ***2.3 Amount distributed to stakeholders:***
>
> ***Section 53 provides for order of priority for making distribution*** *out of proceeds from sale of assets. Further,* ***Regulation 42*** *provides that:*
>
> ***Distribution****.*
> *(1) …….*
>
> *(2) The* ***liquidator shall distribute the proceeds from realization*** *within ninety days from the receipt of the amount to the stakeholders.*
>
> *(3) The* ***insolvency resolution process costs****, if any, and* ***the liquidation costs shall be deducted before such distribution*** *is made.*
>
> *Furthermore, the table in Regulation 4(2)(b) provides for liquidator's fees to be calculated as a percentage of the 'Amount Distributed to Stakeholders'. However, in few cases,* ***it has been observed that the liquidators are erroneously calculating fees even on distribution of the CIRP cost and liquidation cost, including expenses incurred in running the business of the CD during the liquidation process****. The conjoint reading of Regulation 42(2) and 42(3) read with Regulation 4(2)(b) mandates the liquidator to distribute the proceeds from realization after deducting the payment of CIRP cost and liquidation costs as these costs do not represent distribution of proceeds to stakeholders/ claimants.*
>
> ***Clarification****: "****Amount distributed to stakeholders****" shall mean* ***distributions made*** *to the stakeholders,* ***after deducting CIRP and liquidation cost****.*
>
> *[****Emphasis Supplied****]*

61. The primary attack against Paragraph 2.3 is that it lends itself to a potential double count of *liquidation costs* in the course of computing the liquidator's fees. *Liquidation costs* are deductible from the liquidation proceeds realised, to compute the realisation fee. Paragraph 2.3 can be read to suggest that the same costs can be deducted again, and therefore, Mr. Jagtiani argued, it presents a scope for abuse and misuse. Therefore, he would argue, this portion of the Impugned Circular, ought to be struck down as being arbitrary.

62. While at first blush, it appeared that the language in Paragraph 2.3 could potentially lead to a double deduction of the same *liquidation costs*, on a closer review of the record, the mischief sought to be addressed by the clarification becomes apparent. When one reviews Paragraph 2.3 in the context of the facts dealt with by it and the material on record, to discern what it is meant to cover, the import of Paragraph 2.3 becomes clear. The IBBI has pointed out in its reply affidavit that payments made to commercial counter-parties in the course of running the business as a going concern have been treated by liquidators as payments to "stakeholders". The premise of treating the payees when incurring these costs as "stakeholders" is that those providing goods and services to the Corporate Debtor are "operational creditors".

63. It is settled law that mere apprehension that an instrument of law may be abused or misinterpreted cannot lead to the provision being declared unconstitutional. Indeed, the Impugned Circular could have been more elegantly worded to bring out what it sought to clarify, but it is quite clear to us that Paragraph 2.3 seeks to make it clear that payments made to operational creditors in the course of running the business as a going concern is not a "distribution" to "stakeholders" for the liquidator to become entitled to a percentage-based distribution fee on the amount of liquidation costs.

64. Under the second part of the table in Regulation 4(2)(b), liquidators are incentivised to distribute the liquidation proceeds speedily. The distribution fee incentivises efficiency in distribution by paying a higher percentage rate for faster distribution. Such percentage is to be computed on the proceeds distributed. The liquidator has to assess claims of various stakeholders and determine the payments due to them, in compliance with Section 53 of the IBC, read with Regulation 42 of the LP Regulations. Once the amounts are realised, the liquidator's fees are computed as a percentage after deducting the *liquidation costs*. That amount realised, net of *liquidation costs*, is the amount to be distributed, after assessment of claims. The distribution fee is to be computed on such amount "distributed". If payments made

to meet day-to-day costs in keeping a business running as a going concern, are treated as "distribution" to "stakeholders" it would truly turn the very scheme of the LP Regulations on its head. Therefore, the contents of Paragraph 2.3 are not inconsistent with the IBC or the LP Regulations, and do not deserve to be struck down on the premise of being *ultra vires* the IBC or the LP Regulations.

65. We have restricted ourselves to examining if Paragraph 2.3 of the Impugned Circular creates any new standard that is outside the scope and reach of the LP Regulations, to consider if it deserves to be struck down. We are not satisfied that Paragraph 2.3 lends itself to being struck down. It is also common-sensical and logical that the same *liquidation costs* cannot be reduced twice over to compute the fees of the liquidator (once when computing the fees linked to liquidation, and again, when computing fees linked to distribution). Mr. Pankaj Vijayan, on behalf of the IBBI also clarified during arguments that a double count of the same *liquidation costs* was not the intent of the IBBI. The example contained in the reply affidavit of the IBBI too does not show any double deduction.

66. Since the Impugned Circular explains that the IBBI has observed liquidators charging their distribution fee even on payments made

towards expenses incurred in running the business, the objective of the clarification is apparent. Therefore, we refrain from interfering with Paragraph 2.3. We hold that the contents of Paragraph 2.3 would work towards clarifying that payments of amounts towards running the business as a going concern cannot be regarded as a "distribution" to "stakeholders" but would be "*liquidation costs*". With that declaration of the law, we dispose of the challenge to Paragraph 2.3 of the Impugned Circular, without any interference.

Paragraph 2.4 (Amount of Realisation / Distribution):

67. The contents of Paragraph 2.4 are extracted below:-

> ***2.4 Amount of Realisation /Distribution:***
>
> *It is observed that* ***different interpretations are being made for the words "Amount of Realisation /Distribution"*** *used in table in the Regulation 4(2)(b). Though,* ***most of them are interpreting it correctly to mean the cumulative value of assets realised*** *till date,* ***few are interpreting it to mean the value of assets realised during the first six months and then next six months and so on****. The words "Amount of Realisation /Distribution" are mentioned in column 1 only. Other columns are for percentage of fees on such realisation/distribution. Thus, the* ***cumulative value of amount realised/ distributed is to be bifurcated in various slabs as per column 1****. Only* ***after that, liquidator has to divide the amount realised in a particular slab based on the tenure in which it was realised*** *such as in first six months, next six months or thereafter.*
>
> *Out of the total amount pertaining to that slab, for the amount realised in first six months, % of fees will be as per column 2; for the amount realised in next six months, % of fees will be as per column 3; and for the amount realised thereafter, % of fees will be as per column 4.*

Illustration: [*****][3]

In the above illustrations, the liquidator is getting more fee if he realises the assets within 12 months in comparison to realisation of the assets within 6 months *which is against the spirit of the regulation. Thus, it is clear that the* ***cumulative value of amount realised/ distributed is to be bifurcated in various slabs as per column 1****. Only after that, the liquidator has to divide the amount realised in a particular slab based on the tenure in which it was realised such as in first six months, next six months or thereafter. Thereafter, fee rate for various amounts realised in various periods are to be taken as per columns 2, 3 and 4.*

Clarification*: "****Amount of Realisation /Distribution****" shall mean* ***cumulative value of amount realised/ distributed*** *which is to be* ***bifurcated in various slabs*** *as per column 1 and* ***thereafter the same is to be bifurcated into realisation/ distribution*** *in various periods of time* ***and then corresponding fee rate from the table is to be taken****.*

*[****Emphasis Supplied****]*

68. Paragraph 2.4 too is not an epitome of elegance in drafting, in its stated intent to be a clarification. However, it is also not arbitrary or *ultra vires* the IBC and the LP Regulations inasmuch as it does not introduce any new standard. Suffice it to say that all Paragraph 2.4 means is that the cumulative amount realised or distributed must be computed. Thereafter, the time period in which such amounts were realised or, as the case may be, distributed, must be determined. The applicable percentage rates based on such matrix must be applied.

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[3] *In the interest of brevity, the illustrations are not extracted.*

69. Mr. Jagtiani fairly stated that the Writ Petition does not contain any pleading assailing Paragraph 2.4 of the Impugned Circular. His generic grievance is that circulars ought not to be issued in the absence of any confusion, and the LP Regulations must be allowed to run their course.

70. This component of the Impugned Circular need not detain our attention. Suffice it so say, regulators of professionals must indeed make their mind known and issue practice notes and clarifications, to make their policy thinking well known to the communities they regulate. Indeed, care should be taken to ensure that clarifications must not create new areas of confusion.

71. Therefore, in these aforesaid terms, we refrain from interfering with Paragraph 2.4 of the Impugned Circular.

Paragraph 2.5 (Period for calculation of fee):

72. The contents of Paragraph 2.5 are extracted below:-

> *2.5 Period for calculation of fee:*
>
> *It has been observed that the* ***liquidators are suo-moto excluding various time periods such as stay by court on sale*** *of a particular asset,* ***delay in relinquishment by secured creditor****, for the purpose of calculating the fee. However,* ***since the liquidator works under the overall guidance of the Adjudicating Authority, any such exclusion should have stamp of judicial authority*** *and* ***should be only for the***

> ***asset for which such exclusion has been granted***.
>
> ***Clarification***: ***Exclusion*** *for purpose of fee calculation* ***is to be allowed only when the same has been explicitly provided by the Hon'ble NCLT/ NCLAT or any other court of law*** *and will* ***operate only for the asset which could not have been realised during the excluded period***.
>
> *[**Emphasis Supplied**]*

73. Even a plain reading would show that Paragraph 2.5, akin to Paragraph 2.1, indeed imposes a new standard. It is noteworthy the parties are *ad idem* that computation of liquidator's fees is a matter of self-compliance. Any liquidator helping himself to a non-compliant fee would be amenable to the wrath of disciplinary proceedings that could lead to even cancellation of the registration as an IP. There is no provision in the current legal framework for the liquidator applying to the NCLT or the NCLAT for approval of the liquidator's fees. Therefore, indeed, Paragraph 2.5 of the Impugned Circular, introduces a completely new standard by providing that the NCLT or the NCLAT or any other court of law that has stayed the realisation of any asset would need to approve the exclusion of the time period of the stay, in the computation of the liquidator's fee.

74. Since there is no existing provision in the IBC or in the LP Regulations that requires approval of the NCLT, NCLAT or any other

court of law for a liquidator's fee, introducing such a requirement through the Impugned Circular, is clearly in the nature of a substantial amendment to the LP Regulations, and not a clarification. The introduction of such a requirement could only have been made by amending the LP Regulations, in compliance with the *Law-Making Regulations*. Without that process being followed, Paragraph 2.5 indeed deserves to be struck down.

75. As a matter of law too, Paragraph 2.5 is problematic. It is a fundamental Indian legal principle that acts of court can prejudice no one. However, Paragraph 2.5 turns the principle on its head. Although the LP Regulations are silent on ignoring the effect of the sheer inability to dispose an asset due to a stay order, Paragraph 2.5 introduces a new requirement of the liquidator approaching the forum that stayed the disposal, to also review his fee computation, and approve it. Put differently, the Impugned Circular purports to confer a new jurisdiction that is not in existence, and that too by way of a circular. Strangely, Paragraph 2.5 deals with the effect of a stay on liquidation but is silent about any stay on distribution.

76. The Impugned Circular positively introduces a new position that an act of court would indeed prejudice the liquidator, unless he gets the

court to confirm his fee computation, on a case to case basis. The liquidator may even have to approach different courts since according to Paragraph 2.5, only the forum that stayed a disposal of an asset can confirm if the suspension of the time can be availed of, and that too only for such asset as that court protected from being liquidated. Such a detailed and complicated matrix of regulatory requirements cannot constitute a "guideline" that merely clarifies the existing regulatory framework.

77. The only way to make regulations towards this end would be to do so under Section 240 and comply with the *Law-Making Regulations*. That not having been done, Paragraph 2.5 of the Impugned Circular is indeed a substantive amendment masquerading as a clarification. We have no hesitation in striking it down as being *ultra vires* the LP Regulations and the IBC.

78. A close review of the material on record also reveals that the IBBI has indeed issued a Discussion Paper on 20th October, 2023 on "Strengthening the Liquidation Process" and has proposed amendments to the LP Regulations in this regard. In the proposed amendment, it appears that the IBBI's desire is to empower the Stakeholders'

Committee to approve an adjustment to the liquidator's fees, on account of court-inflicted delays. Even while the standard sought to be introduced in the garb of clarification is different from the standard under active consideration for an amendment to the LP Regulations, what is clear is that Paragraph 2.5 can simply not be upheld as a clarification. The stipulations in it are new standards that create new legal requirements, which apart from being *ultra vires* the IBC and the LP Regulations, cannot be explained away as clarifications.

79. For all the aforesaid reasons, the contents of Paragraph 2.5 are hereby struck down.

Summary of Conclusions:

80. To summarise:-

a) Paragraph 2.1 and Paragraph 2.5 of the Impugned Circular are hereby struck down as being *ultra vires* the LP Regulations and the IBC. They introduce substantive amendments to statutory legislation even while purporting to be mere clarifications. The changes they seek to bring in are not even covered by the IBC and the LP Regulations. Due process by way of compliance with the statutory requirements of the *Law-*

Making Regulations is missing. Therefore, in the course of conducting the quasi-judicial proceedings, the IBBI is prohibited from placing any reliance on Paragraph 2.1 and Paragraph 2.5 of the Impugned Circular in determining if any fee charged by the Petitioner in the liquidation assignments in question, was in excess of permissible thresholds;

b) Paragraph 2.2 is upheld in its terms since it does not stipulate any new standard and rightly clarifies the legal position under Section 5(16) of the IBC read with Regulation 2(1)(ea) of the LP Regulations in discerning the meaning of the term "liquidation cost". The definitional content of Regulation 2(1)(ea) of the LP Regulations is only illustrative of the types of "liquidation cost" that are covered by the term "any cost incurred" under Section 5(16) of the IBC;

c) Paragraph 2.3 and Paragraph 2.4 are upheld. Payments to those doing business with the Corporate Debtor in the course of keeping the business running as a going concern pending liquidation, would not constitute a "distribution" to "stakeholders" from the proceeds of realisation, if they are

paid in priority as "liquidation costs". If any business counter-party is willing to wait in queue to be paid as part of the eventual waterfall mechanism (potentially, in itself, a theoretical and impractical proposition), then such counter-party may be an operational creditor who is a stakeholder to whom proceeds from realisation have to be distributed. But a counter-party who is paid for the purpose and while the business of the Corporate Debtors is running as a going concern during liquidation, and that too ahead of all others (only possible because such payment is a "liquidation cost") would not be a "stakeholder" waiting for "distribution" of the liquidation proceeds realised. Any reliance on Paragraph 2.3 and Paragraph 2.4 of the Impugned Circular in the proceedings, must be in accordance with the declaration of the law on the respective subjects as articulated above;

d) We have expressed no opinion on the facts relating to the Petitioner's handling of the eight liquidation assignments. The Petitioner is free to address his arguments and submissions before IBBI in its quasi-judicial capacity. The IBBI shall apply its mind to the facts of the case in accordance with the law

declared in this judgment;

e) The allegations in the Second Show Cause Notice, insofar as they do not relate to the effect of the Impugned Circular, must be adjudicated on their own merit in accordance with law; and

f) The IBBI must discharge the First Show Cause Notice since it evidently has been subsumed by the Second Show Cause Notice, in substance and content. Multiplicity of proceedings on the same cause of action before the same regulator against the same noticee on the same facts is inappropriate. The IBBI must issue a written communication reconciling the coverage of the two show cause notices and in any case dispose of the proceedings as expeditiously as possible and in accordance with law.

An End Note:

81. Before we part with the matter, we would be remiss if we did not highlight to the IBBI that it must examine the serious effect of the issuance of a show cause notice to any IP. The very issuance of a show cause notice has the effect of stopping the IP from taking up new work

by reason of Bye-Law 23A in the Model Bye-Laws that are statutorily specified in the Schedule to the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, which provides as follows:-

> *"The **authorisation for assignment** shall stand suspended **upon initiation of disciplinary proceedings** by the Agency or by the Board, as the case may be."*
>
> *[**Emphasis Supplied**]*

82. While the aforesaid provision is not under challenge before us, we take judicial notice of the serious repercussions on IPs when the IBBI issues a show cause notice. The moment disciplinary proceedings are initiated, the IP's authorisation to conduct his assignments stands suspended. Such a position enabled by subordinate law can have serious implications for IPs. This position may also have the effect making the IBBI reticent to issue show cause notices, considering the debilitating impact it can have on any IP. This situation deserves to be reviewed by the IBBI.

83. We had refrained from granting interim relief since we felt the ends of justice would be better served by hearing the Writ Petition and disposing it of finally. Since the constitutional validity of this provision is not under challenge before us, we refrain from saying anything

further on this subject.

84. Rule is made absolute in the aforesaid terms. The Writ Petition is disposed of accordingly. In the circumstances, there shall be no order as to costs.

85. This judgment will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this judgment.

[SOMASEKHAR SUNDARESAN, J.] **[B.P. COLABAWALLA, J.]**