

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 392 of 2021

[Arising out of Order dated 23.03.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai, in M.A. No. 3714 of 2019 in C.P. (IB) No. 2714 of 2018]

In the matter of:

**Mr. Jayesh N. Sanghrajka,
Erstwhile R.P. of Ariisto Developers Pvt. Ltd.**

....Appellant

Vs.

**The Monitoring Agency nominated by the Committee
of Creditors of Ariisto Developers Pvt. Ltd.**

....Respondent

**For Appellant: Mr. Dhruv Mehta, Senior Advocate with Mr.
 Tishampati Sen, Ms. Riddhi Sancheti, Mr. Ashish
 Perwani, Mr. Devesh Juvekar, Ms. Jyoti Goyal and
 Mr. Dikshat Mehra, Advocates.**

For Respondents: (Notice not issued)

Mr. Sumant Batra, Ld. Amicus Curiae

**J U D G M E N T
(20th September, 2021)**

A.I.S. Cheema, J.

1. This Appeal has been filed by the Resolution Professional of Corporate Debtor- 'Ariisto Developers Pvt. Ltd.'. The Respondent- Monitoring Agency of the Corporate Debtor is formal party.

2. The Appeal is filed against observations and findings of the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in Para 23 of the impugned order dated 23.03.2021 passed in M.A. No. 3714 of 2019 in C.P. (IB) No. 2714 of 2018. By the impugned order, while approving the Resolution

Plan submitted by Successful Resolution Applicant- 'Prestige Estates Projects Ltd.', the Adjudicating Authority disagreed with the Committee of Creditors ("CoC" for short) which has approved 'success fees' to the Resolution Professional of an amount of Rs.3 Crores.

3. Impugned Para 23 of the impugned order (Page 59) is as under:-

"23. Even though the plan is approved, we would like to disagree with the decision of the COC wherein it has approved the success fees to the RP. It has been made clear by the Hon'ble NCLAT in the matter of Mr. Devarajan Raman, Resolution Professional Poonam Drum & Containers Pvt. Ltd v. Bank of India Ltd. [Company Appeal (AT) (Insolvency) No. 646 of 2020] that the fees of the RP is not the commercial wisdom of the COC. The following para from the said judgment is hereby reproduced:

"...Fixation of fee is not a business decision depending upon the commercial wisdom of the Committee of Creditors. We accordingly find this appeal lacking merit. The appeal is accordingly dismissed. No costs."

Therefore, we believe that by disallowing the success fees to the RP, we are not intruding in the commercial wisdom of the COC. Further, we believe the success fees amounting of Rs.3 Crores is unreasonable. Also, it was only in the last meeting of the COC that the fees was claimed. We have been supervising this matter and are aware of all the scenarios since its admission and therefore, are aware that even the RP was uncertain about the success of the Resolution Plan. It was this Bench who had warned the RP time and again and thus, we believe that the success fees is merely an afterthought. We believe that if the RP was so certain, he should have claimed/ asked for the success fees in the beginning itself and now when the plan is approved. It was only in the distribution matrix that he/CoC had approved the success fees to the RP. With this observation, we direct the RP and the CoC to proportionately distribute the said amount of Rs.3 Cr. among the employees/ underpaid operational creditors/unsecured creditors of the corporate debtor

and if left, it is to be proportionately distributed among the underpaid operational creditors.”

4. Against above part of the impugned order, the present Appeal has been filed. The grievance raised is that the approval of the success fees was a commercial decision of the CoC and the Adjudicating Authority could not have interfered with the same while approving the Resolution Plan and directing distribution of the amount set apart for success fees.

5. When this Appeal come up before us, it was noted that the Respondent is the Monitoring Committee and the Appellant claimed that it is formal party. It being more a legal issue, we had observed on 07.06.2021 that it is not necessary to call the response of the Respondent- CoC as the CoC had already (supposedly) expressed itself in the minutes of meeting. We had observed that considering the issue involved, we may appoint an Amicus Curiae. On 14.06.2021, we had passed the following order:-

“14.06.2021: *In this matter the issue relates to approval of fee to Resolution Professional which is stated to be success fee to the extent of Rs.3 Crores. Learned Senior Counsel for the Appellant refers to Circular No. IBBI/IP/013/2018 dated 12th June, 2018, which is stated to be filed on Page 771 of the compendium - Vol. III. It is stated that such success fee is permissible and that the Adjudicating Authority erred in Para 23 of the impugned order in interfering with the decision taken by the Committee of Creditors in this regard.*

Considering the issue involved, we request Advocate Mr. Sumant Batra to assist us as Amicus Curiae. The Counsel for the Appellant to send the copy of the appeal and its annexures to the Amicus Curiae.

*List the Appeal ‘For Admission Hearing’ on **25th June, 2021.**”*

6. Thus, Advocate Mr. Sumant Batra came to be appointed as Amicus Curiae to assist us in the decision of the issue which has arisen in this matter. It is necessary for us to consider whether the 'success fees' could be charged, and the manner in which it has been charged.

7. The Appellant has filed Written Submissions as well as we have the Written Submissions filed by the Amicus Curiae and we have also heard Learned Senior Counsel for the Appellant as well as the Learned Amicus Curiae. Before discussing the submissions made, it may be appropriate to refer to the relevant parts of documents as are available in this matter.

8. The Corporate Insolvency Resolution Process (CIRP) was initiated on 20.11.2018. In the first CoC meeting dated 24.12.2018, the appointment of Appellant was approved by the CoC as Resolution Professional. The proposal and resolution in this regard of the first CoC meeting can be seen from Page 1 @ Page 5 in the convenience compilation (Diary No. 28117) filed by the Learned Amicus Curiae. The Proposal-9 may be reproduced:-

"9. To propose CA Jayesh Sanghrajka as RP :

One member of the COC, Shri Rasik Chheda, proposed the name of one IP CA Jayesh Sanghrajka as RP at a fees of Rs. 3,00,000 + taxes and Fixed Cost of Rs. 5,00,000.00.

The name of Shri Rasik Chheda is proposed to be voted in the e-voting as an additional resolution.

Members voting in favour of Resolution No. 5 can not vote in favour of this resolution, which may please be noted.

RESOLVED THAT CA Jayesh Sanghrajka be proposed as RP of the company at a monthly fees of Rs. 3.00 lakhs plus taxes and Fixed Cost of Rs. 5.00 lakhs."

9. Now, it would be relevant to refer to the Agenda of the 20th CoC meeting scheduled for 12.11.2019. The same is in Diary No.28117 (Page 222). The Agenda Item No.5 was regarding evaluation of Resolution Plans, to finalize the Resolution Applicant and decide the distribution matrix and way forward. In this Item, Resolution Plans of three entities including the Successful Resolution Applicant were to be put up. With the Agenda 5 having main subject of approval of Resolution Plan and CIRP time running out, there is Agenda Item No.7 which is relevant for present matter and may be reproduced:-

“ITEM No. 7

**TO RATIFY THE CIRP COST INCURRED TILL DATE AND TO
APPROVE THE BUDGET FOR FURTHER EXPENSES TO BE
INCURRED AND DECIDE WAY FORWARD FOR FURTHER
FUND RAISE IN THIS CONNECTION**

It is proposed to discuss and ratify the total expenses incurred till date and further to raise fund to meet Legal expenses for various matters at NCLT and NCLAT, fees of professionals, fees of RP and supporting professionals, site protection, property tax, insecticide treatment charges, salary and various other expenses etc.”

10. At Page 226 is a chart of CIRP expenses as on 10.11.2019. The Learned Amicus Curiae has submitted that he has collected all these copies of minutes of meetings from the Appellant and cannot say if this chart was part of the agenda when it was sent to the CoC Members. The Agenda does not have any link to this chart made available by the Appellant- Resolution Professional. If the chart is perused, the fine print has various entries of CIRP expenses in which there is one entry ‘Success Fees’ with an *(Asterisk) and a fine print footnote stating that ‘Amount of Success Fees to be decided by the COC’.

11. Then there are minutes of 20th CoC meeting dated 12.11.2019 with the adjourned meeting dated 13.11.2019. The document is at Annexure A-1 in the Appeal (Page 63). In these minutes, Item No.4 shown is **‘Subject to the decision of the Hon’ble NCLT Mumbai Bench, to evaluate Resolution Plans, to finalize the Resolution Applicant, decide the distribution matrix and way forward’**. The minutes then show the discussion with regard to the Resolution Plans received. Then Item No.5 may be referred. The same reads as:-

“5. TO RATIFY THE CIRP COST INCURRED TILL DATE AND TO APPROVE THE BUDGET FOR FURTHER EXPENSES TO BE INCURRED AND DECIDE WAY FORWARD FOR FURTHER FUND RAISE IN THIS CONNECTION:

The Chairman informed that he has circulated list of expenses incurred during the CIRP Process of the Corporate Debtor along with the notice of 20th COC Meeting.

The COC members appreciated the efforts made by the RP and his team in bringing successful Resolution Plan of the Corporate Debtor with increment in upfront receipts, which was initially Rs.200 Crores offered by Keystone Realtors Pvt Ltd as refundable deposit and now been enhanced to R5.370 Crores offered by Prestige as non-refundable deposits and bringing down the timeline of the project from 11 years offered by Keystone Realtors Pvt Ltd to 4 years by Prestige for repayment/area share to Financial Creditors and Operational Creditors.

The COC members discussed and deliberated on CIRP Cost incurred till date, budget of expenses and success fee of the RP. After detailed discussion of the COC, it was decided by the COC that Rs.3 Crores is just, fair and reasonable success fee of the RP in the light efforts made by the RP in bringing successful Resolution Plan. (Copy of the List of expenses incurred till date, budget including success fee of Rs.3 Crores of the RP is annexed herewith as Annexure -D).

Post which, the Chairman proceeded to conduct voting on CIRP Cost incurred till date including budgeted expenses and success fee of Rs.3 Crores, by way of ballot paper in the Meeting.

After completing each agenda item, the Chairman declared voting results of the item no. 4 and 5 of this Meeting, which is as follows:

Agenda Item No.	Voting Particulars	Voting achieved in favour	Annexure
4	To Approve Resolution Plan of H1 Resolution Applicant (M/S Prestige Estates Projects Limited) as per the Evaluation Matrix and the RFRP as decided in the adjourned 20 th COC Meeting held on 13 th November 2019	85.52%	E
5	To ratify the CIRP cost incurred till date and to approve the budget for further expenses to be incurred	86.67%	F

After declaring voting results, the Chairman informed that since requisite majority votes have been achieved for approval of Resolution Plan of Prestige, he is filing application before the Hon'ble NCLT, Mumbai Bench for approval of Resolution Plan. He further informed that since only one day is left in completion of CIRP of the Corporate Debtor, voting of Homebuyers and Financial Creditors, who have not voted in the meeting and who were absent in the Meeting, will begin on 14th November 2019 and will end on 15th November 2019, voting will remain open for 24 hours."

12. The Appellant claims that he then filed I.A 3714/2019 for approval of the Resolution Plan and when the order approving the Resolution Plan came to be passed the impugned order with para 23 was passed by the Adjudicating Authority which is being impugned.

13. The Appeal has referred to the various efforts made by the Appellant during the course of CIRP. It is argued that the assets of the Corporate Debtor were worth Rs.1,089 Cr. and the same were handled and safeguarded by the Appellant; that he convened 20th CoC meeting; that there were more than 20 hearings before the Adjudicating Authority, Appellate Tribunal and the Hon'ble Supreme Court; that there were different classes of stakeholders which included approx. 100 number of Financial Creditors, approx. 400 number of homebuyers, who were required to be dealt with; that various meetings arranged between homebuyers and Resolution Applicant to harmoniously resolve the issues and concerns of homebuyers; that the Appellant successfully convened CoC meeting and got CoC's approval on the Resolution Plan. Learned Senior Counsel for the Appellant submitted that the issue can be only reasonableness of 'success fees'. According to the Senior Counsel, only CoC can consider if the success fees is to be paid and what should be the success fees. According to the Learned Senior Counsel, the Adjudicating Authority cannot look into this aspect as it is part of commercial wisdom of the CoC. Another contention is that if the Adjudicating Authority did not agree with the success fees, the Resolution Plan has to be sent back and Adjudicating Authority could not have meddled with the CIRP costs which are part of the Resolution Plan.

14. Learned Counsel for Appellant referred to IBBI Discussion Paper dated 01.04.2018, copy of which is filed as Document No.9 by the Appellant (Diary No. 28625) to submit that the IBBI has discussed the aspect with regard to the Resolution fees payable to the Resolution Professional. The argument is

that as to what should be the fee, the question has been left open. The Learned Counsel accepted that such Discussion Paper does not have any reference to ‘Success Fees’. The Learned Counsel referred to the Discussion Paper dated 01.04.2018 and instances quoted wherein either excessively high fees were sought by IRP/ RP or very low fees were fixed. It is stated that the IBBI discussed the issue with regard to the Resolution fee and invited comments from stakeholders as mentioned in Paras 14 and 15 of the Discussion Paper. The said Paras 14 and 15 read as under:-

“14. It has been the endeavour of the Board to engage with the stakeholders through public consultation. It believes that public consultation enables collective choice and imparts legitimacy to decisions. In this spirit, the Board invites comments as under:

- i. Whether the elements of costs listed in Annexure-I are comprehensive? Are the elements of costs / fee classified / grouped appropriately? Please suggest modifications.*
- ii. Should the elements of the IRPC, including fee payable to IPs, Insolvency Professional Entities (IPEs) and other Professionals, be regulated?*
- iii. Should the fee be disclosed by IRP/ RI), and then published on the web site of the respective Insolvency Professional Agency or the IBBI? Is disclosure of fee good enough for regulation of fee?*
- iv. Should the industry and /or the Board promote development of best practices in respect of fee of the IRI) and the RP and other fee associated with CIRP? What should be the elements of best practice? Should best practice for determination of fee good enough for regulation of fee?*
- v. Should the fee payable for various services under CIRP be further (beyond disclosures and best practices) regulated? If so, how should the fee payable to the IRP/RP, IPE and professionals engaged under CIRP be regulated? Should there be a ceiling, a floor or a band for fee payable to the IRP/RP, IPE and other professionals. Should it be a percentage linked to some variable of the corporate debtor?*

Should it be decided based on estimation of man hours of services required in a CIRP? Please elaborate.

- vi. How should the fee and costs associated with CIRP be ascertained and minimized?*
- vii. Is there any further suggestion / comment on costs and fee associated with CIRP?*

15. The comments and suggestions may please be mailed at feedback@ibbi.gov.in latest by 20th April, 2018.”

15. The Learned Senior Counsel then submitted that suggestions were invited by IBBI and after considering suggestions, the Circular dated 12.06.2018 was issued. The Circular reads as under:-

**“Insolvency and Bankruptcy Board of India
7th Floor, Mayur Bhawan, Connaught Place, New Delhi-
110001**

CIRCULAR

No. IBBI/IP/013/2018

12th June, 2018

To

*All Registered Insolvency Professionals
All Recognised Insolvency Professional Entities
All Registered Insolvency Professional Agencies
(By mail to registered email addresses and on website of the
IBBI)*

Dear Madam / Sir,

**Sub: Fee and other Expenses incurred for Corporate
Insolvency Resolution Process**

When a corporate debtor undergoes corporate insolvency resolution process (CIRP), an Insolvency Professional (IP) is vested with the management of its affairs and he manages its operations as a going concern. He complies with the applicable laws on behalf of the corporate debtor. He conducts the entire CIRP. Such responsibilities of an IP require the highest level of professional excellence, dexterity and integrity. He needs to be compensated for his professional services commensurate to his ability, duties and responsibilities. He also needs to pay fee or

incur other expenses for various goods and services required for conducting the CIRP and or managing the operations of the corporate debtor as a going concern.

*2. The relevant provisions of the Insolvency and Bankruptcy Code, 2016 (Code) and regulations made thereunder having a bearing on fee and other expenses of CIRP are at **Annexure A**.*

*3. An IP is obliged under section 208(2)(a) of the Code to take reasonable care and diligence while performing his duties, including incurring expenses. He must, therefore, ensure that not only fee payable to him is reasonable, but also other expenses incurred by him are reasonable. What is reasonable is context specific and it is not amenable to a precise definition. An illustrative list of factors considered in determination of what is reasonable is given in **Annexure B**.*

4. Para 16 of the Code of Conduct for IPs in the Schedule to the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 provides that an IP must maintain written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This shall be maintained so as to sufficiently enable a reasonable person to take a view on the appropriateness of his decisions and actions.

5. The IBBI had put out a discussion paper titled “Regulation of fee payable to insolvency professionals and other process costs under Corporate Insolvency Resolution Process” on its web site on 1st April, 2018 seeking comments thereon. The comments received from stakeholders have been considered in consultation with the Insolvency Professional Agencies.

6. Keeping the above in view, the IP is directed to ensure that:-

- (a) the fee payable to him, fee payable to an Insolvency Professional Entity, and fee payable to Registered Valuers and other Professionals, and other expenses incurred by him during the CIRP are reasonable;*
- (b) the fee or other expenses incurred by him are directly related to and necessary for the CIRP;*
- (c) the fee or other expenses are determined by him on an arms’ length basis, in consonance with the requirements of integrity and independence;*
- (d) written contemporaneous records for incurring or agreeing to incur any fee or other expense are maintained;*
- (e) supporting records of fee and other expenses incurred are maintained at least for three years from the completion of the CIRP;*

- (f) *approval of the Committee of Creditors (CoC) for the fee or other expense is obtained, wherever approval is required; and*
- (g) *all CIRP related fee and other expenses are paid through banking channel.*

7. *The Code read with regulations made thereunder specify what is included in the insolvency resolution process cost (IRPC). The IP is directed to ensure that:-*

- (a) *no fee or expense other than what is permitted under the Code read with regulations made thereunder is included in the IRPC;*
- (b) *no fee or expense other than the IRPC incurred by the IP is borne by the corporate debtor; and*
- (c) *only the IRPC, to the extent not paid during the CIRP from the internal sources of the Corporate Debtor, shall be met in the manner provided in section 30 or section 53, as the case may be.*

8. *It is clarified that the IRPC shall not include:*

- (a) *any fee or other expense not directly related to CIRP;*
- (b) *any fee or other expense beyond the amount approved by CoC, where such approval is required;*
- (c) *any fee or other expense incurred before the commencement of CIRP or to be incurred after the completion of the CIRP;*
- (d) *any expense incurred by a creditor, claimant, resolution applicant, promoter or member of the Board of Directors of the corporate debtor in relation to the CIRP;*
- (e) *any penalty imposed on the corporate debtor for non-compliance with applicable laws during the CIRP;*
- (f) *any expense incurred by a member of CoC or a professional engaged by the CoC;*
- (g) *any expense incurred on travel and stay of a member of CoC; and*
- (h) *any expense incurred by the CoC directly;*

[Reference: Section 17 (2) (e) of the Code read with circular No. IP/002/2018 dated 3rd January, 2018.]

[Explanation: Legal opinion is required on a matter. If that matter is relevant for the CIRP, the IP shall obtain it. If the CoC requires a legal opinion in addition to or in lieu of the opinion obtained or being obtained by the IP, the expense of such opinion shall not be included in IRPC.]

- (i) *any expense beyond the amount approved by the CoC, wherever such approval is required; and*
- (j) *any expense not related to CIRP.*

9. Further, the IP is directed to disclose fee and other expenses in the relevant Form in **Annexure C** to the Insolvency Professional Agency of which he is a member:

- (a) for all concluded CIRPs by 15th July, 2018, and
- (b) for ongoing and subsequent CIRPs within the time as specified in the relevant Form.

10. An Insolvency Professional Agency shall -

- (a) disseminate the disclosures made by its IPs on an appropriate electronic platform within three working days of receipt of the same;
- (b) monitor disclosures made by its IPs and submit a monthly summary of non-compliance by its IPs with this circular to the IBBI by 7th of the succeeding month; (c) take appropriate measures to ensure compliance by its IPs.

11. This circular is issued in exercise of the powers conferred under clause (h) of sub-section (1) of section 196 read with regulation 34A of the IBBI (Corporate Insolvency Resolution Process for Corporate Persons) Regulations, 2016, in consultation with all the three registered Insolvency Professional Agencies.

Yours faithfully,

-Sd-

(Dilip Arjun Khandale)
Deputy General Manager
Email: dilip.khandale@ibbi.gov.in”

(Emphasis supplied)

16. The Learned Senior Counsel pointed out the Circular from the convenience compilation (Diary No.28625 at Page 771). The relevant existing provisions and regulations which have a bearing on fee and other expenses of the CIRP are at Annexure A of the Circular. Annexure A reads as under:-

“Annexure-A

**Provisions and Pronouncements having a bearing on
Fee and other Expenses of CIRP**

I. The Insolvency and Bankruptcy Code, 2016

Section 5(13) reads as under:

“(13) Insolvency Resolution Process Costs” means –

- (a) the amount of any interim finance and the costs incurred in raising such finance;
- (b) the fees payable to any person acting as a resolution professional;
- (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;
- (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and
- (e) any other costs as may be specified by the Board;”

Section 208(2) reads as under:

“208. (2) Every insolvency professional shall abide by the following code of conduct: –

- (a) to take reasonable care and diligence while performing his duties;
- (b) to comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member;
- (c) to allow the insolvency professional agency to inspect his records;
- (d) to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and
- (e) to perform his functions in such manner and subject to such conditions as may be specified.”.

II. The IBBI (Insolvency Professionals) Regulations, 2016

Relevant Paras of the Code of Conduct under the Regulations read as under:

“16. An insolvency professional must ensure that he maintains written contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. This

shall be maintained so as to sufficiently enable a reasonable person to take a view on the appropriateness of his decisions and actions.

25. An Insolvency Professional must provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken and is not inconsistent with the applicable regulations.

25A. An insolvency professional shall disclose the fee payable to him, the fee payable to the insolvency professional entity, and the fee payable to professionals engaged by him to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.

26. An insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.

27. An insolvency professional shall disclose all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as applicable, to all relevant stakeholders, and must endeavour to ensure that such costs are not unreasonable.”.

III. The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

Chapter IX of the Regulations reads as under:

“Chapter IX INSOLVENCY RESOLUTION PROCESS COSTS

Insolvency Resolution Process Costs

31. “Insolvency resolution process costs” under Section 5(13)(e) shall mean-

- (a) amounts due to suppliers of essential goods and services under Regulation 32;*
- (b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);*
- (c) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;*
- (d) expenses incurred on or by the resolution professional fixed under Regulation 34; and (e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.*

Essential supplies.

32. The essential goods and services referred to in section 14(2) shall mean-

- (1) electricity;
- (2) water;
- (3) telecommunication services; and
- (4) information technology services, to the extent these are not a direct input to the output produced or supplied by the corporate debtor.

Illustration- Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.

Costs of the interim resolution professional.

33. (1) The applicant shall fix the expenses to be incurred on or by the interim resolution professional.

(2) The Adjudicating Authority shall fix expenses where the applicant has not fixed expenses under sub-regulation (1).

(3) The applicant shall bear the expenses which shall be reimbursed by the committee to the extent it ratifies.

(4) The amount of expenses ratified by the committee shall be treated as insolvency resolution process costs.

Explanation. - For the purposes of this regulation, “expenses” include the fee to be paid to the interim resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the interim resolution professional.

Resolution professional costs.

34. The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.

Explanation. - For the purposes of this regulation, “expenses” include the fee to be paid to the resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional.

Disclosure of Costs.

34 A. The interim resolution professional or the resolution professional, as the case may be, shall disclose item wise insolvency resolution process costs in such manner as may be required by the Board.”

IV. Circulars Issued by the IBBI

The circular No. IP/004/2018 dated 16th January, 2018 provides as under:

“3. In view of the above, it is clarified that an insolvency professional shall render services for a fee which is a reasonable reflection of his work, raise bills / invoices in his name towards such fees, and such fees shall be paid to his bank account. Any payment of fees for the services of an insolvency professional to any person other than the insolvency professional shall not form part of the insolvency resolution process cost.

4. Similarly, any other professional appointed by an insolvency professional shall raise bills / invoices in his / its (such as registered valuer) name towards such fees, and such fees shall be paid to his / its bank account.”

(Emphasis supplied)

17. Learned Counsel for Appellant insisted on reading Para 3 of the Circular dated 12.06.2018 to link the Circular to contents of Annexure-B.

18. Annexure B of the Circular reads as follows:-

“Annexure-B

What is Reasonable ‘Cost’ and Reasonable ‘Fee’

I. As regards reasonable costs, the Society for Insolvency Practitioners of India, in its statement of best practices on “PAYMENT OF CORPORATE INSOLVENCY RESOLUTION PROCESS COSTS” observes:

“Insolvency professionals must ensure that the costs incurred are reasonable. To determine the reasonability of these costs, they should consider if the costs are-

- (a) directly related to the insolvency resolution process,*
- (b) necessary for meeting the objectives of the insolvency resolution process, and the Code,*
- (c) proportional to the work required to be done and the assets of the corporate debtor, and*
- (d) determined on an arms’ length basis, in consonance with the requirements of integrity and independence.”*

[\[http://www.insolindia.com/uploads/insol/draft_best_practices/files/-1013.pdf\]](http://www.insolindia.com/uploads/insol/draft_best_practices/files/-1013.pdf)

II. As regards reasonable fee, the Society for Insolvency Practitioners of India, in its statement of best practices on “PAYMENT OF FEE AND REIMBURSEMENT OF OUT-OF-POCKET EXPENSES” suggests:

“Factors to be considered while charging fee

(i) An insolvency professional may charge a fixed or variable fee to reasonably remunerate him/her for the work that he/she necessarily and properly undertakes for an appointment under the Code. In determining what is necessary and proper, the insolvency professional should consider if the work is-

- (a) directly related to the insolvency resolution process,
- (b) in furtherance of the exercise of the powers and functions under Code, professional standards, and the terms of agreement, and
- (c) in consonance with his/her duties under the Code and the Regulations thereunder.

(ii) An insolvency professional may use one or a combination of bases to charge fee for carrying out different tasks or discharging different duties. The bases of charging fee include:

- (a) time based charging,
- (b) prospective fee (up to a cap),
- (c) fixed fee,
- (d) percentage based charging,
- (e) success or contingency fee, only to the extent that it is consistent with the requirements of integrity and independence of insolvency professionals.

Illustration: X is appointed as an IRP. She can charge a cumulative of fixed fee to suspend the board of directors and have the public announcement made, fee per hour spent on collecting and verifying claims, and a fee based on the percentage of assets handled for running the business as a going concern.

(iii) An insolvency professional should consider the following factors while determining the quantum of fee to be charged:

- (a) value and nature of the assets dealt with,
- (b) time properly given by the insolvency professional and her staff in attending to the affairs of the debtor,
- (c) the complexity of the case,
- (d) exceptional responsibility falling on the insolvency professional,
- (e) the effectiveness with which the insolvency professional carries out her duties.

Illustration: X, an insolvency professional, may choose to charge higher fee if-

- (a) the properties of the corporate debtor are in multiple locations all over the country (nature of property),
- (b) key trade suppliers are also unpaid creditors and thus hostile (complexity of the case), or
- (c) if the existing management is not capable which requires him to expend unusual effort to run the business as a going concern (exceptional responsibility).

(iv) An insolvency professional should not increase the fee charged without the prior approval of the authority fixing his/her fee.

[\[http://www.insolindia.com/uploads/insol/draft_best_practices/files/-1008.pdf\]](http://www.insolindia.com/uploads/insol/draft_best_practices/files/-1008.pdf)

III. Rule 1.04(b) of the Texas Disciplinary Rules of Professional Conduct, which sets forth eight factors to determine what is reasonable fee in the context of lawyers, reads as under:

“Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;

- (5) *the time limitations imposed by the client or by the circumstances;*
- (6) *the nature and length of the professional relationship with the client;*
- (7) *the experience, reputation, and ability of the lawyer or lawyers performing the services; and*
- (8) *whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered*

(Emphasis supplied)

19. Relying on Regulation 34, Senior Counsel stated that the CoC has to fix the expenses to be incurred by the Resolution Professional and the expenses include fee which will constitute Insolvency Resolution Process Costs.

20. Relying on the above, learned Counsel for the Appellant submitted that Para 23 of the impugned order cannot be maintained and the Adjudicating Authority could not have interfered with the CIRP costs which were made part of the Resolution Plan. Referring to the impugned order, Learned Senior Counsel for the Appellant submitted that the Adjudicating Authority did not say that the success fees could not be charged. Learned Senior Counsel referred to the various acts performed by the Appellant to justify the grant of the success fees as approved by the Committee of Creditors.

21. Learned Senior Counsel for the Appellant accepted that there is no judgment of the Hon'ble Supreme Court of India which has considered whether or not quantum of fees accepted, is or not a commercial decision.

22. Referring to the Judgment relied on by the Adjudicating Authority in impugned order Para 23 in the matter of ***“Mr. Devarajan Raman, Resolution Professional Poonam Drum & Containers Pvt. Ltd. v. Bank of India Ltd.”***

[Company Appeal (AT) (Insol.) No. 646 of 2020], Learned Senior Counsel submitted that the facts of that matter were different. It is stated that in that matter the Appellate Authority had set aside the CIRP and directed the Adjudicating Authority to decide the fee to be paid to the Resolution Professional. The Resolution Professional later on found that the fees fixed by the Adjudicating Authority was inadequate and filed another Appeal and at that occasion, this Tribunal stated that fixation of fees is not a business decision depending upon the commercial wisdom of the CoC. Thus, it is claimed that the observations of this Tribunal in that matter could not have been relied on for interfering with the decision of the CoC. Relying on judgments in the matter of **“Committee of Creditors of Essar Steel India Limited Through Authorised Signatory vs. Satish Kumar Gupta & Ors.”** [Civil Appeal No. 8766-67 of 2019] and **“K. Sashidhar vs. Indian Overseas Bank and Ors”** [MANU/SC/0189/2019], it is argued that the Adjudicating Authority or this Appellate Tribunal cannot interfere with the commercial decision of the CoC. It is claimed that the success fee approved was part of commercial decision. It is further argued that if the Adjudicating Authority did not agree with the fee approved it should have sent back the Resolution Plan to the CoC.

23. We have heard Learned Amicus Curiae also. Learned Amicus Curiae submitted that in the IBC and the Regulations, there is no express provision for grant of success fee. The Learned Amicus Curiae for context made reference to Section 206, Section 5(27) and Section 5(13) of the IBC as under:-

“Section 206 of the Code provides that, “No person shall render his services as insolvency professional under this Code without being enrolled as a member of an insolvency professional agency and registered with the Board”.

Section 5(27) provides that “resolution professional”, means, “an insolvency professional appointed to conduct the corporate insolvency resolution process [or the pre-packaged insolvency resolution process, as the case may be,] and includes an interim-resolution professional”

Section 5(13) of the Code provides that the fees payable to resolution professional and any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern is considered as “insolvency resolution process costs”

24. Reference is made to Section 208(2) of the IBC to submit that the Insolvency Professional is to abide by the code of conduct mentioned in Section 208(2) including clause (a) thereof. Referring to Section 208(2)(a), it is submitted that Insolvency Professional is duty bound to take reasonable care and diligence while performing his duties. The Resolution Professional has to perform function in such a manner and subject to such conditions as may be specified. He has also referred to the provisions as referred to in Annexure A of the Circular dated 12.06.2018. The Learned Amicus Curiae referred to Para 25 to 27 of the Code of Conduct which is First Schedule below IBBI (Insolvency Professionals) Regulations, 2016 (“IP Regulations” for short:-

“Remuneration and costs.

25. An insolvency professional must provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken, and is not inconsistent with the applicable regulations.

25A. An insolvency professional shall disclose the fee payable to him, the fee payable to the insolvency professional entity, and the fee payable to professionals engaged by him to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.

26. An insolvency professional shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.

27. An insolvency professional shall disclose all costs towards the insolvency resolution process costs, liquidation costs, or costs of the bankruptcy process, as applicable, to all relevant stakeholders, and must endeavour to ensure that such costs are not unreasonable.”

25. The submissions are that the Resolution Professional can charge remuneration only in a transparent manner and the remuneration should be a reasonable reflection of the work and should not be inconsistent with the Regulations. It is stated that all the Regulations in this regard are based on ‘reasonableness’. It is stated that with regard to fees payable, the Code or Regulations have not quantified as to what would be the remuneration or the form in which the fees may be paid or charged. It is argued that in the scheme of IBC and layout of Sections the Resolution Professional is appointed in the First Meeting under Section 22 of the IBC at which stage invariably and transparently the fee gets fixed. That, it is against transparency if at the last moments when Resolution Plan is being approved higher amounts as fees are squeezed in it and then to hide behind Resolution Plan. The Learned Amicus Curiae referred to the Discussion Paper dated 01.04.2018 (Document-9, Diary No.28625 filed by the Appellant) wherein para 2 recorded as under:-

“2. An IP needs to be compensated for his services commensurate with his qualification, experience and responsibilities. The law does not specify the amount of fee to be paid to an IP for his services in a particular process. It is partly because of contemporary economic thought that market should determine the fee and partly because of practical difficulties that no two CIRPs require the same quality and quantity of services or no two IPS render homogenous service. The Bankruptcy Law Reforms Committee (BLRC), which conceptualised the Code, considered this issue at length. It felt that the fee charged by a resolution professional (RP) would be as an outcome from market forces, and not set in the Code or provided in regulations. It dealt with fee for various processes under the Code. This note, however, limits discussion mostly to fee for CIRP.”

26. It is stated that there is no express provision in the Code and Regulations prescribing or prohibiting as to the form in which fees can be charged or paid. The Learned Amicus Curiae submitted that a harmonious reading of the relevant provisions of the Code and Regulations makes it clear that the charging of fees by the Resolution Professional and manner/ method of payment shall be subject to the following:-

*“a. **Approval** of the committee of creditors of the corporate debtor ("CCC") by prescribed majority [Refer Regulation 33 of the CIRP Regulations];*

*b. Fee should be a **reasonable** reflection of the work necessarily and properly undertaken by RP [Refer Para 25 of Code of Conduct, IP Regulations, page 243 of Vol. 2 of Compilation filed by Amicus Curiae];*

*c. Fees **should not be inconsistent** with the applicable regulations [Refer Para 25 of Code of Conduct, IP Regulations page 243 of Vol. 2 of Compilation filed by Amicus Curiae];*

*d. Fee should be charged **in transparent manner**; [Refer Para 25 of Code of Conduct, IP Regulations,*

page 243 of Vol. 2 of Compilation filed by Amicus Curiae.]

*e. The RP shall maintain written contemporaneous **record of decision** taken in respect of fees. [Refer Para 16 of Code of Conduct, IP Regulations, page 243 of Vol. 2 of Compilation filed by Amicus Curiae];*

*f. The RP shall take reasonable **care and diligence** while performing his duties associated with charging fees and process associated therewith.; and [Refer Section 208(2) of the Code]; and*

*g. There shall be **item wise disclosure** by RP to all stakeholders [Refer Regulation 27 of Code of Conduct, IP Regulations] and to IBBI [Refer Regulation 34A of CIRP Regulations].”*

27. Referring to the Circular dated 12.06.2018 (Diary No.28625- Document 11, Page 771), it is stated by the Learned Amicus Curiae that this Circular only seeks to guide the stakeholders as to what could constitute “reasonable” in the matter of charging fees. According to him, it does not provide, prescribe, recommend, promote, endorse or sanctify payment of success fees. According to the Amicus Curiae, the claim of the Appellant that this Circular provides for payment of success fees is misplaced. It is stated that the purpose and context of Circular dated 12.06.2018 is entirely different. In the brief written submissions filed by the Learned Amicus Curiae (Diary No. 29028), Paras 8 to 15 read as follows:-

“8. Concern was expressed by the Adjudicating Authority ("AA") in some cases about the unreasonable fee charged by insolvency professionals [Refer page 3 of IBBI Discussion Paper dated 1.4.2018 filed by Amicus Curiae]. There were other unhealthy practices noticed by IBBI in matter of charging fees by insolvency professionals.

9. IBBI undertook an exercise to address the concerns and published a Discussion Paper on 1.4.2018 titled "Regulation of fee payable to Insolvency professionals and other process cost under the Corporate Insolvency Resolution Process". Comments were invited from the stakeholders on various questions listed in the Discussion Paper. It is pertinent to mention that none of the questions inquired if success fees should be permitted. [Refer page 6, 12 of IBBI Discussion Paper dated 1.4.2018 filed by Amicus Curiae].

10. After consultation with the stakeholders, IBBI issued the Circular No. IBBI/IP/013/2018 dated 12.06.2018 titled 'Fee and other Expenses incurred for Corporate Insolvency Resolution Process ("CIRP") in terms of the powers conferred under clause (h) of Section 196(1) of the Code read with Regulation 34A of CIRP Regulations, 2016, in consultation with all the three registered Insolvency Professional Agencies. [Refer Pg. 240 of Vol. 2 of Compilation filed by Amicus Curiae].

11. By way of the Circular, IBBI directed the insolvency professionals to take reasonable care and diligence while performing their duties, including incurring expenses. It further directs that the insolvency professional, "must therefore, ensure that not only fee payable to him is reasonable, but also other expenses incurred by him are reasonable." The Circular further states, What is reasonable is context specific and it is not amenable to precise definition. Clearly therefore, the context and objective of the Circular is to emphasise that fees to be charged by insolvency must be 'reasonable'. Various related directions were also issued.

12. Recognising that what is reasonable is context specific and not amenable to a precise definition, IBBI provided an 'illustrative' list of factors to be considered in determination of what is 'reasonable' by referring to (and extracting them in Annexure B to the Circular), the Best Practice Guidelines issued by the Society for Insolvency Practitioners of India ("SIPI"), namely, "Payment of fee and Reimbursement of Out of Pocket expenses" [Refer Pg. 246 of Vol. 2 of Compilation filed by Amicus Curiae].

13. It is apparent from reading of the Circular that reference to SIPI Best Practices in the Circular is only to illustrate factors to be considered in determination of what is 'reasonable'. This is further clear from the title of Annexure B of the Circular, namely "What is Reasonable Cost and Reasonable Fee".

14. Reference to success fee in SIPI Best Practices and its extract in Annexure B of the Circular to illustrate the factors to be considered in determination of what is 'reasonable', cannot be read to suggest that IBBI Circular provides for payment of success fees to IP.

15. In any case, IBBI cannot, by way of a circular, provide for charging success fees when no such provision exists in the regulations."

28. According to the Learned Amicus Curiae, the provisions as appearing in IBC and as can be seen from Regulations read with the Code of Conduct all indicate that although quantum of fees have not been fixed that the Code and Regulations do intend to control the manner in which Resolution Professional charged fees and according to Learned Amicus Curiae, the quantum of fees payable is a subject which is justiciable before the Adjudicating Authority if it is found to be unreasonable and if the manner, method of payment is inconsistent with the Regulations. The quantum of fees can be fixed by the CoC but it would be subject to scrutiny by the Adjudicating Authority as what is reasonable fee is context specific and it is not part of the commercial decision of the CoC. The CoC exercised commercial decision with regard to Resolution Plan which is required to be approved and although CIRP Costs are required to be paid on priority, the reasonableness of fees is not part of commercial decision. While referring to the judgments relied on by the Learned Senior Counsel for the Appellant, it is stated that these judgments

did not bar the jurisdiction of the Adjudicating Authority to review the quantum of fees charged by the Insolvency Professional or what is approved by the CoC. Fees unreasonably high or low or disproportionate can be looked into by the Adjudicating Authority. It is argued that, had this not been so, there would have been no need of Sections and Regulations referred in the Circular harping on transparency and reasonableness and it could have been blankly left for CoC to decide fees, which is not so. The argument is that the intention of legislature is clear from the Scheme and Regulations that the decision of Insolvency Professional and CoC in the matter of fees is subject to checks and balance through the provisions of the Code and Regulations and in the event of imbalance with regard to quantum of fees charged, method of payment being inconsistent with Regulations, it can be reviewed by the Adjudicating Authority. The Learned Amicus Curiae stated that the absence of Regulation quantifying the fee is with the expectation that the market players will self-regulate themselves and behave in a reasonable manner. The IBBI has power to take disciplinary action in the event of misconduct or breach by Insolvency Professional. In the absence of such power with Adjudicating Authority, the matter of fees would be completely unchecked and devoid of scrutiny. Para 30 of the Written Submissions filed by the Learned Amicus Curiae may be reproduced. The same reads as follows:-

“30. There are many decisions in which AA or IBBI has found of charge fees (including success fees) as unreasonable and in contravention of regulations. [Refer, Mr. Devranjan Raman, Resolution Professional Poonam Drum & Containers Pvt. Ltd. Vs. Bank of India Ltd being Civil Appeal (AT) (IB) No. 646 of 2020 passed by. the Hon'ble NCLAT on 30.07.2020 (refer

Pg. 328 of Vol.II of Compilation filed by Amicus Curiae). It was held that fixation of fee of the Resolution Professional is not a business decision depending upon the commercial wisdom of the Committee of Creditors.] [Parish Tekriwal vs VRG Digital Corporation Pvt. Ltd being IA. No. 1099 of 2020 in C.P. (IB) No. 859 of 2019 passed by the Hon'ble Adjudicating Authority (Mumbai Bench) on 7.01.2021 (refer Pg. 330 of Vol. II of Compilation filed by Amicus Curiae) It was held that fixation of the fees of IRP/RP does not come within the domain of the commercial wisdom of COC and hence is justiciable. The aspect of ascertaining fees of IRP/RP is strictly guided by the mandate and parameters provided by the IBBI vide its Circular dated 12.06.2018 bearing No. IBBI/IP/013/2018] [Shri Shrikrishna Rail Engineers Private limited vs. Madhucon Projects Limited in C.P (IB) No. 4322/9/HDB/2017 passed by the passed by the Hon'ble Adjudicating Authority (Hyderabad Bench) on 22.11.2017 (refer Pg. 335 of Vol. II of Compilation filed by Amicus Curiae) The Hon'ble Adjudicating Authority was of the view that remuneration quoted by the IRP was quite exorbitant and the same needs to be referred to IBBI. Though there are no prescribed set of Rules and Regulations/Guidelines at present with regard to the fee to be payable to the IRP/RP, the Adjudicating Authority is of the view that the fee quoted by the professionals should be reasonable, commensurate with the work to be handled.] [Mr. Venkatesan Order No. IBBI/DC/68/2021 dated 5.03.2021 [refer Pg. 339 of vol. II of Compilation filed by Amicus Curiae] Para 3.3.5 of the Order of the Disciplinary Committee ("DC") reiterated "The DC notes that Mr. Venkatesan has allowed inclusion of a success fee clause in the engagement letter with EY for its professional services. It is observed that the same leads to escalation of CIRP costs leading to extra burden being imposed on already stressed CD. The DC further notes that the charging of success fee linked to the recovery of the debt has not been expressly barred. Moreover, the resolution process of CD was not successful and therefore, the inclusion of success fee in the professional fee of EY did not result in any financial stress on the CD. Hence the DC finds that Mr. Venkatesan has not contravened the provisions of the Code or Regulations as alleged.] [Mr. Vijay Kumar

Garg Order No. IBBI/DC/26/2020 (refer Pg. 369 of Vol.II of Compilation filed by Amicus Curiae) It was held CIRP under the Code is a non-adversarial resolution process where the defaulting corporate debtor cedes control to an IP, who responsible for managing the affairs of the company as a going concern and preserving its One of the duties of the RP under the Code is to act with objectivity in his professional dealings by ensuring that his decisions are made without the presence of any bias and also to ensure that all costs incurred during CIRP are reasonable.”

29. Referring to the Written Submissions, Learned Amicus Curiae submitted that in cases where the fees fixed were unreasonable, the Adjudicating Authority have stepped in and even disciplinary committee has taken action.

30. Learned Amicus Curiae submitted that the Discussion Paper dated 01.04.2018 and the Press Release issued on 01.04.2018 were put up on the site of IBBI. Learned Amicus Curiae has filed copy of the Press Release with Diary No.28552 which reads as follows:

“Insolvency and Bankruptcy Board of India

Press Release

1st April, 2018

IBBI invites suggestions on regulation of fee payable to insolvency professionals and other process costs under Corporate Insolvency Resolution Process.

Today, the Insolvency and Bankruptcy Board of India (IBBI) released a discussion paper on regulation of fee payable to insolvency professionals (IPs) and other process costs under Corporate Insolvency Resolution Process (CIRP). The discussion paper is available at www.ibbi.gov.in.

2. IBBI invites suggestions and comments on the issues discussed in the paper, including the following:

- i. Whether the elements of costs listed in the paper are comprehensive? Are the elements of costs / fee classified / grouped appropriately? Please suggest modifications.
- ii. Should the elements of the insolvency resolution process cost (IRPC), including fee payable to IPs, Insolvency Professional Entities (IPEs) and other Professionals, be regulated?
- iii. Should the fee be disclosed by interim resolution professional (IRP) / resolution professional (RP), and then published on the web site of the respective Insolvency Professional Agency or the IBBI? Is disclosure of fee good enough for regulation of fee?
- iv. Should the industry and /or the Board promote development of best practices in respect of fee of the IRP and the RP and other fee associated with CIRP? What should be the elements of best practice? Should best practice for determination of fee good enough for regulation of fee?
- v. Should the fee payable for various services under CIRP be further (beyond disclosures and best practices) regulated? If so, how should the fee payable to the IRP/RP, Insolvency Professional Entity (IPE) and professionals engaged under CIRP be regulated? Should there be a ceiling, a floor or a band for fee payable to the IRP/RP, IPE and other professionals. Should it be a percentage linked to some variable of the corporate debtor? Should it be decided based on estimation of man hours of services required in a CIRP? Please elaborate.
- vi. How should the fee and costs associated with CIRP be ascertained and minimized?
- vii. Is there any further suggestion / comment on costs and fee associated with CIRP?

3. The suggestions and comments may please be mailed at feedback@ibbi.gov.in latest by 20th April, 2018.”

31. Referring to the Discussion Paper dated 01.04.2018 and the Press Release, Learned Amicus Curiae stated that nowhere in this, success fee was taken up for discussion or deliberation. It is argued that the subsequent

Circular dated 12.06.2018 in introductory part referred to the existing Insolvency and Bankruptcy Code provisions and the Regulations concerned which were reproduced as Annexure-A and illustrative list of factors as to what is reasonable as at Annexure-B. It is argued that Annexure-B is only a collection of statement of best practices as stated by 'Society for Insolvency Practitioners of India'. It is stated by Mr. Sumant Batra, Learned Amicus Curiae that this is only illustrative list referred as context and not decision of IBBI as the directions given are in Paras 6 to 10 of the Circular dated 12.06.2018, which at the most would be relevant to follow.

32. Having heard Learned Counsel for both sides, we do agree with the Learned Amicus Curiae that Annexures- A and B attached with the Circular dated 12.06.2018 were referred by way of introduction. Learned Amicus Curiae has rightly submitted that what is referred as best practices in Annexure-B is only illustrative but the directions are as given in Paras 6 to 10 of the Circular. We have already referred to the Circular and if these paragraphs are considered, in substance the IBBI has directed the Insolvency Professional that the fee payable to them should be reasonable; that the same should be 'directly related to and necessary for the CIRP'; that the fee should be determined on an arms' length basis, in consonance with the requirements of integrity and independence; that it should not include fee or other expenses not directly related to CIRP. Section 208(2) (a) of the IBC requires the Insolvency Professional to take reasonable care and diligence while performing his duties, including incurring expenses. Regulation 34 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

permits the CoC to fix the “expenses” to be incurred on the Resolution Professional and by the Resolution Professional. The “expenses” are to include the ‘fee’ to be paid to the Resolution Professional. Perusal of such provisions and Regulations clearly indicates a prior consultation of minds at initial stage of CIRP to see as to what is the reasonable fee to be incurred on the Resolution Professional or by the Resolution Professional. Claim of success fee squeezed in at the last moment when the Resolution Plan is being approved is more in the nature of taking a reward or gift than expenditure incurred on or by the Resolution Professional. Reference to term “success fee” in Annexure-B of the Circular dated 12.06.2018 which was view of the ‘Society for Insolvency Practitioners of India’ is a term which is unguided. Rather even the said society has a caveat to it when it mentions that the success and contingency fee is only to the extent that it is consistent with the requirements of integrity and independence of Insolvency Professionals. In our view, if the Resolution Professional seeks to have success fee at the initial stage of CIRP, it would interfere with independence of Resolution Professional which can be at the cost of Corporate Debtor. If success fee is claimed when the Resolution Plan is going through or after the Resolution Plan is approved, it would be in the nature of gift or reward. “Success fee”- term is contrary to what IBBI provided in its Circular dated 16.01.2018 that Insolvency Professional shall render services for a fee which is a reasonable reflection of his work. The fee has to be related to acts performed or to be performed for furtherance of the CIRP, for dues or expenses actually incurred. It has to be directly related to acts done or expenses incurred which are necessary for the CIRP. The role of the Resolution Professional has to be like a dispassionate person concerned with

performance of his duties under the Code for reasonable fees and it cannot be result oriented.

33. Again, the Learned Amicus Curiae is right in his submissions that Circular dated 12.06.2018 is only a Circular which cannot be equated with the Rules and Regulations framed under the provisions of the IBC. Although reference has been made that Circular is issued in view of powers exercised under Section 196(1) (h) read with Regulation 34A of the CIRP Regulations, both the provisions have not been carefully referred to. Section 196(1) (h) relates to calling for any information and records from Insolvency Professional Agencies, Insolvency Professionals and Information Utilities. Regulation 34A of the CIRP Regulations relates to 'disclosure of costs'. The Regulation specifies that the IRP or the RP shall disclose item wise insolvency resolution process costs in such manner as may be required by the Board. It is stated that the Circular has Annexure-C showing as 'Cost Sheet for Insolvency Resolution of Corporate Debtor' which is a format. The Learned Amicus Curiae submitted that even if Regulation 34A is relevant for the said purpose reference to Section 196(1) (h) was not correct. The Learned Senior Counsel for the Appellant submitted that reference to wrong provision would not effect as the correct provision was Section 196(1) (aa) which relates to promoting the development of, and regulating the working and practices of, insolvency professionals. It is argued that under Section 196(1) (p), IBBI can issue necessary guidelines to the insolvency professionals and the Circular should be read in that context. Although the reference to wrong clause can be ignored, still it shows that the attention of the Authority issuing the Circular

missed details while referring to opinions as in Annexure-B. The Appellant is trying to take advantage of this so as to pick up from Annexure-B one word 'success fee' and ignoring other aspects benefit is sought to be taken. Apart from the fact that the Code or the Regulations as existing do not provide for fee on speculative basis, Circular dated 12.06.2018 also in the portion where directions are given or clarification issued does not make any such 'success fee' or 'contingency fee' payable. Thus, it cannot be said that charging of success fee is within the provisions of the Code or the Regulations. By indirect reference in a Circular it cannot be accepted that success fee as sought is legally chargeable or payable.

34. The Appellant has referred to the Appeal and minutes recorded in the 20th CoC meeting to submit that the CoC appreciated his work and approved the success fee. Appellant has also referred to the various steps taken by the Appellant during the course of CIRP to submit that the Appellant was entitled to the success fee and the quantum as was fixed in this CoC meeting. The Learned Amicus Curiae has pointed out that in the 1st CoC meeting dated 24.12.2018, the name of the Appellant was proposed as Resolution Professional for a fee of Rs.3 Lakh and fixed costs of Rs.5 Lacs. It was not clear whether this fixed costs was for per-month. It is stated that the Appellant has been charging Rs.8 Lakh per month and has claimed fee on that basis not only upto the approval of the Resolution Plan and even thereafter when the Appellant moved Adjudicating Authority and filed additional-affidavit dated 25.10.2020. He had already received payment of Rs.1.84 Crores (till the date of filing affidavit) as his professional fees. Referring to the Affidavit (Diary

No. 28117; Page 216) and the CIRP Costs table attached with it, the Learned Amicus Curiae pointed out that the Appellant calculated his fees for Rs.1,84,00,000/- till 25th October, 2020 in addition to success fee of Rs. 3,00,00,000/-. It is stated that even after approval of Resolution Plan Resolution Professional continued to charge “Fixed Cost of Rs.5 Lakh” as was approved in First CoC Meeting, on monthly basis which is unjustified.

35. The Learned Amicus Curiae further submitted that the minutes of Item No.5 recorded in 20th CoC meeting that it was the Resolution Professional who brought about the successful Resolution Plan cannot be accepted as a reason for the success fee as provisions of the IBC and Regulations provide that the Resolution Professional is merely a facilitator and it is the CoC members who have to deliberate with the prospective Resolution Applicant and it is their efforts which leads to the Resolution Plan getting settled down so as to be approved. The Amicus Curiae rightly argued that if the minutes of Item No.5 of the 20th CoC meeting are perused, it is a case of approving a big gift for the Resolution Professional which can be only at the cost of Creditors waiting in line and whose percentage of dues would consequently get reduced. It is rightly argued that this would be a bad precedent. The alleged acts performed were handsomely paid for in the month to month “fee’ taken. The success fee given in addition to the big amount of Rs.8 Lakh per-month is only in the nature of gift or reward according to the Amicus Curiae. We agree with the Learned Amicus Curiae.

36. The Learned Amicus Curiae submitted that there are many instances of exorbitant charging of fees by the Resolution Professional and the

Adjudicating Authority has interfered so as to rationalise the same. In the present matter, at the last stage when Resolution Plan was being approved the Resolution Professional without putting on record necessary particulars for the success fee got the same included. It is argued that although the fees of the Resolution Professional under the provision which requires to pay as CIRP Costs and the Resolution Plan has to have provisions to pay CIRP Costs on priority, this by itself does not make the quantum of the fees of the Resolution Professional a matter of commercial decision. CoC may be approving the fees but as it has to be reasonable under the provisions of the Code and Regulations, it is justiciable. We agree with the submissions of the Learned Amicus Curiae in this regard. When the fees have to be on the basis of the case and work performed or to be performed, the reasonability or otherwise would be justiciable. By pushing in a big amount at last moment in the name of success fees for the Resolution Professional and making it part of CIRP costs at the time of approval of the Resolution Plan does not make the same a commercial decision of the CoC. The Resolution Applicant and other stakeholders, other than those present of CoC would not know what is being hived off from the beneficiaries of the Resolution Plan. Fees payable to IRP/ RP have been made part of CIRP costs so as to safeguard interest of the IRP/ RP. Section 30(2) provides that the Resolution Plan should provide for payment of Insolvency Resolution Process costs in a manner specified by the Board in priority to the payment of other debts of the Corporate Debtor. The protection is to the CIRP costs validly incurred. The interest of IRP/ RP cannot be equated with the interest of the Corporate Debtor and other stakeholders, creditors. Fees cannot be disproportionate to eat into the percentage of other

claimants of the Corporate Debtor and the Corporate Debtor about to be resolved. Learned Amicus Curiae has also relied on judgment in the matter of **“Alok Kaushik vs. Bhuvaneshwari Ramanathan & Ors.”**- [(2015) 5 SCC 787] to submit that the Hon’ble Supreme Court has held that NCLAT has got power to determine fees and expenses etc. payable to a professional. It is stated that in that matter dispute arose with regard to fee payable to registered valuer who had been appointed and not paid fee ratified by CoC, when CIRP was set aside. According to the learned Amicus Curiae, reading the provisions of the Code, Rules and Regulations and taking a conspectus view, no fault can be found with the impugned paragraph of the impugned order.

Perusal of the judgment shows the Appellant in that matter had been appointed registered valuer and his professional fees and expenses had been ratified by the CoC. NCLAT had set aside the CIRP and matter was remitted to NCLT to decide CIRP costs. NCLT determined the fees payable to the IRP but not regarding fee payable to the Appellant who had been appointed as registered valuer as the valuer had been paid Rs.50,000/- by the Resolution Professional after reducing fees. When Appellant moved Adjudicating Authority it declined to exercise jurisdiction. The Hon’ble Supreme Court, inter alia referred to Regulation 31 of the IRP Regulations and clause (c) which reads as under:-

“31. Insolvency resolution process costs.-

“Insolvency resolution process costs” under Section 5(13)(e) shall mean-

xxx

xxx

xxx

(c) expenses incurred on or by the resolution professional to the extent ratified under regulation 33.....”

It was noted that this clause (c) was particularly important to the case which enunciated expenses incurred on or by the Resolution Professional to the extent ratified under Regulation 33. Para 19 of the Judgment reads as under:-

“19. Though the CIRP was set aside later, the claim of the appellant as registered valuer related to the period when he was discharging his functions as a registered valuer appointed as an incident of the CIRP. The NCLT would have been justified in exercising its jurisdiction under Section 60(5)(c) of the IBC and, in exercise of our jurisdiction under Article 142 of the Constitution, we accordingly order and direct that in a situation such as the present case, the Adjudicating Authority is sufficiently empowered under Section 60(5)(c) of the IBC to make a determination of the amount which is payable to an expert valuer as an intrinsic part of the CIRP costs. Regulation 34 of the IRP Regulations defines ‘insolvency resolution process cost’ to include the fees of other professionals appointed by the RP. Whether any work has been done as claimed and if so, the nature of the work done by the valuer is something which need not detain this Court, since it is purely a factual matter to be assessed by the Adjudicating Authority.”

Thus, although the fees of the valuer had been ratified by the CoC, in the facts of the matter where CIRP had been set aside, the Hon’ble Supreme Court held that the Adjudicating Authority has power to determine the amount payable to an expert valuer as an intrinsic part of the CIRP.

37. The Learned Amicus Curiae has further rightly pointed out that the Appellant claiming that he had done excessively well to deserve Rs. 3 Crores of success fees, the Adjudicating Authority had made comments as to what was the scenario when it was supervising the CIRP. We have seen the observations of the Adjudicating Authority in impugned para 23 of the impugned order. The Adjudicating Authority was at the ground level monitoring the progress of CIRP and its observations cannot be simply ignored.

38. For the above reasons, we hold that ‘success fees’ which is more in the nature of contingency and speculative is not part of the provisions of the IBC and the Regulations and the same is not chargeable. Apart from this, even if it is to be said that it is chargeable, we find that in the present matter, the manner in which, it was last minute pushed at the time of approval of the Resolution Plan and the quantum are both improper and incorrect.

39. The argument that the Adjudicating Authority should have sent the matter back to the CoC if it was not approving the success fee deserves to be discarded as the Adjudicating Authority while not accepting the success fee merely asked proportionate distribution which would even otherwise have happened if “success fee” was set aside as the money would become available improving percentage of other creditors’ dues.

40. For such reasons, we do not find that there is any substance in the Appeal. The Appeal is dismissed. No order as to costs.

41. Before parting, we record our deep appreciation for the efforts put in by the Advocate Mr. Sumant Batra, Learned Amicus Curiae who assisted us in the disposal of this Appeal which involves important question of law.

**[Justice A.I.S. Cheema]
The Officiating Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

New Delhi
Anjali