

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

IA No. 1760 of 2023 IN

CP (IB) No.3026/MB-IV/2019

Under Section 43(1) Section 44, 45 and 50 r/w
51 of the I&B Code, 2016

Ms. Anagha Anasingaraju,

...Resolution Professional/Applicant

V/s.

Smt. Neelam Pokerna and Ors.

... Respondent(s) No.1

In the matter of:

The Janata Sahakari Bank Limited, Pune

... Financial Creditor

V/s.

**M/s Beton Concrete Products Private
Limited**

... Corporate Debtor

Order Dated: 02.08.2023

Coram:

**Mr. Prabhat Kumar
Hon'ble Member (Technical)**

**Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)**

Appearances (via videoconferencing):

For the Applicant(s) : Mr. Avinash R. Khanolkar a/w CS
Anagha Anasingaraju Ms. Surekha
Yadav, Advocates.

For the Respondents : None present.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is an Application i.e. IA-1760/2021 is filed by Interim Resolution Professional CS Anagha Anasingaraju (hereinafter as **the Applicant**), of Beton Concrete Products Private Limited (hereinafter referred to as **the Corporate Debtor**) seeking directions of this Tribunal under Section 44(1)(a) & (d) r/w Section 48(1)(c) & 49 of the Insolvency and Bankruptcy Code, 2016 (“Code”) against Smt. Neelam Pokerna (“Respondent No. 1” or “R1”) and M/s Ramraj Enterprises (“Respondent No. 2” or “R2”) to make good the transactions undertaken with the Corporate Debtor.
2. The Applicant was appointed as Interim Resolution Professional in the Corporate Insolvency Resolution Process (“CIRP”) process of Corporate Debtor vide an Order dated 28 April 2020 passed in the CP (IB) 3026/2019. The applicant was subsequently appointed as the Resolution Professional by the Committee of Creditors (hereinafter referred as **the COC**) in its first meeting held on 03 June 2020.
3. The Respondent no. 1 is an erstwhile Director of the Corporate Debtor and is a related party to the Corporate Debtor as per the provisions of the Section 5 (24) of the Code. Respondent No. 2 is a Proprietorship firm of R-1.

4. The Respondents no. 1 & 3 are the Directors (with suspended powers) of the Corporate Debtor and they were in charge of the affairs of the Corporate Debtor before the commencement of the **CIRP**.
5. On 11 May 2020, the Applicant caused the public announcement inviting claims from the Stakeholders of the Corporate Debtor. The Applicant, by virtue of the provisions of the Code, constituted the COC for the Corporate Debtor with the sole Secured Financial Creditor of the Corporate Debtor.
6. Since the Lockdown was on going, the Applicant could not immediately take all the requisite steps as enshrined under the Code. The audited financial statements for the year ended 31 March 2019 were available along with the Tally backup. For the year 2019-20, the tally back up was made available. The Applicant had formed an opinion on the avoidance transactions on the basis of these inputs and informed the CoC in its meeting held on 28 September 2020.
7. Following the formation of opinion, the RP verified the supporting documents for the lookback period, as available to him, and evaluated the transactions carried out by the Corporate Debtor during the period 29 April 2018 to 28 April 2020 for identifying and then classifying the transactions as Preferential or Undervalued or Transaction defrauding Creditors or Fraudulent Transaction or Extortionate credit transaction or transactions of fraudulent / wrongful trading as the case may be.

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8. Based on the initial opinion formed by the Applicant and the findings during the course of the forensic audit conducted by M/s Himanshu Patel & Associates, Chartered Accountants, Pune, the Applicant made a determination of the transactions as required under the Code. During the CIRP period, the Applicant also interacted with the director with suspended powers and requested for information pertaining to the transactions. The director sought further time stating that the accountant was not available or records were not available. The Applicant also held personal meetings in Aurangabad with the director with suspended powers seeking clarification and explanation on various transactions of the corporate debtor. Thereafter, the draft of the report was shared with the director for his comments. However, the director with suspended powers merely denied the contents and again sought further time to submit his explanation. Correspondence exchanged with the director with suspended powers in this regard are forming part of this application.
9. The Applicant submits that on account of the lockdown situation in the state of Maharashtra and more particularly in Aurangabad till the month of October 2020, the Applicant could not travel to the district of Aurangabad where the corporate debtor is located till the month of October / November 2020. Because of this, the Applicant was not able to form an opinion on the

said transactions within 75 days, and could not make the determination within 115 days and could not file applications within 135 days as required under Regulation 35A of the CIRP Regulations. The Applicant seeks condonation of delay in filing of these applications. Further, the Hon'ble NCLT vide its order dated 11 January 2021 has excluded the period of 122 days from the CIRP period towards the lockdown. As resolved by the COC in its meeting held on 03 December 2020, the CIRP was extended by 90 days.

10. The director with suspended powers had sought time to submit resolution plan and also to submit explanation and supporting documents for the avoidance transactions. Since the CIRP period was expiring, the COC meeting was held on 09 February 2021 and there being no resolution plan received, the COC resolved to liquidate the corporate debtor.

11. The Applicant submits that as determined by the Applicant, the Corporate Debtor has entered into following transactions with Respondent no. 1 & 2, which are in nature of Preferential and Undervalued transactions and violates Section 43 and 45 read with Section 48 & 49 of the Code.

11.1. Preferential Transactions

11.1.1. Repayment of personal and car loan of R1 amounting to Rs. 1,65,147/- There is a transfer of property for the benefit of the creditor in respect of an antecedent debt owed by the corporate debtor and this transfer has the effect of putting Mrs. Neelam

Pokerna in a beneficial position (financial creditor) than she would have been in the event of distribution of assets under section 53 (as an equity shareholder);

11.1.2. Salary payable to Respondent no. 1 amounting to Rs. 6,00,000/- : There is a transfer of property for the benefit of the creditor in respect of an antecedent debt owed by the corporate debtor this transfer has the effect of putting Mrs. Neelam Pokerna in a beneficial position (financial creditor) than she would have been in the event of distribution of assets under section 53 (as an equity shareholder);

11.1.3. Running account in the name of Respondent no. 1 in the books of the corporate debtor amounting to Rs. 6,93,573/-: There is a transfer of amounts paid/payable to Mrs. Neelam Pokerna (R1) for the benefit of the creditor (R1) in respect of an antecedent debt owed by the corporate debtor. This transfer has the effect of putting R1 in a beneficial position (financial creditor) that she would have been in the event of distribution of assets under section 53 (as an equity shareholder);

11.1.4. Contract for services with R-2 amounting to Rs. 9,05,000/- : There is a transfer of property with respect to the payment towards production charges in 2019-20 for the benefit of the R2 a creditor in

respect of an antecedent debt owed by the corporate debtor this transfer has the effect of putting R1 in a beneficial position (operational creditor) than she would have been in the event of distribution of assets under section 53 (as an equity shareholder).

11.2. Undervalued Transactions

11.2.1. Salary payable to Respondent no. 1 amounting to Rs. 6,00,000/- : The Corporate debtor has entered into the transaction with R1 involving transfer of receivables (assets) for a consideration (services availed against remuneration) which is significantly less than the value of consideration provided by the corporate debtor;

11.2.2. Contract for services with R-2 amounting to Rs. 16,75,908/- : The Corporate debtor has entered into the transaction with Ramraj Enterprises and assets (receivables) are transferred by the corporate debtor for a consideration (production services received) which is significantly less than the value of consideration provided by the corporate debtor.

11.3. Undervalued Transactions with Intent to Defraud Creditors :

11.3.1. Repayment of personal and car loan of R1 amounting to Rs. 3,50,347/-: The said transaction can be treated as a gift from the corporate debtor which is not in the ordinary course of business;

11.3.2. Running account in the name of Respondent no. 1 in the books of the corporate debtor amounting to Rs. 9,68,358/- : The Corporate debtor has entered into the transaction with R1/R2 in which assets (receivables) are transferred by the corporate debtor for value of the consideration (services availed against remuneration) is significantly less than the value of consideration provided by the corporate debtor. This Transaction has been pleaded to be Extortionate Transactions falling u/s 50 of the Code also.

12. The auditor appointed for the purpose, M/s Himanshu Patel & Associates, Chartered Accountants, Pune, has confirmed these transactions in his report. In the present case, all these transactions were entered within period of two years preceding the CIRP commencement date, hence, this transaction is within the period is specified in Section 44 or 46 of the Code.

13. Under section 43 of the Code, the following are the essentials of a preferential transaction:

- a. There is a transfer of property, or an interest thereof, of the corporate debtor,
- b. Such transfer is for the benefit of a creditor or surety or guarantor,
- c. Such transfer is towards repayment of an antecedent financial or operational debt or other liabilities owed by the corporate debtor,

- d. The above transfer has the effect of putting such creditor / surety / guarantor in a beneficial position than it would have been in the event of a distribution of assets made in accordance with Section 53.
- e. Such transfer is not in the ordinary course of business or financial affairs of the corporate debtor or transferee

14. Under section 45 of the Code, a transaction is under valued transaction, if such transaction has not taken place in the ordinary course of business, and is in nature of either of following transaction:

- a. The corporate debtor has made a gift to a person; or
- b. The corporate debtor enters into a transaction with a person which involves transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor.

15. Under section 49 of the Code, the following undervalued transactions are considered as transaction defrauding creditors, if they are undertaken deliberately :

- a. for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor, or
- b. in order to adversely affect the interests of such a person in relation to the claim.

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16. During the look back, period i.e. from 29 April 2018 onwards (since Respondent no.1 herein is a related party), number of entries are passed through this account of Respondent no. 1 in the books of the Corporate Debtor. The ledger account in the books of Corporate Debtor in the name of R1 is as follows:

Particulars	Debit (Rs.)	Credit (Rs.)
Opening balance	2,450	
Repayment of personal loan / car loan of Mrs. Neelam Pokerna	1,85,310	
Remuneration for 2018-19		2,40,000
Transfer from Ramraj Enterprises (R2) on 31 March 2019		6,41,333
Total	1,87,760	8,81,333
Opening balance in Neelam Pokerna Loan account (Closing credit balance of personal account as on 31		6,93,573

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March 2019 transferred to Loan account)		
Remuneration for 2019-20		3,60,000
Repayment of car loan of R1	95,147	
Traveling expenses (no supporting available)		9,932
Closing credit balance as on 31 March 2020 of Neelam Pokerna Loan account		9,68,358

17. During the look back, period i.e. from 29 April 2018 onwards (since Respondent no.1 herein is a related party), number of entries are passed through this account of Respondent no. 2 in the books of the Corporate Debtor. The ledger account in the books of Corporate Debtor in the name of R2 is as follows:

Particulars	Debit (Rs.)	Credit (Rs.)
Opening balance	3,46,049	
Payment to R2 towards Repayment of personal car loan of Mrs. Neelam Pokerna	70,000	

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Payment to R2 towards insurance of Car belonging to Mr. Ashish Pokerna (R3)	21,699	
Transfer To Mrs. Neelam Pokerna (R1) on 31 March 2019	6,41,333	
Production charges payable		16,75,908
Cash Voucher payments made towards labour and security charges.	9,91,152	
Bank payments made to R2	2,18,601	
Money received from R2		11,00,000
TOTAL	22,88,834	27,75,908
Closing credit balance of R2 as on 31 March 2020		4,87,074

18. This Bench heard the Counsel and has perused the material on record.

19. The Applicant has sought condonation of delay in filing present application beyond the timelines as specified in Regulation 35A of the CIRP Regulations on account of the lockdown situation. This Bench is of the considered view that the timelines provided in Regulations 35A are directory in nature.

Nonetheless, the COVID-19 lock down and relaxations granted by the Hon'ble Supreme Court in relation to specified period pertaining to COVID-19 disruptions also supports the case of the Applicant. Accordingly, the delay in filing present application is condoned.

20. From the perusal of definition of Preferential Transactions, Undervalued Transactions, Transactions to defraud Creditors and Extortionate Transactions, this Bench finds that these transactions have been defined to have certain characteristics, and such characteristics are distinct. In the present case, the Applicant has characterised transactions falling under multiple category of avoidance transactions, which can not be possible in accordance with the definition of such transactions provided under Code. Nonetheless, this Bench feels that it would be in the interest of justice to adjudicate on the transactions based on the material placed on record.

20.1. This Bench finds that the repayment of personal and car loan of R1 amounting to Rs. 1,65,147/- has taken place by way of debit to her ledger account maintained in the books of Corporate Debtor. The summary of ledger account shows that such repayment was made against the remuneration payable to her and such remuneration has also been determined as Preferential/Undervalued Transaction/Transaction to defraud Creditors in the Applicant in this Application. Since, the amount of Rs. 1,65,147/- (Rs. 3,50,347/- stated as Undervalued

Transaction u/s 45) paid by the Corporate Debtor has been debited to the account of R-1 & R2, the same can not be considered either as Undervalued Transaction or as Transaction to defraud Creditors. Since, the payment of remuneration to the employees of the Corporate Debtor is made in the ordinary course of business, and it is not the case of the Applicant that such payment was in precedence or in priority of salary payment to other employees, this Bench also holds that this transaction, being in ordinary course of business having the effect of payment of monthly remuneration to R-1, can not be considered as Preferential transaction u/s 43 of the Code.

20.2. This Bench finds that the ledger account of R1 has been credited with a sum of Rs. 6,00,000/- towards remuneration payable to her in Financial Year 2018-19 & 2019-20. At the outset, this transaction can not be said to be preferential in nature, as the amount has been credited to the ledger account of R-1 and subsequent debits, in nature of actual payments, can at best be considered to have resulted into preference, provided it is not in ordinary course of business. As held in the preceding para, payment of salary to an employee is a payment in the ordinary course of business, accordingly, this transaction can not be held to be a preferential transaction.

20.2.1. The Applicant has merely stated that such remuneration is in excess of value of services availed from her by the Corporate Debtor, however, the Applicant has not averred that no service was provided by R-1 against such remuneration. It is the case of Applicant that R-1 & R-3 were in charge of affairs of the Corporate Debtor as averred in Para 2 of the Application. The payment of monthly remuneration of Rs. 20,000/- in Financial Year 2018-19 or Rs. 30,000 in next year can not be said to be excessive, as such remuneration is drawn by a simple graduate also. Accordingly, this Bench is of the considered view that this transaction is not an undervalued transaction. As this transaction is held to be not an undervalued transaction, the same can not be considered as a transaction to defraud the creditors also.

20.3. Running account in the name of Respondent no. 1 in the books of the corporate debtor amounting to Rs. 6,93,573/-: As per the ledger account summary submitted in the Application, there is credit balance of Rs. 9,68,358/- in R-1's loan account in the books of the Corporate Debtor at the end of Financial year 2019-20, and this balance includes the opening balance of Rs. 6,93,573/- in her personal account brought forward from 31.3.2019. This Bench is unable to comprehend how carry forward of balance in personal account of R-1 from the preceding year

in the books of account to the loan account ledger in the next year can be a Preferential Transaction u/s 43. This is sheer non application of mind on the hand of the Applicant Resolution Professional and the CoC, where such transaction came to be placed as Preferential Transaction.

20.4. Contract for services with R-2 amounting to Rs. 9,05,000/- : The Applicant has submitted that the amount of Rs.16,75,908/- credited to the ledger account of R2 towards production charges in Financial year 2019-20 have been introduced in the books through cumulative entries without any supporting documents. The Corporate Debtor has awarded contract to Ramraj Enterprises for providing production services without a proper vendor selection process. Copy of contract is not available in records. The nature of business of R2 is not known and hence whether R2 has relevant experience and expertise in the field of providing these services is questionable. There are no bills raised by R2 towards the production charges. All amounts paid to R2 are supported by cash/bank vouchers. Out of this sum, a sum of Rs. 9,91,512/- is stated to have paid in cash on different occasions. After consideration of these facts, this Bench feels that this transaction does not appear to be genuine, accordingly can not be said to have taken place in the ordinary course of business. Since, the Respondents have failed to satisfy the Applicant if any actual services were received from R-2 so as to entitle R-2 to

payments on account of this rendition of production services, this Bench is of considered view that this is a case of undervalue transaction entered into with an intent to defraud creditors u/s 49 of the Code. Accordingly, this Bench holds that credit of Rs. 16,75,908/- and debit of Rs. 9,91,512/- in the ledger account of R-2 should be reversed. The reversal of these two transaction shall increase the Cash Balance with Corporate Debtor by a sum of Rs. 9,91,512/-, and the balance in R2's ledger account shall become Rs. 1,97,682/- debit balance. R1 & R3 are liable to contribute to the Corporate Debtor the amount of such Cash Balance with 30 days from the date of this order.

20.5. Running account in the name of Respondent no. 1 in the books of the corporate debtor amounting to Rs. 9,68,358/- : As per the ledger account summary submitted in the Application, there is credit balance of Rs. 9,68,358/- in R-1's loan account in the books of the Corporate Debtor at the end of Financial year 2019-20, and this balance includes the opening balance of Rs. 6,93,573/- in her personal account brought forward from 31.3.2019. This Bench is unable to comprehend how carry forward of balance in personal account of R-1 from the preceding year in the books of account to the loan account ledger in the next year can be a Preferential Transaction u/s 43. This is sheer non application of

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mind on the hand of the Applicant Resolution Professional and the CoC,
where such transaction came to be placed as Preferential Transaction.

20.6. In so far as, the transfer of a sum of Rs. 6,41,333/- by debit to R-2 to credit of R-1 is concerned, this Bench is of the considered view that R1 is proprietor of R-2 and R-2 has no independent legal status. Accordingly, such transfer of balance from one account to another account does not have any effect. After reversal of transaction of credit of Rs. 16,75,908/- and debit of Rs. 9,91,512/- in the ledger account of R-2, there remains a debit balance of Rs. Rs. 1,97,682/- in the account of R-2. In case this entry is also reversed, there shall be credit balance of Rs. 4,43,651/- in the account of R-2. As there is already a credit balance in account of R-1 to the extent of Rs. 9,68,358/-, even if credit of Rs. 6,41,333/- is reversed, there shall still be credit balance of Rs. 3,27,025/.

21. In view of above findings, this Bench directs R1 & R3 to contribute a sum of Rs. 9,91,512/- to the assets of the Corporate Debtor in accordance with Section 49 (1) (b) (i) and (ii) of the Code within 30 days from the date of this order.

22. Accordingly, **IA-1760/2022** is Partly allowed.

Sd/-

PRABHAT KUMAR
Member (Technical)
02.08.2023

Sd/-

KISHORE VEMULAPALLI
Member (Judicial)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
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IA No. 2133 of 2023

IN

CP (IB) No.3026/MB-IV/2019

Under Section 43(1) Section 44, 45 and 50 r/w
51 of the I&B Code, 2016

Ms. Anagha Anasingaraju,

...Resolution Professional/Applicant

V/s.

M/s Pujaa Steels and Ors.

... Respondents No.1

In the matter of:

The Janata Sahakari Bank Limited, Pune

... Financial Creditor

V/s.

M/s Beton Concrete Products Private

Limited

... Corporate Debtor

Order Dated: 02.08.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant(s) : Mr. Avinash R. Khanolkar a/w CS
Anagha Anasingaraju Ms. Surekha
Yadav, Advocates.

For the Respondents : None present.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is an Application i.e. IA 2133/2021 is filed by Interim Resolution Professional CS Anagha Anasingaraju (hereinafter as **the Applicant**), of Beton Concrete Products Private Limited (hereinafter referred to as **the Corporate Debtor**) seeking directions of this Tribunal under Section **45 r.w. 48, 49 AND 50 r.w. 51** of the Insolvency and Bankruptcy Code, 2016 (“Code”) against M/s M/s Pujaa Steels (Proprietorship firm of Sh. Vishal Jawaharlal Bohra) (“Respondent No. 1” or “R1”), and M/s. Ravikiran Construction (Proprietorship firm of Sh. Kiran Ravindra Wadhi (“Respondent No. 2” or “R-2”)), , to make good the transactions undertaken with the Corporate Debtor.
2. The Applicant was appointed as Interim Resolution Professional in the Corporate Insolvency Resolution Process (“CIRP”) process of Corporate Debtor vide an Order dated 28 April 2020 passed in the CP (IB) 3026/2019. The applicant was subsequently appointed as the Resolution Professional by

the Committee of Creditors (hereinafter referred as **the COC**) in its first meeting held on 03 June 2020.

3. The Respondent no. 1 is a Proprietorship firm owned by Sh. Vishal Jawaharlal Bohra (“Respondent No. 2), and was a supplier of raw materials to the Corporate Debtor.
4. The Respondent no. 2 is a Proprietorship firm owned by Sh. Kiran Ravindra Wadhi (“Respondent No. 2), involved in works contract services and construction services. The corporate debtor sold Flyash bricks to R2 in the year 2018-19.
5. Respondent No. 3 & 4 i.e. Sh. Ashish Pokerna and Smt. Neelam Pokerna are the Director of the Corporate Debtor (with suspended powers) and they were in charge of the affairs of the Corporate Debtor before the commencement of the **CIRP**.
6. On 11 May 2020, the Applicant caused the public announcement inviting claims from the Stakeholders of the Corporate Debtor. The Applicant, by virtue of the provisions of the Code, constituted the COC for the Corporate Debtor with the sole Secured Financial Creditor of the Corporate Debtor.
7. Since the Lockdown was on going, the Applicant could not immediately take all the requisite steps as enshrined under the Code. The audited financial statements for the year ended 31 March 2019 were available along with the Tally backup. For the year 2019-20, the tally back up was made available.

The Applicant had formed an opinion on the avoidance transactions on the basis of these inputs and informed the CoC in its meeting held on 28 September 2020.

8. Following the formation of opinion, the RP verified the supporting documents for the lookback period, as available to him, and evaluated the transactions carried out by the Corporate Debtor during the period 29 April 2018 to 28 April 2020 for identifying and then classifying the transactions as Undervalued or Transaction defrauding Creditors or Fraudulent Transaction or Extortionate credit transaction or transactions of fraudulent / wrongful trading as the case may be.
9. Based on the initial opinion formed by the Applicant and the findings during the course of the forensic audit conducted by M/s Himanshu Patel & Associates, Chartered Accountants, Pune, the Applicant made a determination of the transactions as required under the Code. During the CIRP period, the Applicant also interacted with the director with suspended powers and requested for information pertaining to the transactions. The director sought further time stating that the accountant was not available or records were not available. The Applicant also held personal meetings in Aurangabad with the director with suspended powers seeking clarification and explanation on various transactions of the corporate debtor. Thereafter, the draft of the report was shared with the director for his comments.

However, the director with suspended powers merely denied the contents and again sought further time to submit his explanation. Correspondence exchanged with the director with suspended powers in this regard are forming part of this application.

10. The Applicant submits that on account of the lockdown situation in the state of Maharashtra and more particularly in Aurangabad till the month of October 2020, the Applicant could not travel to the district of Aurangabad where the corporate debtor is located till the month of October / November 2020. Because of this, the Applicant was not able to form an opinion on the said transactions within 75 days, and could not make the determination within 115 days and could not file applications within 135 days as required under Regulation 35A of the CIRP Regulations. The Applicant seeks condonation of delay in filing of these applications. Further, the Hon'ble NCLT vide its order dated 11 January 2021 has excluded the period of 122 days from the CIRP period towards the lockdown. As resolved by the COC in its meeting held on 03 December 2020, the CIRP was extended by 90 days.
11. The director with suspended powers had sought time to submit resolution plan and also to submit explanation and supporting documents for the avoidance transactions. Since the CIRP period was expiring, the COC

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meeting was held on 09 February 2021 and there being no resolution plan received, the COC resolved to liquidate the corporate debtor.

12. The Applicant submits that, during the look back period i.e. 2019-20, the corporate debtor has entered into the transactions with Respondent no. 1 and Respondent No. 2, which are classified as Undervalued, Transactions defrauding creditors, and extortionate credit transactions as defined under the Code. The details are as follows –

No	Nature of transaction	Amount involved (Rs.)	Action required to be taken
1	Undervalued, Fraudulent and Extortionate	6,97,760.50	Entry to be reversed
2	Undervalued, Fraudulent and Extortionate	6,97,760.50	Amount to be recovered from R2

13. The auditor appointed for the purpose, M/s Himanshu Patel & Associates, Chartered Accountants, Pune, has confirmed these transactions in his report. In the present case, all these transactions were entered within period of two years preceding the CIRP commencement date, hence, this transaction is within the period specified in Section 45 or 49 or 51 of the Code.

13.1. TRANSACTIONS WITH RESPONDENT NO. 1 : In the beginning of the look back period i.e., 29 April 2019, as per the books of accounts of the Corporate Debtor, there was an account in the name of Respondent no. 1 which had a debit balance of Rs. 50,29,502.50/- implying that Respondent no. 1 owed money to the corporate debtor. At the end of the financial year 2019-20, the Corporate Debtor owed a sum of Rs. 6,97,760.50/- to R-1, and this amount was paid to R-1 by transferring liability owed to it to set off amount recoverable from R-2. The summary of transactions with R-1 is depicted in the table below -

Particulars	Debit (Rs.)	Credit (Rs.)
Opening balance	50,29,502.50	
Total amount of purchases of Fly Ash Bricks from R1 in 2018-19		20,74,464
Total amount of purchases cement and steel from R1 in 2018-19		12,26,560
Money received from R1 in 2018-19 in Vaijapur Bank Account		10,66,395

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Money received from R1 in 2018-19 in Janata Sahakari Bank Account		19,00,000
Sales of fly ash bricks to R1 in 2019-20	3,50,156	
Payment made from Vaijapur Bank Account to R1 in 2019-20	5,40,000	
Money received in Vaijapur Bank Account from R1 in 2019-20		3,50,000
Total	59,19,658.50	66,17,419.00
Balance of R1 transferred to R2 making it Nil closing balance in R1 account	6,97,760.50	

13.2. TRANSACTIONS WITH RESPONDENT NO. 2: Respondent no. 2 was a debtor of the Corporate Debtor at the beginning of the look back period. Summary of transactions entered into by the Corporate Debtor with Respondent no. 2 is depicted below in the table :

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Particulars	Debit (Rs.)	Credit (Rs.)
Opening balance	0	
Sales of fly ash bricks to R2 in May 2018	7,06,135.50	
Closing balance of R1 transferred to R2		6,97,760.50
Total	7,06,135.50	6,97,760.50
Closing Balance	8,375	

14. The transaction involves transfer of asset of the company (debtor) for no consideration / consideration which is significantly less than the value provided by the company and is also not in the ordinary course of business. The corporate debtor purchased finished goods - Fly Ash Bricks, within a period of one week in April 2018. However, the director (with suspended powers) informed that these are sales return of goods sold in 2017-18. However, GST invoices supporting purchase of fly ash brick made from Respondent No.1 at the rate of Rs. 2800/- cubic metre were provided by the Corporate Debtor. There are no stock records available to substantiate these transactions. All the purchases made from Respondent No.1 are with insufficient documentary evidence like LR copies, E-way Bill, etc and

without proper vendor selection process. In 2019-20, the corporate debtor has made a sale of fly ash bricks worth Rs. 3,50,156 to No.1. The rates as per Tally back up provided by the corporate debtor are Rs. 2726/- along with transportation charges, from Aurangabad to Chakan, Pune. However, the invoices raised by the corporate debtor on Respondent specify the rates as Rs. 3176/-. During the look back period, Respondent No.1 has made payments against their dues and also, received on account payments from the corporate debtor. The net effect of these transactions resulted in the opening receivable amount of Rs. 50,29,502 getting converted into a payable amount of Rs. 6,97,160.50. The account of Respondent No.1 was closed by transferring the credit balance of Rs. 6,97,760.50 to Respondent No.2 resulting a NIL closing balance at the end of 2019-20.

15. The opening debit balance of Rs.7,06,135.50 of Respondent No.2 was reduced to Rs.8,375 by transfer entry from the account of Respondent No.1. This resulted in reduction in the net balance receivable from Respondent No.2.

16. On repeated requests, the management did not produce the ledger confirmation statements from Respondent No.1 and Respondent No.2. All the transactions entered with Respondent No.1 require further verification and could be classified as potentially fraudulent transactions, based on the findings.

17. The Applicant received a communication from Respondent No.2 while following up for the receivable amount stating that R2 is not aware about this transfer entry. Clarification on the same is awaited from Respondent No.2. Respondent No.2 was also not able to provide ledger of the corporate debtor in its books.
18. As a result of this, the creditors were affected since amount recoverable from the Respondents could have been used to pay the creditors. Also, by passing fictitious entries in the books, a receivable amount from debtor was used to reduce the value of a creditor when no actual cash was received from Respondent No.2.
19. This Bench heard the Counsel and has perused the material on record.
20. The Applicant has sought condonation of delay in filing present application beyond the timelines as specified in Regulation 35A of the CIRP Regulations on account of the lockdown situation. This Bench is of the considered view that the timelines provided in Regulations 35A are directory in nature. Nonetheless, the COVID-19 lock down and relaxations granted by the Hon'ble Supreme Court in relation to specified period pertaining to COVID-19 disruptions also supports the case of the Applicant. Accordingly, the delay in filing present application is condoned.

21. From the perusal of definition of Undervalued Transactions, Transactions to defraud Creditors, and Extortionate Transactions, this Bench finds that these transactions have been defined to have certain characteristics, and such characteristics are distinct. In the present case, the Applicant has characterised transactions falling under Undervalued Transactions, Transactions to defraud Creditors, and Extortionate Transactions. Nonetheless, this Bench feels that it would be in the interest of justice to adjudicate on the transactions based on the material placed on record.
22. Under section 45 of the Code, the a transaction is undervalued transaction, Such transaction has not taken place in the ordinary course of business, and is in nature of either of following transaction:
- a. The corporate debtor has made a gift to a person; or
 - b. The corporate debtor enters into a transaction with a person which involves transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor.
23. Under section 49 of the Code, the following undervalued transactions are considered as transaction defrauding creditors, if they are undertaken deliberately :

- a. for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor, or
- b. in order to adversely affect the interests of such a person in relation to the claim.

24. Under section 50 of the Code, the following are the essentials of an extortionate credit transaction:

- a. Corporate debtor has received financial or operational debt,
- b. Terms of such transaction required exorbitant payments to be made by the corporate debtor.

25. This Bench finds that the Applicant has determined above two transactions as under valued transactions defrauding Creditors. This Bench finds that the transfer of balance payable to R-1 to set off the amount receivable from R2 results into recovery of amount receivable from R-2 and discharge of liability towards R1. Hence, these transactions are neither in nature of a gift nor are transfer for a consideration less than its value. Accordingly, the said transactions cannot be held to be under valued transactions under Section 45 of the Code. Consequently, these transactions cannot be termed as transactions defrauding creditors under Section 49(1) of the Code, because these transactions are not under valued transactions and Section 49(1) contemplates only an under valued transactions which is deliberately entered

into for keeping assets of the Corporate Debtor beyond the reach of the creditors or to adversely affect their interest. This transaction is also not covered under the definition of Extortionate Transaction, as the transaction does not result into terms of such transaction requiring exorbitant payments to be made by the corporate debtor. On the contrary, the effect of these transaction is to discharge one debt owed to the Corporate Debtor by debt owed by the Corporate Debtor. Hence, it can be said to be in nature of Preferential Transaction, at best.

26. In view of the above, this Bench is of the considered view that an order under Section 48 (1) (a) r/w 49(1) (b) (i) or 48(1)(c) cannot be passed by this Bench. Accordingly, IA-2133/2021 is **dismissed**.

27. It is clarified that the Applicant shall be at liberty to file another application, in relation to transactions alleged to be undervalued transaction defrauding creditors, seeking relief under the relevant provisions of the Code, if such application is otherwise permissible under the Code.

Sd/-

PRABHAT KUMAR
Member (Technical)
02.08.2023

Sd/-

KISHORE VEMULAPALLI
Member (Judicial)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

IA 2138/2021

IN

CP (IB) No.3026/MB-IV/2019

Under Section 43(1) Section 44, 45 and 50 r/w
51 of the I&B Code, 2016

Ms. Anagha Anasingaraju,

...Resolution Professional/Applicant

V/s.

M/s Ashish Transport and Ors.

... Respondents No.1

In the matter of:

The Janata Sahakari Bank Limited, Pune

... Financial Creditor

V/s.

M/s Beton Concrete Products Private

Limited

... Corporate Debtor

Order Dated: 02.08.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant(s) : Mr. Avinash R. Khanolkar a/w CS
Anagha Anasingaraju Ms. Surekha
Yadav, Advocates.

For the Respondents : None present.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is an Application i.e. IA 2138/2021 is filed by Interim Resolution Professional CS Anagha Anasingaraju (hereinafter as **the Applicant**), of Beton Concrete Products Private Limited (hereinafter referred to as **the Corporate Debtor**) seeking directions of this Tribunal under Section 45 r/w 48 & 49 of the Insolvency and Bankruptcy Code, 2016 (“Code”) against M/s Ashish Transport (Proprietorship firm of Sh. Ashish Pokerna) (“Respondent No. 1” or “R1”), M/s. Ashish Pokerna HUF (“Respondent No. 2” or “R-2”), and Sh. Ashish Pokerna (“Respondent No. 3” or “R-3”), to make good the transactions undertaken with the Corporate Debtor.
2. The Applicant was appointed as Interim Resolution Professional in the Corporate Insolvency Resolution Process (“CIRP”) process of Corporate Debtor vide an Order dated 28 April 2020 passed in the CP (IB) 3026/2019. The applicant was subsequently appointed as the Resolution Professional by the Committee of Creditors (hereinafter referred as **the COC**) in its first meeting held on 03 June 2020.

3. The Respondent no. 1 is a Proprietorship firm owned by M/s. Ashish Pokerna HUF ("Respondent No. 2), of which Sh. Ashish Pokerna is a karta. Hence, R1 & R2 are related party of the Corporate Debtor.
4. Respondent No. 3 & 4 i.e. Sh. Ashish Pokerna and Smt. Neelam Pokerna are the Director of the Corporate Debtor (with suspended powers) and they were in charge of the affairs of the Corporate Debtor before the commencement of the **CIRP**.
5. On 11 May 2020, the Applicant caused the public announcement inviting claims from the Stakeholders of the Corporate Debtor. The Applicant, by virtue of the provisions of the Code, constituted the COC for the Corporate Debtor with the sole Secured Financial Creditor of the Corporate Debtor.
6. Since the Lockdown was on going, the Applicant could not immediately take all the requisite steps as enshrined under the Code. The audited financial statements for the year ended 31 March 2019 were available along with the Tally backup. For the year 2019-20, the tally back up was made available. The Applicant had formed an opinion on the avoidance transactions on the basis of these inputs and informed the CoC in its meeting held on 28 September 2020.
7. Following the formation of opinion, the RP verified the supporting documents for the lookback period, as available to him, and evaluated the transactions carried out by the Corporate Debtor during the period 29 April

2018 to 28 April 2020 for identifying and then classifying the transactions as Preferential or Undervalued or Transaction defrauding Creditors or Fraudulent Transaction or Extortionate credit transaction or transactions of fraudulent / wrongful trading as the case may be.

8. Based on the initial opinion formed by the Applicant and the findings during the course of the forensic audit conducted by M/s Himanshu Patel & Associates, Chartered Accountants, Pune, the Applicant made a determination of the transactions as required under the Code. During the CIRP period, the Applicant also interacted with the director with suspended powers and requested for information pertaining to the transactions. The director sought further time stating that the accountant was not available or records were not available. The Applicant also held personal meetings in Aurangabad with the director with suspended powers seeking clarification and explanation on various transactions of the corporate debtor. Thereafter, the draft of the report was shared with the director for his comments. However, the director with suspended powers merely denied the contents and again sought further time to submit his explanation. Correspondence exchanged with the director with suspended powers in this regard are forming part of this application.

9. The Applicant submits that on account of the lockdown situation in the state of Maharashtra and more particularly in Aurangabad till the month of October 2020, the Applicant could not travel to the district of Aurangabad where the corporate debtor is located till the month of October / November 2020. Because of this, the Applicant was not able to form an opinion on the said transactions within 75 days, and could not make the determination within 115 days and could not file applications within 135 days as required under Regulation 35A of the CIRP Regulations. The Applicant seeks condonation of delay in filing of these applications. Further, the Hon'ble NCLT vide its order dated 11 January 2021 has excluded the period of 122 days from the CIRP period towards the lockdown. As resolved by the COC in its meeting held on 03 December 2020, the CIRP was extended by 90 days.
10. The director with suspended powers had sought time to submit resolution plan and also to submit explanation and supporting documents for the avoidance transactions. Since the CIRP period was expiring, the COC meeting was held on 09 February 2021 and there being no resolution plan received, the COC resolved to liquidate the corporate debtor.
11. The Applicant submits that, during the look back period i.e. 2019-20, the corporate debtor has entered into the transactions with Respondent no. 1, 2 & 3, which are classified as Preferential, Undervalued, Transactions

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defrauding creditors, and Fraudulent and Wrongful Trading transactions as defined under the Code. The details are as follows –

No	Nature of transaction	Amount involved (Rs.)	Action required to be taken
1	Preferential, Undervalued, Fraudulent, Wrongful and Fraudulent Trading (with R1)	15,17,200	All entries passed in accounts towards machinery dismantling to be reversed.
2	Undervalued, Fraudulent (with R2 & R3)	50,440	Entry to be reversed
3	Undervalued, Fraudulent (with R2)	1,90,000	Amount to be recovered from R2
4	Undervalued, Fraudulent (with R3)	7,83,680	Amount to be recovered from R3

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5	Undervalued, Fraudulent (with R3)	1,00,000	Entry to be reversed
6	Undervalued, Fraudulent (with R3)	1,12,670	Entry to be reversed
7	Fraudulent and Wrongful trading (with R2)	1,78,55,087.60	Amount to be recovered from R3 and R4.

12. The auditor appointed for the purpose, M/s Himanshu Patel & Associates, Chartered Accountants, Pune, has confirmed these transactions in his report. In the present case, all these transactions were entered within period of two years preceding the CIRP commencement date, hence, this transaction is within the period specified in Section 46 or 50 or 66 of the Code.
13. The corporate debtor has entered into this transaction which involves transfer of asset of the corporate debtor. The Applicant further states that these transactions with Respondent no. 1,2 & 3 can be classified as Preferential, Undervalued, Defrauding creditors, Extortionate credit and Fraudulent and Wrongful Trading transactions under the provisions of the Code for the reasons elaborated hereinbelow.

13.1. **Transactions with R-1** : As on 01 April 2018, Respondent No.1 owed an amount of Rs. 2,88,495 to the Corporate Debtor. It is pertinent to note that a transportation entity is a debtor of the Corporate Debtor which is an unlikely scenario and actually pays part of the amount due during the year. Since the Applicant could not access the Tally data for period prior to the look back period, the nature of transactions between the parties which have culminated into an opening balance receivable from Respondent No.1 could not be concluded. These transactions could potentially be classified as Fraudulent Transactions after further verification. During the year, Respondent No.1 paid Rs. 2,00,000 to the Corporate Debtor leaving a balance of Rs. 88,495. During the year 2019-20, Machinery and Dismantling charges of Rs. 12,80,000 were shown payable to Respondent No.1 starting from January 2020 till 09 March 2020. The details of these transactions and other pertinent facts to the dismantling and shifting of machinery from the premises of corporate debtor is listed below: As per the books of the Corporate Debtor, since 01 January 2020 through 09 March 2020 various charges are shown as incurred by the Corporate Debtor towards dismantling and shifting of machinery of the Corporate Debtor to another location. Out of this, Rs. 6,15,000 was booked in January 2020, Rs. 5,79,400 was booked in February 2020 and Rs. 3,22,800 in March 2020. On enquiring with the

director with suspended powers who is Respondent No.3 in this application, it was informed that the machinery was dismantled and shifted since the financial creditor was seeking possession of the assets of the Corporate Debtor. Respondent No.3 received copy of the DM order only on 20 Jan 2020 and sought time vide his letter dated 03 Feb 2020 to shift machineries; however, he had started that process on the day the Hon'ble NCLT reserved its order. This is evident from the entries in the books of accounts. In addition to the amount payable to Respondent No.1, there are expenses towards dismantling and shifting of machinery paid through bank accounts of the Corporate Debtor of Rs. 15,000, in cash of Rs. 1,90,000 and Rs.32,200 paid by Respondent No.3. Thus, total expenses on dismantling and shifting of machinery are Rs. 15,17,200. Machinery belonging to Concept Enterprises was also dismantled and shifted. Since the vouchers booking the expenses are silent on this aspect, it is not possible to ascertain whether the expenses charged to this account are for the Corporate Debtor or for other entities as well. On enquiry about the shifting, Respondent No. 3 (the director with suspended powers) informed that since the FC wanted to take possession of the premises, he has shifted the machinery. This has resulted in reducing in the chances of resolution of the Corporate Debtor since a potential resolution applicant would consider the cost of shifting

and erecting the machinery at the premises of the Corporate Debtor. Since the dismantling and shifting of the machinery has started from 01 January 2020 itself as per the books and the FC is informed on 03 February 2020 for the first time, the fact whether the FC was aware is not relevant in determining the nature of the avoidance transaction. As is evident from above, almost half of the expenses for shifting were booked before the communication to the FC. Further, even though the transportation charges are not paid actually, the amount is shown payable and as a result, a debtor of the Corporate Debtor has ultimately become an operational creditor of the Corporate Debtor. It is pertinent to note that the ledger of the Corporate Debtor in the books of the Respondent No.1 contains entries towards dismantling and shifting the machinery from 03 February 2020 through 09 March 2020 along with copy of LR. These entries do not match with the entries in the books of accounts of the Corporate Debtor. The closing balance as on 31 March 2020 is a payable balance of Rs. 11,78,705 to Respondent No.1.

- 13.2. **TRANSACTIONS WITH RESPONDENT NO. 2 :** As on 01 April 2018, there is a journal entry of transferring an amount of Rs. 50,440 transferred from Respondent No.3 account to Respondent No.2. There is no narration or supporting for passing this entry. During the year 2018-19, an amount of Rs. 1,90,000 was paid to Respondent No.2

account without any supporting and when there was no amount payable to Respondent No.2. It is also not known for what this amount was paid. This resulted in net receivable of Rs. 2,40,440 from Respondent No.2. As on 31 March 2019, the total amount of Rs. 2,40,440 is transferred to Respondent No.3 account stating that it is towards slag dust charges paid by Respondent No.3. There is no other supporting available to verify this payment by R3 to third party. As a result of this entry, the receivable from Respondent No.2 has become NIL. There are no transactions during the year 2019-20. The business of Respondent No.2 is not known. There are no other transactions in this account during the relevant period. There is nothing to suggest that Respondent No.2 has paid the slag dust charges on behalf of the Corporate Debtor or supplied slag dust to the Corporate Debtor. During the year 2019-20, there are no transactions with Respondent No.2. By making payment of Rs. 1,90,000 to the Respondent No.2, preference is given to the Respondent No.2 when there were outstanding dues to the FC. By passing fictitious entries in the books, the amount paid to the Respondent No.2 without supporting is regularized and adjusted against slag dust charges. It is not known whether these are in fact payable.

13.3. **TRANSACTIONS WITH RESPONDENT NO. 3** : Respondent No.3 is one of the directors of the Corporate Debtor who also holds 497

class A and 762 class B equity shares respectively in the Corporate Debtor. He is the proprietor of Ashish Transport (Respondent No.1) and Karta of Ashish Pokerna HUF (Respondent No.2). Respondent No.3 is a partner in Concept Enterprises, partnership firm (Concept).

13.3.1. The Corporate Debtor owed Respondent No.3 Rs. 36,12,004.88 as on 01 April 2018. Also, there is an opening balance of remuneration payable of Rs. 3,84,500 as on 01 April 2018. As per the books of accounts, he is entitled to remuneration of Rs. 40,000 per month during the year 2018-19 and Rs.50,000 per month during the year 2019-20. This amount is shown payable in the books. During the look back period, there are many transactions which could not be investigated due to the absence of supporting documents. There are many transactions wherein R3 has made payment to creditors and towards expenses of the company. Also, customers have deposited money directly to R3's personal account and money was transferred into / from the company bank accounts from / to R3's personal bank account without proper narrations. The total amount that was transferred to R3 in this manner amounts to Rs.24,05,835. This amount excludes the transactions, stated in the following sub-paras.

13.3.2. **Repayment of personal gold loan :** During the year 2018-19, payments made to Respondent No.3's personal bank account from the Corporate Debtor's JSB account were of Rs. 35,65,000. During 2019-20, no amounts were paid. Respondent No.3 has received Rs. 7,10,000 in 2018-19 and Rs. 42,44,970.50 in 2019-20 from the Corporate Debtor's VMC account. In all, the Corporate Debtor has paid a total of Rs. 42,75,000 in the year 2018-19 and Rs. 42,44,970.50 in the year 2019-20 to Respondent No.3's personal bank account. There is no narration to the above entries. Supporting documents for such payments were also not made available. Hence, conclusion about the reasons and veracity of these amounts cannot be drawn. During the relevant period (29 April 2018 through 28 April 2020), the Corporate Debtor has repaid personal loan (gold loan) of Respondent No.3 of Rs. 7,83,680 during 2018-19. No such payment in the year 2019-20. This is the loan taken by the director for personal purpose.

13.3.3. **Transfer of balances to R3's personal account :**The opening receivable balance of Rs.1,00,000 from Shri Guru Gautam Labdhi Education Center Aurangabad was transferred to Respondent No.3 on 31 March 2019. The amount payable to Respondent No.3 has been increased by passing a journal entry of

Rs. 50,440 from Respondent No.2 account. There is no narration or supporting for passing these entries in the director's personal account. As a result of this, the creditors are affected since amount recoverable from Shri Guru Gautam Labdhi Education Center would have been used to pay the creditors. Also, by passing fictitious entries in the books, a receivable amount from debtor was used to reduce the amount payable to Respondent No.3.

13.3.4. **Opening of account in Vaijapur Merchants Cooperative**

bank: While the corporate debtor was in default of repaying loans to the Secured creditor (JSB), the corporate debtor opened a current account in Vaijapur Merchants Cooperative Bank Ltd (VMC) on or about 10 July 2018 (account number 000600260000471). This was without the approval and in violation of the terms of sanction letter of JSB. The business transactions were routed through the VMC account since July 2018. There are no transactions post 02 November 2019 in the JSB account. R3 has been routing the corporate debtor's funds through his personal account and VMC account while conducting business transactions. Since the transactions of the corporate debtor were diverted through other bank accounts / personal bank accounts, funds were kept away from JSB account and hence there was no repayment of the loan taken by

the corporate debtor. The total amounts credited to VMC account in the year 2018-19 is Rs.77,33,906.60 and in 2019-20 is Rs. 1,01,21,181. The closing balance of VMC account as on 28 April 2020 is Rs. 9,239. During the period under review and especially when the corporate debtor was in financial stress, the corporate debtor has made personal payments to / on behalf of a directors and related parties through bank accounts other than JSB instead of making payment against the outstanding loan. This act of opening another bank account and entering into such transactions involve fraudulent removal of property of the corporate debtor which has caused loss to the creditors.

13.3.5. **Payments made by R3 on behalf of Related Parties:** An amount of Rs. 62,670 was paid in 2018-19 and Rs. 50,000 in 2019-20 towards electricity charges of Concept Enterprises (a related party) has been paid by Respondent No.3 personally and eventually shown payable to Respondent No.3 in the books of the corporate debtor. The Corporate Debtor and Respondent No.3 are partners in Concept Enterprises. During the lookback period, Respondent No.3 made payment towards electricity charges of Concept Enterprises from his personal bank account. During the period under review and especially when the Corporate Debtor was in financial stress,

expenses not related to the Corporate Debtor have been booked and charged to Respondent No.3. This has led to an increase in amount payable to Respondent No.3 for expenses which are not of the corporate debtor.

14. This Bench heard the Counsel and has perused the material on record.
15. The Applicant has sought condonation of delay in filing present application beyond the timelines as specified in Regulation 35A of the CIRP Regulations on account of the lockdown situation. This Bench is of the considered view that the timelines provided in Regulations 35A are directory in nature. Nonetheless, the COVID-19 lock down and relaxations granted by the Hon'ble Supreme Court in relation to specified period pertaining to COVID-19 disruptions also supports the case of the Applicant. Accordingly, the delay in filing present application is condoned.
16. From the perusal of definition of Preferential Transactions, and Undervalued Transactions, this Bench finds that these transactions have been defined to have certain characteristics, and such characteristics are distinct. In the present case, the Applicant has characterised transactions falling under Preferential Transactions and Undervalued Transaction, however, the Applicant has made prayers only in relation to Undervalued Transactions. Nonetheless, this Bench feels that it would be in the interest of justice to adjudicate on the transactions based on the material placed on record.

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17. The Applicant has placed on record the Summary of transactions entered into by the Corporate Debtor with Respondent no. 1 and the said summary reflects nature wise transactions debited/credited to the ledger account of R-1 in books of the Corporate Debtor :

Particulars of Transactions with R-1	Debit (Rs.)	Credit (Rs.)
Opening balance	2,88,495	
Money received from R1 in 2018-19		2,00,000
Machinery Shifting and Dismantling charges		12,80,000
TDS Payable	12,800	
Total	3,01,295	14,80,000
Closing credit balance as on 31 March 2020	-	11,78,705

Particulars of Transactions with R-2	Debit (Rs.)	Credit (Rs.)
Opening balance	-	

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Amount transferred from R3 to R2 with no narration in 2018-19	50,440	
Money paid to R2	1,90,000	
Total	2,40,440	-
Closing transferred to R3 towards slag dust charges paid by R3 on 31 March 2020		2,40,440

Particulars of Transactions with R-3	Year 2018-19 (Rs.)	Year 2019-20 (Rs.)
Opening Balance	36,12,004.88	28,96,058.88
<u>Add (Credits):</u>		
Money introduced by Respondent No.3 to the Corporate Debtor JSB a/c	12,51,800.00	-

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Money introduced by Respondent No.3 to the Corporate Debtor VMC a/c	-	11,95,100.00
Expenses of the Corporate Debtor paid by Respondent No.3	10,06,411.00	7,71,580.49
Concept and Personal Electricity bills paid by Respondent No.3 but charged to his Account	62,670.00	50,000.00
Transfer from Respondent No.2 to Respondent No.3	50,440.00	-
Payment to third Parties directly done by Respondent No.3	14,86,913.00	6,98,131.50
Director's remuneration Payable	8,54,500.00	6,00,000.00
Machinery Shifting Expenses paid by Director		32,200.00
	47,12,734.00	33,47,011.99
<u>Less (Debits):</u>		

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Amount paid by the Corporate Debtor from JSB to Respondent No.3	35,65,000.00	-
Amount paid by the Corporate Debtor from VMC to Respondent No.3	7,10,000.00	42,44,970.50
Customer/ Debtor money received by Respondent No.3	2,70,000.00	58,000.00
Personal loan of Respondent No.3 Paid by The Corporate Debtor	7,83,680.00	-
Transfer of debtor balance to R3 account	1,00,000.00	-
	54,28,680.00	43,02,970.50
Closing Balance (amount due to Respondent No.3) at year end	28,96,058.88	19,40,100.37

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Personal Payments made from Vajapur Mercantile Co-Op Bank			
Date	Account Head in Books of Accounts	Rs.	Details
08-08- 2018	Pokerna Ramesh	39,590	United India for Mediclaim policy of Mr. and Mrs. Ramesh Pokerna
23-08- 2018	Ramraj Enterprises	21,699	Personal Car – ICICI Lombard general insurance S Cross car MH20 EE- 6498
27-02- 2019	Insurance Expenses	44,749	Truck insurance MH 15BJ 8127 27 February 2019
29-07- 2019	Electrical/power expenses	50,000	Bill of Concept Enterprises

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18-10-2019	Loan from Neelam Pokerna	35,000	SBI car loan account
02-12-2019	Electrical/power expenses	35,950	Bill of Concept Enterprises
25-02-2020	Machinery shifting and Dismantling	15,000	Machinery shifting
20-01-2020	Loan from Neelam Pokerna	60,147	SBI car loan account
	Total	3,02,135	

18. Under section 43 of the Code, the following are the essentials of a preferential transaction:

- (a) There is a transfer of property, or an interest thereof, of the corporate debtor,
- (b) Such transfer is for the benefit of a creditor or surety or guarantor,
- (c) Such transfer is towards repayment of an antecedent financial or operational debt or other liabilities owed by the corporate debtor,

(d) The above transfer has the effect of putting such creditor / surety / guarantor in a beneficial position than it would have been in the event of a distribution of assets made in accordance with Section 53.

(e) Such transfer is not in the ordinary course of business or financial affairs of the corporate debtor or transferee

19. Under section 45 of the Code, the a transaction is undervalued transaction, Such transaction has not taken place in the ordinary course of business, and is in nature of either of following transaction:

- a. The corporate debtor has made a gift to a person; or
- b. The corporate debtor enters into a transaction with a person which involves transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor.

20. Under section 49 of the Code, the following undervalued transactions are considered as transaction defrauding creditors, if they are undertaken deliberately :

- a. for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor, or
- b. in order to adversely affect the interests of such a person in relation to the claim.

21. Under section 50 of the Code, the following are the essentials of an extortionate credit transaction:

- a. Corporate debtor has received financial or operational debt,
- b. Terms of such transaction required exorbitant payments to be made by the corporate debtor.

22. Under section 66(1) of the Code, the carrying of business of the Corporate Debtor with intent to defraud creditors of the corporate debtor or for any fraudulent purpose is defined as fraudulent trading transaction; and following persons are liable to contribute for such wrongful trading transaction –

- a. before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and
- b. such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

23. The Applicant has claimed that the transactions amounting to Rs. 11,85,000, being a claim in respect of unpaid transport charges from 06 January 2020 i.e. the date on which R1 became a creditor of the CD) for the benefit of the

creditor in respect of an antecedent debt owed by the corporate debtor and this transfer has the effect of putting R1 in a beneficial position (operational creditor) than he would have been in the event of distribution of assets under section 53 (having no standing since R1 was a debtor) entered into by the corporate debtor with R1 towards dismantling and shifting of the machinery are preferential transactions violating section 43 of the Code.

23.1. However, on perusal of the summary of transactions entered into with R-1, this Bench finds that the Corporate Debtor had credited a sum of Rs. 12,60,000/- to the account of the R-1 on account of Machine shifting & Dismantling Charges, and also had deducted TDS @ 1% by debiting R-1 account. Further, the opening balance receivable from R-1 was Rs. 2,88,495/-, and against this, the Corporate debtor was paid a sum of Rs. 2,00,000/- by R-1. Accordingly, the books of Corporate Debtor showed a net amount of Rs. 11,78,705/- payable to R-1. It is stated that the machinery was dismantled and shifted since the financial creditor was seeking possession of the assets of the Corporate Debtor. Respondent No.3 received copy of the DM order only on 20 Jan 2020 and sought time vide his letter dated 03 Feb 2020 to shift machineries; however, he had started that process on the day, the Hon'ble NCLT reserved its order. This is evident from the entries in the books of accounts. These facts clearly demonstrate that the shifting and

dismantling of the machineries was to place such machineries beyond the reach of the Secured Creditors, hence falls under Section 50 of the Code. Accordingly, the expenditure incurred on such dismantling & shifting ought to be reversed in the books of Corporate Debtor. After such reversal, the remaining balance from R-1 shall be recoverable.

24. As regards transactions amounting to Rs. 15,17,200/- towards dismantling and shifting of machinery claimed to be undervalued, defrauding creditors, fraudulent and wrongful trading transactions violating sections 45, 49, 66(1) and (2) of the Code, this Bench finds that this amount represents aggregate of Rs. 6,15,000 was booked in January 2020, Rs. 5,79,400 was booked in February 2020 and Rs. 3,22,800 in March 2020, stated to have been booked as Machine Shifting & Dismantling Charges. As held in Para 23.1, the act of the shifting of machines of the Corporate Debtor was in itself a transaction to defraud the creditors u/s 50 of the Code, accordingly, the expenditure debited in books of the Corporate Debtor on this account are also in nature of a transaction to defraud the creditors u/s 50 of the Code. Accordingly, the transactions of Rs. 15,17,200/- also ought to be reversed, and consequential recovery is to be made from the R-1 to R-3. Since, it is not clear from the facts in relation to transaction of Machine Shifting & Dismantling, whether the amount of Rs. 15,17,200/- includes Rs. 12,80,000/- or is a separate transaction, this Bench clarifies that the

Applicant shall verify this facts from the books of the Corporate Debtor, and ensure that reversal vide para 23.2 & this para does not result into duplicate reversal of any transaction.

25. As regards transaction of Rs. 50,440/-, being in nature of the transfer of balance from R3's ledger account to R2's ledger account in the books of Corporate Debtor; transaction of Rs. 1,90,000/- paid to R2, and claimed to be an undervalued and fraudulent transaction violating the sections 45 and 49 of the Code, this Bench finds that these transactions having been debited to the ledger account of R-2 in the books of accounts in the respective ledger account of R-2 & R-3, it can not be said that such transfer entry or payment transaction is either in nature of gift or in nature of a transaction for a consideration significantly less than its value. Also, this transaction can not be said to be in nature of transaction to defraud creditors. However, these two transaction have been settled against of transfer of balance to R-3 towards slag dust charges paid by R3 on 31 March 2020, thus making the balance in the ledger account of R-2 as NIL, can be dealt with while considering the transactions with R-3. Accordingly, this Bench is of the considered view that no relief can be given in relation to these two transactions.
26. As regards the transaction of Rs. 7,83,680/- towards repayment of the personal loan of R3 being claimed as an undervalued and fraudulent

transaction violating sections 45 and 49 of the Code, this Bench finds that this transaction having been debited to the ledger account of R-3 in the books of accounts in the respective ledger account of R-2 & R-3, it can not be said that such payment transaction is either in nature of gift or in nature of a transaction for a consideration significantly less than its value. Also, this transaction can not be said to be in nature of transaction to defraud creditors. Accordingly, this Bench is of the considered view that no relief can be given in relation to this transaction.

27. As regards transfer of balance of Rs. 1,00,000/- receivable from one of debtors to the account of R-3 by debiting R-3 account claimed as undervalued and fraudulent violating the sections 45 and 49 of the Code, this Bench finds that this transaction having been debited to the ledger account of R-3 in the books of accounts in the respective ledger account of R-2 & R-3, it can not be said that such payment transaction is either in nature of gift or in nature of a transaction for a consideration significantly less than its value. Also, this transaction can not be said to be in nature of transaction to defraud creditors. Accordingly, this Bench is of the considered view that no relief can be given in relation to this transaction.

28. As regards the entry of amount of Rs. 1,12,670/- paid by R3 on behalf of related parties but charged to books of accounts of the Corporate Debtor, this Bench finds that amount was not incurred for the business of the Corporate

Debtor, and accordingly is an undervalued and fraudulent transactions violating the Sections 45 and 49 of the Code, as this transaction has the effect of benefitting such related party at the cost of the Corporate Debtor. Hence, this entry ought to be reversed in the books of the Corporate Debtor.

29. As regards the transactions of Rs. 1,78,55,087.60/- which are receipts wrongfully diverted from bank account of the Corporate Debtor by R3 and R4 claimed as fraudulent and wrongful trading violating the section 66 of the Code, this bench finds that this entire transaction of opening a separate bank account is in violation of the terms of the sanction letter, and in nature of an act to keep such money beyond the reach of the Creditors. R-3 is stated to have diverted a sum of Rs. 77,33,906.60 in financial year 2018-19 and Rs. 1,01,21,181/- in financial year 2019-20. These amounts are not accounted in the personal account of R 3 for in the books of the Corporate Debtor as is revealed from summary of transactions. The Applicant has stated that the end use of these funds is also questionable. The director (with suspended powers) was aware that the petition was filed by the financial creditor in July 2019 and in spite of repeated opportunities (as is evident from various orders of the Hon'ble NCLT), there was no prospect of avoiding insolvency in respect of the corporate debtor. In spite of this, the director (with suspended powers) did not exercise due diligence in minimizing the potential loss to the creditors of the corporate debtor. All transactions from Janta Sahkari Bank

Limited were diverted to this account post November 2019. Section 66 of the Code includes transaction in nature of the carrying of business of the Corporate Debtor for any fraudulent purpose, and makes liable persons who are responsible for such transactions to contribute to the assets of the Corporate Debtor. The Forensic Auditor has stated in his report that “*Mr. Ashish Pokerna has been routing the company’s funds through his personal account and VMC account while conducting business transactions. Since the transactions of the company were diverted through other bank accounts / personal bank account, funds were kept away from JSB account and hence there was no repayment of the loan taken by the company*”. There is no finding from the Forensic Auditor that the transactions in the Bank Account opened with Vijapur Merchant Co-operative Bank Limited, were not found recorded in the books of accounts or the credits in such bank account were found recorded in the name of R-3 & R4, this Bench is of the considered view that opening an account, in defiance of sanction letter, per-se cannot tantamount to Transactions falling u/s 49 or 66 of the Code. The Forensic Auditor has quantified the amount of loss equivalent to credits in such bank account. This Bench feels that loss to the Corporate Debtor can be said to have occurred only if any of the amount credited in such bank account is found to have been utilised for purpose other than the business of the Corporate debtor, which is not the

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case in this application. In the absence of such finding, this Bench is of considered view that, no relief can be granted in respect of this transaction.

30. It is clarified that the Applicant shall be at liberty to take necessary steps to recover the amount, in relation to transactions of Rs. 1,78,55,087.60/-, to the extent such amounts are not found recorded in the books of accounts of the Corporate Debtor or found recorded in the manner resulting into increase in amount payable to the such Respondent or reduction in amount receivable from such persons on net basis, as otherwise permissible under the Code.

31. In view of above, this IA-2138/2021 is **partly allowed**.

Sd/-

PRABHAT KUMAR
Member (Technical)
02.08.2023

Sd/-

KISHORE VEMULAPALLI
Member (Judicial)