

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

**IA-2502/2021**

**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. Concept Enterprises Newasa 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-2502/2021 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 M/s. Concept Enterprises Newasa (“Respondent No. 1”or “R1”) and Shri Ramesh Pokerna and Shri Ashish Pokerna (“Respondent No. 2 & 3”or “R2 & 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 partnership firm, of which R-2 & R3 are partners, and are also erstwhile Director of the Corporate Debtor, accordingly R-1 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. 2 & 3 are the Partners of R-1, and R-2 is a erstwhile Director. R-3 is a Director (with suspended powers) of the Corporate Debtor and was in charge of the affairs of the Corporate Debtor alongwith R-4 before the commencement of the **CIRP**.
5. The Respondents no. 4 i.e. Smt. Neelam Pokerna is also the Director (with suspended powers) of the Corporate Debtor and she was 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 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.
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 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 as determined by the Applicant, the Corporate Debtor has entered into following transactions with Respondent no. 1 & 2, which are in nature of Undervalued, Fraudulent, Extortionate and

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Fraudulent And Wrongful Trading and violates Section 45 and 49, 50 and Section 66 of the Code.

No	Nature of transaction	Amount involved (Rs.)	Action required to be taken
1	Undervalued, Fraudulent, Extortionate and Fraudulent And Wrongful Trading	63,67,996	Amount to be recovered from R1
2	Undervalued and Fraudulent	2,77,186	Amount to be recovered from R1
3	Undervalued and Fraudulent	3,77,137	Entry to be reversed
4	Undervalued, Fraudulent, Extortionate and Fraudulent And Wrongful Trading	39,98,000	Entry to be reversed

13. The Applicant has placed on record the summary of ledger account of R-1, as appearing in the books of the Corporate debtor, which is reproduced below –

Particulars	Debit (Rs.)	Credit (Rs.)
Opening balance	1,04,55,348.49	
Payment of electricity expenses of R1	40,000.00	
Money received from R1		9,00,000.00
Transfer from R2 account		3,37,137.00
Fixed Assets purchased from R1 in 2019-20		39,98,000.00
TOTAL	1,04,95,348.49	52,35,137.00
Closing balance	52,60,211.49	

14. The Applicant made following submissions in relation to each of transaction in this Application.

14.1. **Takeover of outstanding loan of R-1 from the secured creditor :**

In 2013, at the time of availing credit facilities from Janata Sahakari Bank Ltd, the corporate debtor took over the outstanding loan of R-1 of Rs. 63,67,996. The bank disbursed the loan amount of Rs. 1.45 crores to the corporate debtor and closed the balance loan of Rs. 63.67 lakhs of R-1 in its books. The corporate debtor has shown this amount receivable in its books. The corporate debtor has continued to pay interest @ 15.25% on this loan and also repaid this loan which was taken over. The corporate debtor has not recovered that amount from R-1 since 2013. In fact, the loan taken over was only Rs. 63.67 lakhs and the opening balance outstanding from R-1 as on 01 April 2018 is Rs. 1.04 crores. R-1 was paying interest @ 15% on the loan before it was taken over by the corporate debtor. There is no supporting document for the reasons why the corporate debtor has taken over the loan of Concept and the terms and conditions on which it was taken over.

14.2. **Payments made to / on behalf of R1 (Debtor) :** The corporate debtor during the relevant period (29 April 2018 through 28 April 2020) has paid cash to R-1 of Rs. 40,000 towards electricity charges.

14.3. As per books, an additional amount of Rs. 81,000 was paid in 2018-19 and Rs.1,56,186 was paid by the corporate debtor towards

electricity charges of Concept. These are identified from the MSEB consumer number which is 148668000361 for which all these charges are paid. These amounts have not been charged to R-1 but have been booked as Electricity and Power expenses of the corporate debtor. Also, R3 has made payments towards electricity expenses of R1 and the amounts paid have been shown as payable to R3 in the books of the Corporate Debtor.

14.4. **Transfer of Loan amount of R2 (Shri. Ramesh Pokerna) to R1:**

During the year 2018-19, an amount of Rs. 3,37,137 was transferred from personal account of director to the account of R-1 account by closing the director's personal account. As a result of this, the creditors of the corporate debtor are affected since amount recoverable from the directors, which reduced the amount receivable from R-1, could have been used to pay the creditors, and such transfer results into giving precedence to the R-1 in payment to its creditors by the Corporate Debtor.

14.5. **Purchase of Fixed Assets from R1 :** During the period 2019-20, the books of the corporate debtor show entries of Fixed Asset, amounting to Rs. 39,98,000, purchased from R-1. The director (with suspended powers) has not provided documentary evidence like valuation report of assets purchased and invoice for the assets purchased. The necessity of this purchase of assets when the corporate debtor was in financial stress is also questionable. In the absence of Fixed Assets register and a proper

vendor selection process, the veracity of these transactions is also not ascertainable. The outstanding receivable from R-1 has been reduced by a considerable amount by the corporate debtor purchasing the fixed assets at a price which has no justification. The creditors are affected since amount recoverable from R-1 could have been used to pay the creditors.

15. The Applicant submitted that the above transactions with Respondent no. 1 can be categorised as Undervalued, Defrauding creditors, extortionate credit and fraudulent and wrongful trading transactions under the provisions of the Code for the reasons elaborated hereinbelow.

16. 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.

17. 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

18. 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.

19. 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.

20. This Bench heard the Counsel and perused the material on record.

20.1. 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.

20.2. 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.

20.3. The Corporate Debtor has paid a sum of 40,000 towards electricity charges of R-1 and the same are duly debited to its Account in the books of the Corporate Debtor. Hence, this bench feels that this transaction can

not be held to be transaction in nature of Preferential Transactions, Undervalued Transactions, Transactions to defraud Creditors and Extortionate Transactions. As regards, payment of an additional amount of Rs. 81,000 in 2018-19 and Rs.1,56,186 electricity charges of R-1, the Applicant has submitted that these amounts have been debited to Profit & Loss Account of the Corporate Debtor. Accordingly, the sum of Rs. 2,37,186/- paid for the benefit of R-1 definitely falls under the definition of Undervalued Transactions, as being in nature of gift. Since, this transaction keeps the assets to this extent beyond the reach of the Creditors of the Corporate Debtor and the Corporate Debtor was not under any obligation to pay the same, this amount is held to be a transaction to defraud creditors of the Corporate Debtor in terms of Section 49 of the Code. This transaction of Rs. 2,37,186/- ought to be reversed in the books of the Corporate Debtor.

20.4. As regards takeover of loan of R1 amounting to Rs. 63,67,996/- is concerned, this amount is duly debited to the ledger account of R-1 in the books of Corporate Debtor, hence, this amount can not be termed as an undervalued. Further, this amount can not also be termed as fraudulent u/s 49 or wrongful trading u/s 66 in view of the fact that the Secured Creditor of the Corporate debtor had knowledge of this transaction since inception, and this transaction appears to have taken place in concurrence of such secured creditor, as is evident from the

pleadings of the applicant. This amount is also not in nature of Extortionate Transaction, as it does not satisfy the basic ingredient of section 51. Nonetheless, the amount shown as debit balance in the name of R-1 in books of Corporate Debtor is recoverable from R-1 in accordance with other provisions of the law.

20.5. As regards the transaction of Rs. 3,77,137/-, this Bench finds that this amount is shown as paid to R-2 against the outstanding receivable from the R-1, which has the effect of preference having been given to R-2, as such preference has been given to R-1 by reduction of receivable from it towards antecedent debt in preference over other creditors. Accordingly, this Bench is of the considered view that this transaction of transfer, in nature of set-off of balance between two related parties, ought to be reversed. Though, the Applicant has sought declaration of this transaction as undervalued and fraudulent violating the sections 45 and 49 of the Code, however, this Bench feels that the relief can be granted only u/s 44 of the Code, as this transaction of transfer of balance from one account to another account having no over-all effect on the receivable and payable of the Corporate Debtor, can be said to be a Undervalued Transaction. Consequently, this transaction also does not fall u/s 49 of the Code.

20.6. As regards purchase of fixed assets amounting to Rs. 39,98,000/- from R-1, this Bench finds that the Applicant has not averred that no

fixed asset was purchased and it was merely a book entry. Her case is based on the insufficiency of documentary evidences to substantiate the veracity of this transaction. Since, the Respondents have neither provided any clarification to her, nor filed any reply before us, this bench considers it appropriate to hold this transaction as Undervalued Transaction u/s 45 of the Code in the absence of comparable price available on record. The Applicant pleaded that this transaction has resulted into reduction in the outstanding receivable from R-1 by the equivalent amount, which could otherwise have been used to pay the creditors. Accordingly, this transaction ought to be reversed in the books of the account of the Corporate Debtor. However, the ownership and physical possession of these Fixed Assets shall be restored to the R-1, if it is feasible at this juncture.

21. The balance to the debit of R-1 shall accordingly be re-stated and R-1 shall be liable to pay the amount as per such re-stated account. R-2 & R-3, who are partners of R-1, shall also be liable severally or jointly to pay this amount to the Corporate Debtor. It is clarified that the transaction of take-over of loan and payment of Rs. 40,000/- in cash stands subsumed in the debit balance arising after giving effect to this Order, hence no separate order is required to be passed in relation to those transaction. The Applicant shall deal with the amount payable to R-2 (in relation to transfer transaction of Rs. 3,77,137) after such re-statement in accordance with the provisions of

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this Code. As regards payment of electricity charges credited to the account of R-3, since this amount is ordered to be reversed, the balance in the Account of R-3 shall be adjusted accordingly.

22. In view of the aforesaid discussion and findings, this **IA-2502/2021** is partly **allowed.**

**Sd/-**

**PRABHAT KUMAR**  
**Member (Technical)**  
02.08.2023

**Sd/-**

**KISHORE VEMULAPALLI**  
**Member (Judicial)**