

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

IA 2141/2021

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.

Smt. Pratibha 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)

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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 2141/2021 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 Smt. Pratibha Pokerna (“Respondent No. 1” or “R1”) 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 shareholder and relative of the Director of the Corporate Debtor (with suspended powers), accordingly is a related party to the Corporate Debtor as per the provisions of the Section 5 (24) of the Code.
4. The Respondents no. 2 & 3 i.e. Sh. Ashish Pokerna & Neelam Smt. Pokerna 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.

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

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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 transactions with Respondent no. 1, which are in nature of Undervalued Fraudulent transactions and violates Section 45 & 49 of the Code. These transactions were credited to a personal account in the name of R1, which was created in the year 2019-20 in the books of accounts of the Corporate Debtor.

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, 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.
15. The corporate debtor has entered into this transaction which involves transfer of asset of the corporate debtor (creation of an operational creditor) for no consideration / consideration which is significantly less than the value provided by the corporate debtor.
16. The Applicant has submitted that the corporate debtor has neither entered into any rent or leave and license agreement with R1 nor has R1 issued invoices for the rent being charged to the corporate debtor. The records show no evidence of the said premises, being used for the purposes of the corporate debtor since April 2019 when the rent was charged. The rent provided for is from April 2019 when the operations of the Corporate Debtor were still being carried on from the registered office of the corporate debtor (which is same as address of the R1). The authenticity and reasonableness of this transaction is questionable. There are no supporting board resolutions / shareholders' resolutions for availing the premises on rent. This is in violation of the provisions of Section 188 of the Companies Act 2013. There is no comparison of the market rate of rent being charged for similar premises. Also, there is no record of TDS on rent being deducted by the corporate debtor. In view of the above, it can be

concluded that the said premises were taken on rent by the corporate debtor only because Respondent No.1 is a related party. No vendor selection process was followed. This transaction is also not in the ordinary course of business. Also, by passing fictitious entries in the books, new Operational Creditor was created.

17. This Bench heard the Counsel and has perused the material on record.
18. 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.
19. Since, there is no payment of the amount of office rent expenses to the R-1, the provisions of section 43 are not applicable to the present case. As regards this transaction being in nature of Undervalued transaction, this Bench finds that the Applicant has pleaded that the premises, alleged to have been taken on rent from R-1, was not utilised for the purpose of Office of the Corporate Debtor since April, 2019 and the rent credited to the account of R-1 is for the period from April, 2019. On this finding alone, this Bench feels that R-1's account ought to not have been credited by this sum, and this transaction is in nature of

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Transaction to defraud Creditors and squarely falls under section 49 of the Code.

This Bench feels that the claim of R-1 would have been admitted by the Applicant in CIRP under the category of 'Related Parties', and the same could have been rejected at the threshold on ground of her finding that the office premises was not in use of the Corporate Debtor.

20. Since, no payment has been made, but the amount has been credited to the account of R-1 and the Applicant has prayed for reversal of this transaction only, this Bench allows the prayer of the Applicant for reversal of this Transaction of office rent expenses booked in the books of account of the Corporate Debtor on account of this transaction being in nature of 'Transaction to defraud Creditors'.

21. Accordingly, **IA 2141/2021 is Allowed and disposed of.**

Sd/-

PRABHAT KUMAR
Member (Technical)
02.08.2023

Sd/-

KISHORE VEMULAPALLI
Member (Judicial)