

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

IA No. 2180 of 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.

BSB Concrete Products 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)

Appearances (via videoconferencing):

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

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 No. 2180 of 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 BSB Concrete Products (“Respondent No. 1” or “R1”) & its Partners 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 owned by Smt. Priyanka Vikram Bohra, Shri. Sarang Vallabh Bagla, and Shri. Ashish Mahavir Saklecha (

("Respondent No. 2 to 4" or "R2-4" respectively). R-1 is registered under GST (Number 27AAVFB1900B1ZT) in August 2019 for HSN 7016, 6808, 6810, and is registered as a wholesaler / retailer of cement, concrete, tiles, flagstones, bricks etc. It is pertinent to note that the factory/work address on the invoices of R1 and the address of the Corporate Debtor is the same. During the look back period i.e. 2019-20, the corporate debtor has purchased raw material i.e. cement, metal, steel and slag dust from R1 and sold finished goods i.e. fly ash bricks and PSC poles to R1.

4. Respondent No. 5 & 6 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 purchased raw material i.e. cement, metal, steel and slag dust from R1 and sold finished goods i.e. fly ash bricks and PSC poles to R1. As determined by the Applicant, these transactions with Respondent no. 1 are in nature of Undervalued Fraudulent transactions and violates Section 45, 49, & 66 of the Code. The details are as follows –

No	Nature of transaction	Amount involved (Rs.)	Action required to be taken
1	Undervalued and Fraudulent	1,41,600	Amount to be recovered from R1
2	Undervalued, Fraudulent and Extortionate Credit	23,04,538	Entry to be reversed
3	Undervalued, Fraudulent and Extortionate Credit	21,87,938	Amount to be recovered from R1

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

IA No. 2180 of 2021 IN
CP (IB) No.3026/MB-IV/2019

4	Undervalued, Fraudulent, Extortionate Credit, Fraudulent Trading and Wrongful Trading	52,57,023	Entry to be reversed
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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 (creation of an operational creditor) for no consideration / consideration which is significantly less than the value provided by the corporate debtor. The Applicant further states that the above transactions with Respondent no. 1 are categorised as Undervalued, Defrauding creditors, Extortionate credit and Fraudulent and Wrongful Trading transactions under the provisions of the Code for the reasons elaborated hereinbelow.

- 13.1. **Purchase of raw material from Respondent No.1** : The corporate debtor during the period August 2019 through January 2020 has purchased raw material from R1 amounting to Rs. 23,04,538. As informed by the management, the corporate debtor was undergoing severe liquidity crunch during the said period as a result of which the corporate debtor was unable to procure raw material from the market to execute the orders on hand. On repeated requests, the management did not produce the list of orders on hand in the relevant period. Hence, it is not possible to examine the veracity of this statement. The corporate debtor, in order to execute the orders in hand, purchased raw material from R1 on credit. The rate at which this raw material is purchased from R1 is higher than the market rate in most cases. A comparative chart showing the sale prices is annexed to the Transaction Audit Report. During this relevant period, the corporate debtor has not made any purchases from open market. All the purchases are routed through R1.
- 13.2. **Sale of finished goods to Respondent No.1** : During the period August 2019 through March 2020, the corporate debtor has sold almost all the finished products to R1, who in turn has sold these goods to the parties who were pre-existing customers of the corporate debtor. This is evident from the sales invoices which are raised on R1 and material is

shipped to these customers. Average sale price to R1 is less than the price charged to other customers. A comparative chart showing the sale prices is annexed to the Transaction Audit Report. This has resulted in lower turnover of the corporate debtor and lower receivables from R1. The invoices bearing invoice numbers 192 to 197, state the product being sold as PSC Poles. However, these invoices are recorded in Tally as sale of fly ash brick. Further, the total of the invoices is Rs. 3,71,700, whereas the sales amount recorded in Tally towards these invoices is Rs. 1,96,708. The balance in R1 account in the books of the corporate debtor is NIL as on 31 March 2020 by charging the purchases against the balance due towards the sale.

- 13.3. **Routing of business through Respondent No.1 :** The corporate debtor has outsourced its entire production activity to R1 since August 2019 and sold goods worth 52,57,023/- in such process. There are no documents in support of selecting R1 for this purpose. There is an absence of a vendor selection process. There is nothing to suggest that R1 has relevant experience and expertise in the field of undertaking these activities especially in view of the fact that it is formed in August 2019. It is evident from the invoices raised by R1 that it is operating out of the work premises of the corporate debtor. Thus, R1 is utilizing

infrastructure of the corporate debtor for carrying out its activity. R1 is not a registered manufacturer; it is registered as a wholesaler / retailer. Hence, it can be inferred that merely the transactions are routed through R1 while infrastructure and workers of the corporate debtor are used to complete the orders. The business of the corporate debtor is thus taken away by R1 and in turn, loss is caused to the corporate debtor by purchase of raw materials from R1 at higher rates and sale to R1 at lower rates. The management during a meeting informed that, the corporate debtor was undergoing severe liquidity crunch during the said period as a result of which the corporate debtor was unable to procure raw material from the market to execute the orders on hand. Thus, R1 is merely a conduit to siphon the business of the corporate debtor. This is further evidenced by the fact that till August 2019, the corporate debtor was supplying finished goods to parties Samarth Enterprises, Sai Electricals & Electronics and Allied Transpowers. Post August 2019 when R1 was formed, all business was diverted through R1 – invoice was raised by the corporate debtor on R1 where the shipping address was the address of these parties. This has caused grave and irreparable damage to the corporate debtor. February 2020 onwards when the financial creditor sought possession of the property of the corporate debtor under

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

IA No. 2180 of 2021 IN
CP (IB) No.3026/MB-IV/2019

SARFAESI, there are no purchases from R1. However, sales have continued. In absence of stock statements for the relevant period, inspite of repeated requests, the veracity of the orders in hand, need for purchase from R1 and need for routing sales through R1 cannot be confirmed. Further, it appears that R1 has not made payment of the entire amount of Rs. 52 lakhs towards the purchase of finished goods from the corporate debtor. R1 has paid about Rs. 30 lakhs. The balance amount is adjusted towards purchases made by the corporate debtor from R1. Again, as seen in table annexed below, the purchases are made at a price higher than the market rate.

ANNEXURE 1

SALES

Name of Product	Psc Pole 8m/140 Kgs W.L.	Psc Pole 9m/200kgs W.L.	Fly Ash C/c/ Aac Blocks
Name of the Party - (Rate in Rs.)	Cash/Manoj Parakhe -2288	Cash/Rajendra Ghawate- 2500	Cash -2700
	Dattatray Kulkarni- 2119	Deepiyot -2200	Pujaa Steel -3176
	BSB Concrete -1756	BSB Concrete- 1939	Ravikiran Construction- 2900
	Megha Engineering -2288	Cash/Chandrakant Kardile -2432	V Zone -3075
	Cash/Shendage Patil - 2118	Sai Electric & Electronics - 2400	Rajesh G Deshmukh-3086
	BSB Concrete -1550	Sai Electric Audyogik -2300	Mall Infrastructure-3151
		Megha -2325	Jaishree Steel -3057
		Allied Transpowers -2150	
		Suvidhinath (2250)	
		Gautam (2200)	
		Ashoka- 2250	
		Samarth - 2150	

PURCHASES

Name of Raw Material	Metal 20mm or 3/4 mm	Metal 10mm or 1/2 mm	
Name of the Party - (Rate in Rs.)	Ambade Traders- 2200	Ambade Traders- 1900	
	BSB Concrete- 2266	BSB Concrete- 1957/2060	
	Yuvraj Enterprises-2200	Yuvraj Enterprises- 1900	
	Mauli Stone Crusher-2200	Mauli Stone Crusher-1900	

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.
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 :

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

IA No. 2180 of 2021 IN
CP (IB) No.3026/MB-IV/2019

Particulars	Debit (Rs.)	Credit (Rs.)
Opening balance	-	-
Sale of PSC Poles	50,60,315	
Sale of FLY Ash Bricks	1,96,708	
Payment made to R1	1,41,600	
Factory Expense		25,000
Purchase of Cement		6,94,120
Purchase of Metal		2,67,672
Purchase of Steel		10,81,250
Purchase of Slag Dust		2,61,496
Money received from R1 to Vaijapur Bank Account		30,69,085
Total	53,98,623	53,98,623
Closing credit balance as on 31 March 2020	-	-

18. 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.

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. 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.

21. 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.

22. The Applicant has claimed that a sum of Rs. 1,41,600/- paid by the Corporate Debtor to R-1 ought to be recovered as Undervalued and Fraudulent, however, this Bench finds that this amount represents payment by the Corporate Debtor to R-1 by debit to its ledger account. Accordingly, this transaction cannot be held in nature of Undervalued and Fraudulent transactions. In so far as its recovery is concerned, it is being dealt with in the following paras.

23. The Applicant has claimed transaction of purchase of goods amounting to Rs. 23,04,538/- to be an Undervalued, Fraudulent and Extortionate Credit. This Bench finds that this transaction is claimed as undervalued on the basis

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

IA No. 2180 of 2021 IN
CP (IB) No.3026/MB-IV/2019

of comparative rates summary in the forensic audit report, however, this report does not specify anywhere that whole of transaction took place without supply of material by R-1. The forensic auditor has given the following comparative rates of purchases and sales in relation to similar transactions with unrelated parties of the Corporate Debtor -

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	Yuvraj Enterprises-2200	Yuvraj Enterprises- 1900	
	Mauli Stone Crusher-2200	Mauli Stone Crusher-1900	

23.1. The above table shows that the Corporate debtor has purchased Metal @ 2266/- from R-1, while similar material was purchased from other parties @ 2200/-. Similar is the case in relation to other item as well. This Bench is of the considered view that there is variation of 3% in the prices of the material, charged by R-1 and by other unrelated parties. Section 45 of the Code considers a transaction to be undervalued where the debtor receives no consideration or an amount significantly

less than the value of the transaction. It is in ordinary course of business any businessman to add certain percentage as profit for the risks/labour put in by businessman. Accordingly, it can not be said that the said transaction of purchase falls under the definition of Undervalued Transaction as provided in Section 45 of the Code. Accordingly, this Bench does not find any merit in the contention of the Applicant on this issue, hence this Bench feels that no order u/s 45 or 49 or 51 of the Code can be passed in relation to this transaction.

24. The Applicant has claimed transaction of Rs. 21,87,938/- to be an Undervalued, Fraudulent and Extortionate Credit. This amount includes Purchases made from R-1 amounting to Rs. 23,04,538 and Rs. 25,000/- credited to R-1's account towards Factory Expenses, as reduced by Rs. 1,41,600/- paid by the Corporate Debtor to R-1. This Bench has held in Para 22.1 that, the transaction of purchase of goods can not be held to be Undervalued in nature. The Applicant has not made any allegation in the Application that the Factory expenses are fake, and forensic auditor's report also does not contain any finding in relation to this expenditure. The Applicant has only alleged that outsourcing of activities to R-1 was detrimental to the interest of the Corporate Debtor. In the absence of any finding in relation to Factory expenses of Rs. 25,000/-, this Bench is not

inclined to hold such transaction as Undervalued or Fraudulent or Extortionate in nature.

25. The Applicant has claimed transaction of Rs. 52,57,023 to be an Undervalued, Fraudulent, Extortionate Credit, Fraudulent Trading and Wrongful Trading. On perusal of the summary of transaction, it is noticed that this amount represents the sum total of debit and credit side of the ledger account of R-1. Further, the summary of transactions also show a credit of Rs. 30,69,085/- on account of payment made by R-1 to the Corporate Debtor. Though, there is a finding in the Forensic Audit report that the sale of goods by the Corporate Debtor to R-1 is less than the price charged from unrelated customers, but no separate relief on this account has been prayed in this application. Accordingly, this Bench considers it appropriate to deal with the under-statement of value of sales under this head, since the Applicant has prayed declaration of this transaction as undervalued transaction also. Section 45 of the Code considers a transaction to be undervalued where the debtor receives no consideration or an amount significantly less than the value of the transaction. It is not in dispute that no actual sales of goods from the Corporate Debtor to R-1 had taken place. Accordingly, it cannot be said that the whole of transaction value of Sales, as is the case of the Applicant, is liable to be recovered from R-1. This Bench

is of the considered view that an order for recovery in relation to undervalued transaction can be made to the extent of benefit given to related party or the loss caused to the Corporate Debtor, which in the present case can not exceed the price difference. Accordingly, this Bench consider it appropriate to direct the Applicant to determine such benefit/loss on transaction of sales from Corporate Debtor to R-1. The amount of benefit/loss from such transaction shall be the amount, which shall be recoverable from R1-R4 jointly or severally.

26. In view of the above, IA-2180/2021 is **partly allowed**.

Sd/-

PRABHAT KUMAR
Member (Technical)
02.08.2023

Sd/-

KISHORE VEMULAPALLI
Member (Judicial)