

F.No:9/23/ADJ/SEC.62(1)(a) OF 2013/KARNATAKA/RD(SER)/2023 /5186

BEFORE THE REGIONAL DIRECTOR, SOUTH EAST REGION

MINISTRY OF CORPORATE AFFAIRS, HYDERABAD

IN THE MATTER OF COMPANIES ACT, 2013

IN THE MATTER OF KRISHIKAN KRISHIKAN PRIVATE LIMITED

1. M/s. Krishikan Krishikan Private Limited
2. Mr. Nagaraju Kancham, Director
3. Mr. Vivek Radhakrishnan, Director

Appellants

Date of hearing : 12.09.2023

Present : Mr. P Sriram, PCS

**ORDER**

This is an appeal filed under section 454(5) of the Companies Act, 2013 by the above appellants in e-form ADJ vide SRN F64014251 dated 07.09.2023 against the adjudication order No. ROC(B)/Adj.Ord.454-62/Krishikan/Co.No.134416/2023 dated 05.07.2023 under section 454 passed by the Registrar of Companies, Karnataka for default in compliance with the requirements of Section 62(1)(a) of the Companies Act, 2013.

2. Registrar of Companies in his order of adjudication has stated that the company has filed a Suo-motu adjudication application on 13.12.2022 citing default/violation of section 62(1)(c), 62(3) and section 42 of the Act. This application has been filed by the company and its promoters-cum-directors. It has been submitted in the application that the company has issued Optionally Convertible Debentures (OCDs) trice i.e., on 24.07.2020, 10.12.2020 and 29.01.2021 respectively as per section 71 of the Act and allotted the same later. These OCD's have been issued as rights issue under section 62(1)(a) of the Act instead of preferential allotment under section 62(1)(a) of the Companies Act, 2013 and further submitted that the lack of procedural significant of, section 42 and other applicable provisions of the Act has led to this default. The company submits it has further repaid the subscription amount back to the debenture holders along with 12% interest and proof of the same has been attached with the application.

3. Further stated that the details of issue and allotment of the OCDs are as follows:

Issue	Date of issue	Nominal Value	No. of debentures	Total value of debentures	Date of allotment	SRN of PAS-3 form
1	24.07.2020	Rs. 10,00,000	3	Rs. 30,00,000	17.09.2020	R857320160
2	10.12.2020	Rs. 10,00,000	2	Rs. 20,00,000	14.01.2021	R94231925
3	29.01.2021	Rs. 10,00,000	2	Rs. 20,00,000	01.04.2021	T38539425

4. Pursuant to the adjudication application filed by the company, Notice of hearing was issued on 13.12.2022 and physical hearing was held on 16.12.2022. It was attended by Mr. Ravikumar TL, practicing company secretary and authorised representative of the company and promoters-cum-directors. During the hearing, the authorised representative made his submissions as mentioned in the application stating that the default has occurred due to lack of procedural clarity and pleaded for lesser penalty. Thereafter, the authorised representative made further submissions vide letter dated nil, received by this office on 05.01.2023, stating that the company has followed section 62 of the Act for issue of OCDs in all 3 issues, and if the first issue is treated as violation of section 42 of the Act, the remaining two issues may not fall under the ambit of violation of section 42 of the Act as the company has duly followed the method of rights issue of OCDs under section 62 of the Act while issuing the debentures in second and third instances which were offered to the friends of the shareholders-cum-directors after the renunciation of the offer made to them.

5. As per section 71(1) of the Act, a company may issue debentures with an option to convert such debentures into shares, either wholly or partly at the time of redemption and as per the provisions of section 23(2) of the Act, a private company may issue securities (a) by way of rights issue or bonus issue in accordance with the provisions of this Act; or (b) through private placement by complying with the provisions of Part II of this Chapter (i.e. section 42 of chapter III of the Act).

6. As per section 62(1)(c) of the Companies Act, 2013, where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares shall be offered to any persons, if it is authorised by a special resolution, whether or not those persons include the persons referred to in clause (a) or clause (b), either for cash or for a consideration other than cash, if the price of such shares is determined by the valuation report of a registered valuer, subject to the compliance with the applicable provisions of Chapter 111 and any other conditions as may be prescribed. Further, as per Rule 13(1) of Companies (Share Capital and Debentures) Rule, 2014, for the purpose of clause (c) of sub-section (1) of section 62, if authorized by a special resolution passed in a general meeting, shares may be issued by any company in any manner whatsoever including by way of a preferential offer, to any persons whether or not those persons includes the persons referred to in clause (a) or clause (b) of sub-section (1) of section 62 and such issue on preferential basis also comply with conditions laid down in section 42 of the Act. The explanations provided for under this rule further clarify the scope of this section and rule and state that for the purposes of this rule, (i) the expression 'Preferential Offer' means an issue of shares or other securities, by a company to any select person or group of persons on a preferential basis and does not include shares or other securities offered through a public issue, rights issue, employee

stock option scheme, employee stock purchase scheme or an issue of sweat equity shares or bonus shares or depository receipts issued in a country outside India or foreign securities; (ii) the expression, "shares or other securities" means equity shares, fully convertible debentures, partly convertible debentures or any other securities, which would be convertible into or exchanged with equity shares at a later date.

7. As per section 42 of the Companies Act, 2013, a company may, subject to the provisions of this section, make a private placement of securities which shall be made only to a select group of persons who have been identified by the Board, whose number shall not exceed 200 in a financial year subject to such conditions as may be prescribed, which are provided for in Rule 14 of Companies (Prospectus and Allotment of Securities) Rules, 2014,

8. The company ought to have issued OCDs under section 62(1)(c) of the Act on preferential basis by complying with the conditions laid down in section 42 of the Act since OCDs fall under the definition of "shares or other securities" as provided for in the explanation to Rule 13(1) of Companies (Share Capital and Debentures) Rule, 2014.

9. However, the company has issued OCDs wrongly under section 62(1)(a) as rights issue which is only meant for issue of shares (equity or preference) to the holders of equity shares in proportion to the paid-up share capital by sending a letter of offer. Further, it is seen from the minutes of the EoGM attached in the adjudication application that the shareholders have resolved to issue OCDs as rights issue and the company has failed to comply with the procedural requirements laid down in section 42 of the Act read with Rule 14 of Companies (Prospectus and Allotment of Securities) Rules, 2014 viz. identifying the select group of persons to whom allotment of OCDs shall be made, issuing private placement offer and application form, receiving monies in a separate bank account, maintaining & filing the appropriate requisite records etc. Thus, the company has violated provisions of section 62(1)(c) of the Act by not following the appropriate method of issuing OCDs rendering the company and directors liable for action under section 450 of the Act and has violated provisions of section 42 of the Act for not following the procedure as mentioned above rendering the company, promoters and directors liable for action under section 42(10) of the Act for each of the three issues of OCDs mentioned in para 4 of this order which constitute separate defaults each and are liable to be penalised independently. Further, section 62(3) of the Act as mentioned by the company in the adjudication application is not applicable in this case as this clause is applicable to the increase of the subscribed capital of a company caused by the exercise of an option as a term attached to the debentures issued or loan raised by the company to convert such debentures or loans into shares in the company which is not the case at hand.

10. As per the provisions of section 450 of the Act, if a company or any officer of a company or any other person contravenes any of the provisions of this Act or the rules made thereunder or any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded given or granted, and for which no penalty or punishment is provided elsewhere in this Act, the company and every officer of the company who is in default or such other person shall be liable to a penalty of ten thousand rupees and in case of continuing contravention, with a further penalty of one thousand rupees for each day after the first during which the contravention continues, subject to a maximum of two lakh rupees in case of a company and fifty thousand rupees in case of an officer who is in default or any other person. Further, as per provisions of section 42(10) of the Act, if a company makes an offer or accepts monies in contravention of this section, the company, its promoters and directors shall be liable for a penalty which may extend to the amount raised through the private placement or two acre rupees, whichever is lower, and the company shall also refund all monies with interest as specified in sub-section (6) to subscribers within a period of thirty days of the order imposing the penalty.

11. It is seen from the records that the subject company is a small. company and the provisions for imposing lesser penalty as per section 446B of the Act shall be applicable in this case. The same has also been prayed for .by the company and authorised representative. As per the provisions of section 446B of the Act, notwithstanding anything contained in this Act, if. penalty is payable for non-compliance of any of the provisions of this Act by a One Person Company, small company, start-up company or Producer Company, or by any of its officer in default, .or any other person in respect of such company, then such company, its officer in default Or any other person, as the case may be, shall be liable to a penalty which shall not be more than one-half of the penalty specified in such provisions subject to a maximum of two lakh rupees in case of a company and one lakh rupees in case of an officer who is in default or any other person, as the case may be.

12. Therefore, having considered the facts and circumstances of the case and the submissions made by the company, promoters and directors through their authorised representatives, in view of the above Registrar of Companies in his adjudication order has stated that penalty has been imposed under Section 450 read with Section 446B of the Companies Act for violation of Section 62(1)(c) of the Act for Company and 2 directors i.e., Mr. Nagaraju Kancham and Mr. Vivek Radhakrishnan of Rs.5,000/- each (3 defaults) i.e., 15,000/- each and penalty under section 42(10) read with Section 446B of the Act for violation of Section 42 of the Act for Company to Rs.2,00,000/- each (3 defaults) i.e., 6,00,000/- and for 2 promoter-cum-directors i.e., Mr. Nagaraju Kancham and Mr. Vivek Radhakrishnan to Rs.1,00,000/- (3 defaults) i.e., 3,00,000/- each (total aggregating to Rs.12.45 Lakhs).

13. An opportunity of being heard was given to the Appellants on 12.09.2023. The authorized representative Mr. P Sriram, Practicing Company Secretary appeared on behalf of the appellants and reiterated the submissions made in the appeal and also submitted as under:

a) Pursuant to Section 62(1)(c) of the Companies Act, 2013 wherein, a company having a share capital proposes to issue any instrument convertible into equity to a person other than existing shareholders, shall comply with certain conditions, such as (i) such issue is authorized by a special resolution in the general meeting, (ii) the price of such shares is determined by way of a valuation report by a registered valuer, and (iii) mandatory compliance of Section 42 of the Companies Act, 2013.

b) The Applicant Company No. I had issued Optionally Convertible Debentures (OCDs) in 3 tranches on 24th July 2020, 10th December 2020 and 29th January 2021 respectively as per Section 71. The Company has followed the Rights issue method of issuing Debentures for all the tranches (i) without seeking members approval as envisaged in proviso to Section 62(1)(C) and (ii) without following the procedure of private placement provided under Section 62 (1) (c) of the Companies Act, 2013, read with Rule 13 of the Companies (Share Capital and Debenture) Rules, 2014 and Section 42 of the Companies Act, 2013.

c) The Company and the Applicant No. II and III had defaulted the provisions of Section 62, Section 42 and other applicable provisions of the Companies Act, 2013 due to the following factors:

(i) On Account of covid pandemic in the year 2020, the Directors could not obtain professional guidance on the true meaning of Optionally Convertible Debentures (OCDs) and Compulsorily Convertible Debentures (CCDs) and on the lack of procedural significance of Section 62, Section 42 and other applicable provisions of the Companies Act, 2013.

(ii) Due to oversight the Company and the Directors in default were under the impression that necessary Sections/Rules have been complied as suggested by the then Professional.

(iii) The default was purely due to the complexity arising out of the legal terminology of the words OCDs and CCDs and understanding the complexity and applicability of Section 42, Section 62 and other applicable provisions of the Companies Act, 2013, and not with any malafide intention. It is pertinent to mention that the Company and the Director(s) have made genuine and serious efforts in complying with the provisions of Section 42 and Section 62 and other applicable provisions of the Companies Act, 2013.



(iv) The said default is a repeated occurrence of defaults (specifically 3 times) for issuance of OCDs due to the aforementioned reason and the Company has been regular in complying with the other applicable provisions of the Companies Act and the Rules made thereunder.

d) In pursuance of the observation made as above, the applicants had filed suo-moto application for adjudication before the Registrar of Companies, Bangalore in form GNL-1 vide SRN F51959088 dated 06th December 2022 and the same was duly represented by the Authorised Representative of the company on 16th December 2022 before the Registrar of Companies, Bangalore.

14) In the light of the above facts, the Board of Directors of the Company submits that the penalty levied by the Adjudicating Officer is high for the following specific reasons:

a. The Company is engaged in Agriculture business and is a Startup and a Small company which is striving hard to scale up its business and to promote the ease of doing business which is the moto of the honourable Ministry of Corporate Affairs.

b. The company being a closely held company had issued optionally Convertible debenture for the purpose of borrowing money and to raise funds. If a higher penalty is levied, the company will face a higher borrowing cost which will substantially impede its ability to continue its operation.

c. The Company had no malafied intention in violating the sections mentioned above; the violation is due to the reasons mentioned in supra.

d. Considering various exemptions granted to a small company under the Companies Act, 2013, and due to multiplicity of professional opinion on the applicability of the preferential allotment for the OCDs, the management has inadvertently failed to comply with section 62 and 42 of the Act.

e. Due to the non compliance, no injury to public interest is caused and this is the first time of default by the Company. No undue gain or unfair advantage is made due to the non compliance and no loss caused to anyone.

Further the authorized representative requested to reduce the quantum of penalty as levied by Registrar of Companies.

15) Taking into consideration the facts of the appeal and submissions made by the authorized representative, the following order is passed:

(a) Penalty imposed by the Registrar of Companies under section 450 of the Act r/w Section 446B of the Act for violation of Section 62(1)(c) of the Act, is upheld and directed to pay the penalty as under:

S.No	Applicants	Default 1	Default 2	Default 3
1.	Company	Rs.5,000/-	Rs.5,000/-	Rs.5,000/-
2.	Mr. Nagaraju Kancham	Rs.5,000/-	Rs.5,000/-	Rs.5,000/-
3.	Mr. Vivek Radhakrishnan	Rs.5,000/-	Rs.5,000/-	Rs.5,000/-

(b) Penalty imposed by Registrar of Companies under section 42(10) r/w Section 446B of the Act for violation of Section 42 of the Act is reduced to 25% and directed to pay the penalty as under:

S.No	Applicants	Default 1	Default 2	Default 3
1.	Company	Rs.50,000/-	Rs.50,000/-	Rs.50,000/-
2.	Mr. Nagaraju Kancham	Rs.25,000/-	Rs.25,000/-	Rs.25,000/-
3.	Mr. Vivek Radhakrishnan	Rs.25,000/-	Rs.25,000/-	Rs.25,000/-

The appellants are directed to comply with this order and also provisions of Section 454(8) of the Companies Act, 2013 read with Companies (Adjudication of Penalties) Rules, 2014.

16. Accordingly, penalty was paid by the Company and officers as below:

(a) Penalty paid under section 450 of the Act r/w Section 446B of the Act for violation of Section 62(1)(c) of the Act:

S.No	Applicants	Default 1	Default 2	Default 3	Total paid
1.	Company	Rs.5,000/- vide SRN X54393400 dated 25.09.2023	Rs.5,000/- vide SRN X54394416 dated 25.09.2023	Rs.5,000/- vide SRN X54393798 dated 25.09.2023	Rs.15,000/-
2.	Mr. Nagaraju Kancham	Rs.5,000/- vide SRN X54395355 dated 25.09.2023	Rs.5,000/- vide SRN X54395074 dated 25.09.2023	Rs.5,000/- vide SRN X54393996 dated 25.09.2023	Rs.15,000/-
3.	Mr. Vivek Radhakrishnan	Rs.5,000/- vide SRN X54396676 dated 25.09.2023	Rs.5,000/- vide SRN X54396908 dated 25.09.2023	Rs.5,000/- vide SRN X54397864 dated 25.09.2023	Rs.15,000/-
				<b>Total</b>	<b>Rs.45,000/-</b>



Contd..8

(b) Penalty paid under section 42(10) r/w Section 446B of the Act for violation of Section 42 of the Act:

S.No	Applicants	Default 1	Default 2	Default 3	Total Paid
1.	Company	Rs.50,000/- vide SRN X54384854 dated 25.09.2023	Rs.50,000/- vide SRN X54385430 dated 25.09.2023	Rs.50,000/- vide SRN X54386081 dated 25.09.2023	Rs.1,50,000/-
2.	Mr. Nagaraju Kancham	Rs.25,000/- vide SRN X54388848 dated 25.09.2023	Rs.25,000/- vide SRN X54388996 dated 25.09.2023	Rs.25,000/- vide SRN X54389473 dated 25.09.2023	Rs.75,000/-
3.	Mr. Vivek Radhakrishnan	Rs.25,000/- vide SRN X54390703 dated 25.09.2023	Rs.25,000/- vide SRN X54391115 dated 25.09.2023	Rs.25,000/- vide SRN X54390398 dated 25.09.2023	Rs.75,000/-
<b>Total</b>					<b>Rs.3,00,000/-</b>

Accordingly, this order is issued to the Appellants with a copy to Registrar of Companies, Karnataka and Joint Secretary, E-Governance Cell, Ministry of Corporate Affairs, New Delhi for information and necessary action.

Issued under my hand and seal on this the 15<sup>th</sup> day of November 2023.

✓ M/s. Krishikan Krishikan Private Limited  
4th Floor, No.1353/433, 5th Block, HBR 2nd Stage, BDA,  
Nagawara Ring Road, Bangalore North, Karnataka- 560045



(DR. RAJ SINGH)  
REGIONAL DIRECTOR (SER)  
HYDERABAD

Copy for information and necessary action to :

1. Naga Raju Kancham, Director  
24/1091, Near Johns High School, Jammalamadugu,  
Cuddapah, Andhra Pradesh- 516434.
2. Vivek Radhakrishnan, Director  
313, 4<sup>th</sup> C Cross, HRBR Layout, 3<sup>rd</sup> Block, Kalyan  
Nagar, Bangalore North, Karnataka- 560043.
3. Registrar of Companies, Ministry of Corporate Affairs,  
Karnataka, Bangalore.
4. The Joint Secretary, E-Governance Cell, Ministry of Corporate Affairs, New Delhi.

(DR. RAJ SINGH)  
REGIONAL DIRECTOR (SER)  
HYDERABAD