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**IN THE NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH – I, CHENNAI**

IA/IBC/390/CHE/2023

IN

CP (IB)/317(CHE)/2021

(Filed under Section 33(2) of the Insolvency and Bankruptcy Code, 2016)

In the matter of **Khadyota Kishan Foundation (Kishan Research And
Development Center)**

Usha Gayathri Kavi,
Resolution Professional
(IBBI/IPA-001/IP-P02639/2022-2023/14100).
Old No. 12/1, New No. 21,
KhadyotaKishan Foundation,
Kutchery Road,
Mylapore, Chennai - 600004

... Applicant

Along with

IA/413/CHE/2023

IN

CP (IB)/317(CHE)/2021

*(Filed under Section 60 (5) of the IBC,2016 read with Rule 49 (2), 11 & 15 of the NCLT Rules,
2016)*

Mr. R. Jayaganesh,
Director of the Suspended Board of
KhadyotaKishan Foundation.
(Kishan Research and Development Centre),
No.242/1, 3d Sundaram Street,
Nalvar Layout, Rathinapuri,
Coimbatore - 642 027

.... Applicant

-Vs-

1. JYOTHI LABS LIMITED.,
"Ujala House" Ramakrishna Mandir Road,
Kondivita Andheri (East),
Mumbai - 400 059.
Maharashtra.



2. Ms. Usha Gayathri Kavi,
IBBI/IPA-001/IP-Po2639/2022- 2013/14100
Old No. 12/1, New No. 21,
KhadyotaKishan Foundation,
Kutchery Road,
Mylapore, Chennai - 600004

...Respondents

Along with

IA/414/CHE/2023
IN
CP (IB)/317(CHE)/2021

(Filed under Section 60 (5) Read with Rule 11, 14 and Rule 15 of the NCLT
Rules, 2016)

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Old No. 12/1, New No. 21,
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Mylapore, Chennai - 600004

...Respondents

Order Pronounced on 27th July 2023

CORAM:

SANJIV JAIN, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)

For Applicant : *Krithajnya R, Advocate*
In IA/390/CHE/2023

Geetha Rani V, Advocate
In IA/413 & 414/CHE/2023

COMMON ORDER

Per: SAMEER KAKAR, MEMBER (TECHNICAL)

[Heard Through -VC-]

I. IA/390/CHE/2023

This is an application filed under Section 33(2) of the Insolvency and Bankruptcy Code, 2016 read with Rule of the NCLT Rules, 2016 seeking relief as follows:

- "a) Pass an order for the liquidation of Khadyota Kishan Foundation, the Corporate Debtor herein:*
- b) Pass an order appointing an Insolvency Professional as Liquidator in respect of the present matter from the IBBI Panel List as maintained by this Hon'ble Tribunal; and,*
- c) Pass further or other orders as may be deemed necessary and thereby render justice"*

2. The CIRP of the Corporate Debtor was initiated on 09.11.2022 in CP/317/CHE/2021 and the Applicant herein was appointed as the IRP.

3. It is submitted that the Applicant effected public announcements in FORM A in newspaper daily Trinity Mirror (English) and Makkal

Kural (Tamil) on 14.11.2022 and fixed the last date for receiving claims as 23.11.2022.

4. It is stated in para 3 & 4 of the Application that the Applicant received no claims from any Financial Creditors and only 2 claims from the Operational creditors within 23.11.2022. Thus, the COC was constituted with two operational creditors with the following voting share

S.No	Name	Voting Share
1.	Jyothy Labs Limited	66.15%
2.	IBS Tea Plantations Private Limited	33.85%

5. It is stated that the business of the Corporate Debtor was procuring goods from suppliers and selling the same at low prices to consumers through "Kishan Ration Shops".

6. It is stated in para 6 of the Application that at the time of commencement of the CIRP of the Corporate Debtor, the Corporate Debtor had only one Director, Mr. Rajendran Jayaganesh. One Mr. Kumaraswamy Rajendran had ceased to be a Director of the Corporate Debtor on 18.06.2020 and from the initiation of CIRP of the Corporate Debtor, there had been no co-operation from the Suspended Director, Mr. Rajendran Jayaganesh.

7. It is submitted that on visiting the Registered Address of the Corporate Debtor situated at 242/1, 3rd Sundaram Street, Nalvar Layout, Near Lala Mahal, Rathinapuri, Coimbatore-641 027 it was found that the

Corporate Debtor had vacated the premises and no books of accounts or other financial information pertaining to the Corporate Debtor were available.

8. The Applicant stated that the Suspended Director had been arrested along with few other persons for defrauding suppliers by way of a news article published on the website of 'The Hindu' on 29.06.2022. The Applicant had filed IA/1494(CHE)/2022 under Section 19(2) of the Code before this Tribunal on 24.11.2022 and the said Application was allowed vide order dated 02.01.2023. A copy of the order dated 02.01.2023 is appended as ANNEXURE 7 of the Application typeset.

9. It is stated in para 7 of the Application that the COC in meeting dated 08.12.2022 unanimously resolved to appoint the Applicant as the RP.

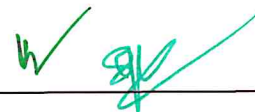
10. It is stated in para 8 of the Application that 2nd COC meeting dated 27.12.2022 was attended by the Suspended Director Mr. Rajendran Jayaganesh where he agreed to cooperate in the CIRP of the Corporate Debtor but requested time to provide the document and details sought by the Applicant RP. The 2nd COC minutes is annexed as Annexure 9 of the Application typeset.

11. In the 3rd meeting of the Committee of Creditors dated 06.01.2022, the Suspended Director Mr. Rajendran Jayaganesh logged into the meeting but left after a minute, without marking his presence through

audio or video. The COC in the 3rd meeting expressed that it would be advisable for them to explore the idea of liquidating the Corporate Debtor and pursuing criminal action against the Suspended Director as it would be futile to expect a positive outcome from CIRP due to the non-operational nature of the Corporate Debtor. The 3rd COC minutes are annexed as Annexure 10 of the Application typeset.

12. It is stated in para 10 of the Application that the 4th COC meeting was convened on 16.01.2022 and continued on 17.01.2022. During the meeting, the Suspended Director initially denied the existence of the dues to the members, however, upon the Applicant sharing her screen and showing the Suspended Director the bank statements submitted by the members with their claims and other records evidencing the debt, the Suspended Director admitted the existence of the same. It is stated that, he then communicated his intention to settle his dues to the members of the Committee of Creditors and that he would issue a settlement schedule to the members by 20.01.2023. The 4th COC minutes are appended as Annexure 11 of the Application typeset.

13. The Applicant submitted that in the 4th COC meeting it was discussed about the inability of the Applicant to perform certain tasks relating to that preparation and issuance of an information memorandum, appointment of registered valuers, preferential transactions, and Form G as mandated by the Code due to the unavailability of books of accounts and lack of co-operation from the Suspended Director.



14. It is stated in para 12 of the Application that the suspended board of director submitted an informal settlement proposal on 20.01.2023 to the RP. The proposal contained a repayment schedule to EMD amount obtained from Jyothy Labs Limited. The copy of the settlement proposal and the communication of the RP is appended as Annexure 13 of the Applicant typeset.

15. It is stated that in the 4th COC meeting, it was discussed about the debit freeze status of the HDFC A/C No shared by the suspended director to the RP and the communication made by the RP to HDFC Bank. The copies of the communication between the RP and the Bank are appended as Annexure 14 of the Application typeset.

16. It is stated in para 16 of the Application that in the 5th COC meeting dated 27.01.2023, the members of the COC discussed that the intention of the suspended board of director to settle the matter does not seem genuine and directed the RP to pursue the settlement for one last time before proceeding to take civil and criminal action against the suspended director.

17. It is stated that in the 6th COC meeting on 10.02.2023, the members of the COC opined that as the books of accounts of the Corporate Debtor are unavailable, the Corporate Debtor has not been operational before the CIRP period, there are no Identified assets belonging to the Corporate Debtor, and there is no co-operation from the Suspended

Director towards resolution despite several attempts being made by the Applicant, it would be fruitless to continue with the CIRP as there is no possibility of reviving the Corporate Debtor as envisioned under the Code. Therefore, the members unanimously with 100% voting share resolved to file for the liquidation of the Corporate Debtor:-

"RESOLVED THAT the Corporate Debtor is to be liquidated and the Resolution Professional shall intimate the Adjudicating Authority of the decision of the Committee of Creditors to liquidate the Corporate Debtor by filing an application before the Adjudicating Authority praying for liquidation of the Corporate Debtor."

A copy of the minutes of the 6th COC meeting is appended as Annexure 16 of the Application typeset.

18. It is submitted that the COC has not proposed the Applicant herein as the Liquidator of the Corporate Debtor and hence she has not given her consent in FORM AA.

19. Form-H has been placed on record before this Tribunal as Annexure 17 of the Application typeset.

20. Heard the submissions made by the Ld. Counsel for the Applicant. It can be seen from the submissions placed that the RP could not trace the books of Accounts of the Corporate Debtor owing to the non cooperation of the suspended director one Mr.R.Jayaganesh, and the following steps could not be accomplished by the RP, namely preparation and issuance



of Information Memorandum, forming an opinion on preferential transactions, Form G, Appointment of registered valuers.

21. In so far as liquidation of the Corporate Debtor, in the 6th meeting dated 10.02.2023 it has been unanimously resolved to liquidate the Corporate Debtor and it clearly satisfies the muster of 66% voting share under Section 33 (2) of the IBC, 2016. The Section 33 (2) of the IBC, 2016 is extracted hereunder for reference:-

Section 33 (2)

“Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than sixty-six percent of the voting share to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).”

22. In the case of *K. Sashidhar v. Indian Overseas Bank* [(2019) ibclaw.in 08 SC], it was held that the decision of the “CoC’s commercial wisdom is non-justiciable” and that neither the NCLT nor the NCLAT has the authority to reverse it.

23. The Hon’ble Apex Court in the case of *Committee of Creditors of Essar Steel India Ltd v. Satish Kumar Gupta & Ors* [(2019) ibclaw.in 07 SC] has, thoroughly discussed the relevancy of the commercial wisdom of the Committee of Creditors (CoC) and stressed upon that the tribunal must work within the framework of IBC and is not entitled to travel beyond the jurisdiction.



24. Hence in the light of the discussion made above and also in view of the decision of the Hon'ble Supreme Court in the matter of **K. Sasidharan** (*supra*), this Tribunal orders for Liquidation of the Corporate Debtor.

25. It is also seen from the records that the Applicant herein has not accorded the written consent, Form AA to act as the Liquidator of the Corporate Debtor and has prayed before this tribunal to appoint the same.

26. In the circumstances, **Mr. Ayyamplalayam Venkatesan Arun** with Reg. No: IBBI/IPA-001/IPP01079/2017-18/11792 email id: avarun77@gmail.com is appointed as the Liquidator of the Corporate Debtor to carry out the liquidation process subject to the following terms of the directions:-

- a) The Liquidator shall strictly act in accordance with the provisions of IBC, 2016 and the attendant Rules and Regulations including Insolvency and Bankruptcy (Liquidation Process) Regulations, 2017 as amended upto date enjoined upon her.
- b) The Liquidator shall issue the public announcement that the Corporate Debtor is in liquidation. In relation to officers/ employees and workers of the Corporate Debtor, taking into consideration Section 33(7) of IBC, 2016, this order shall be deemed to be a notice of discharge.



- c) The Liquidator shall investigate the financial affairs of the Corporate Debtor particularly, in relation to preferential transactions/ undervalued transactions and such other like transactions including fraudulent preferences and file suitable application before this Adjudicating Authority.
- d) Copy of this order be sent to the Financial creditors, Corporate Debtor and the Liquidator for taking necessary steps and for extending the necessary co-operation in relation to the Liquidation process of the Corporate Debtor, viz., company-in-liquidation.
- e) In terms of section 178 of the Income Tax Act, 1961, the Liquidator shall give necessary intimation to the Income Tax Department. In relation to other fiscal and regulatory authorities which govern the Corporate Debtor, the Liquidator shall also duly intimate about the order of liquidation.
- f) The order of Moratorium passed under Section 14 of the Insolvency and Bankruptcy Code, 2016 shall cease to have its effect and that a fresh Moratorium under section 33(5) of the Insolvency and Bankruptcy Code shall commence.
- g) The Liquidator is directed to proceed with the process of liquidation in a manner laid down in Chapter III of Part II of the Insolvency and Bankruptcy Code, 2016.
- h) The Liquidator is directed to investigate the financial affairs of the Corporate Debtor in terms of the provisions of Section – 35(1) of IBC, 2016 read with relevant rules and regulations and also file its response for disposal of



any pending Company Applications during the process of liquidation.

- i) The Liquidator shall submit a Preliminary report to this Tribunal within 75 (seventy-five) days from the liquidation commencement date as per regulation 13 of the Insolvency and Bankruptcy (Liquidation Process) Regulations, 2016. Further such other or further report as are required to be filed under the relevant Regulations, in addition, shall also be duly filed by him with this Adjudicating Authority.
- j) The Registry is directed to communicate this order to the Jurisdictional Registrar of Companies and to the Insolvency and Bankruptcy Board of India;

27. With the above directions, this IA/390/CHE/2023 stands **allowed**.

II. IA/413/CHE/2023& IA/414/CHE/2023:

IA/413/CHE/2023 has been filed by the erstwhile suspended director of the Corporate Debtor under Section 60 (5) of Insolvency and Bankruptcy Code, 2016 read with rule 49 (2), 11 and 15 of the NCLT Rules, 2016 seeking relief as follows;

"Therefore, the Applicant respectfully prays that this Hon'ble Tribunal maybe pleased to recall and set aside the ex parte order dated 17/02/2022 in CP/IB/317(CHE)/2021 and consequently restore the Corporate Debtor to file Counter in Company Petition No. CP/B/317(CHE)/2021 and pass such order/s or further order/s as this Hon'ble Tribunal may deem fit in the facts and circumstances of the case and thus render justice."



2. IA/414/CHE/2023 has been filed by the erstwhile suspended director of the Corporate Debtor under Section 60 (5) of Insolvency and Bankruptcy Code, 2016 read with rule 11,14 and 15 of the NCLT Rules, 2016 seeking relief as follows;

“Therefore, the Applicant respectfully prays that this Hon’ble Tribunal may be pleased to condone the delay of 346 and 80 days for filing the Petition to recall and set aside the ex parte order dated 17/02/2022 and 09/11/2022 in CP/IB/317(CHE)/2021 and consequently restore the Corporate Debtor to file Counter in Company Petition No. CP/IB/317(CHE)/2021 and pass such order/s or further order/s as this Hon’ble Tribunal may deem fit in the facts and circumstances of the case and thus render justice.”

FACTS RELEVANT TO DISPOSE OF THE APPLICATIONS

3. Applicant herein is the director of the Suspended Board of the Corporate Debtor.

4. In para 3 of the Application it is stated that criminal proceeding was initiated by the Chennai Crime Branch against the Applicant and few others vide FIR No.23 dated 22.01.2022.

5. It is stated that Anticipatory Bail Application filed by the Applicant was dismissed and he was remanded to judicial custody on 27.06.2022 and thereafter bail was granted on 14.07.2022 by the CCB and CBCID Metropolitan Magistrate Court, Egmore, Chennai in CRL.MP. No 17000/2022 and in CCB Cr. No 23/2022, which was conditional in which the Applicant had to appear and sign before the Inspector of Police, Forgery Wing, Team -27, Central Crime Branch, Egmore, Chennai.

6. It is stated in para 4 of the Application that, the Applicant was in Chennai for the reasons stated *Supra* and the notice issued to the Corporate Debtor did not reach the Applicant and he was not aware of the proceedings initiated against the Corporate Debtor.

7. In para 5, it is stated that on 10/11/2022, the Applicant received email from the Respondent No.2, wherein the Order copy dated 09/11/2022, passed by this Tribunal was attached. From the said order, the Applicant came to know about the present Petition and also the factum of Corporate Debtor being set ex parte on 17/02/2022.

8. Subsequently the Applicant preferred an appeal before the Hon'ble National Company Law Appellate Tribunal, Chennai, on 02/12/2022. After hearing the arguments of the Counsel for Appellant (Applicant herein), the Hon'ble National Company Law Appellate Tribunal, Chennai, was pleased to permit withdrawal of appeal viz. Comp. App. (AT) (CH) (Ins) No.426/2022 on 19/12/2022 observing that the said dismissal of the Appeal will not preclude the Appellant (Applicant herein) to file a proper interlocutory application before this Tribunal seeking to set aside the Ex Parte Order dated 09/11/2022.

9. In para 7 of the averments it is stated that the owing to medical conditions, he could not participate in the COC proceedings in person and engaged a counsel to file the present Application for recall and set aside the ex-parte order dated 17.02.2022.



10. The Applicant has also filed an Application in IA/414/CHE/2023, to condone the delay of 346 and 80 days for filing the Petition IA/413/CHE/2023 to recall and set aside the ex parte order dated 17/02/2022 and 09/11/2022 in CP/IB/317(CHE)/2021 and consequently restore the Corporate Debtor to file Counter in CP/IB/317(CHE)/2021.

11. In the condone delay Application, the Applicant has pleaded ill-health and also averred the dismissal of the Anticipatory bail application as reason for the delay of 346 and 80 days in filing IA/413/CHE/2023 i.e. to set aside the ex-parte order.

12. Heard the submissions and perused the documents placed on record.

13. It is stated that the delay was caused due to the reasons mentioned *supra* in para 3,5,6,7. However at this juncture it cannot be forgotten that IBC is a time-bound process and all stakeholders are bound by the timelines. The claim about the efforts made to take legal advice and pursue the settlement before the COC does not seem bonafide.

14. Further in the Application to condone delay of 346 days and 80 days in filing the set aside application, there is "*no sufficient cause*" shown by the Applicant. Similar reasons are averred by the Applicant in the condone delay Application and the Set-aside ex-parte Application under Rule 49 of the NCLT Rule, 2016. This seems to be a delaying tactic of the Applicant to delay the inevitable. From the liquidation Application filed

by the RP before this Tribunal it can be seen that the Suspended director., viz the Applicant herein has been a willing participant in the COC meetings and has been aware of the CIRP proceedings. It is admitted position that bail was granted to the applicant on 14.07.2022 and the CIRP admission order of this Tribunal under Section 9 is dated 09.11.2022. No effort was made by the Applicant to approach this Tribunal in any manner.

15. Be that as it may, at this juncture the judgement of **Esha Bhattacharjee v. Raghunathpur Nafar Academy**, (2013) 12 SCC 649 will squarely apply in which the Hon'ble Apex Court has categorically laid down the broad principles governing the term 'sufficient cause', which are as follows

"21. From the aforesaid authorities the principles that can broadly be culled out are:

21.1. (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

21.2. (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

21.3. (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21.4. (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.6. (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

21.7. (vii) *The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.*

21.8. (viii) *There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.*

21.9. (ix) *The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.*

21.10. (x) *If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.*

21.11. (xi) *It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.*

21.12. (xii) *The entire gamut of facts are to be carefully scrutinised and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.*

21.13. (xiii) *The State or a public body or an entity representing a collective cause should be given some acceptable latitude.*

22. *To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:*

22.1. (a) *An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.*

22.2. (b) *An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.*

22.3. (c) *Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency*

and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

22.4. (d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters."

16. For the reasons stated above, this Tribunal finds that the reasons stated by the Applicant in IA/414/CHE/2023 are haphazard and lackadaisical and a copy paste of the reasons stated in IA/413/CHE/2023. From the Application also made by the RP in IA/360/CHE/2023 it can be seen that the Suspended director viz the Applicant herein has been a voluntary participant in the proceedings of the COC and has even offered a settlement proposal to the RP which had failed eventually. This Tribunal views the Applications IA/413/CHE/2023 & IA/414/CHE/2023 as a tactic to hamper the due process of law and justice.

17. In the light of the above said reasons this IA/414/CHE/2023 fails and stands **dismissed** as a result of which IA/413/CHE/2023 also stands **dismissed**.

— Sd —

SAMEER KAKAR
MEMBER (TECHNICAL)

— Sd —

SANJIV JAIN
MEMBER (JUDICIAL)