

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH - II, CHENNAI**

IA/2/2021 in CP/75/CHE/2021

(Filed Under Rule 11 of the NCLT Rules, 2016)

In The Matter of Technology Frontiers (India) Private Limited

Mayank Agarwal
No.5

... Applicant / Respondent

Versus

Technology Frontiers (India) Private Limited,
Represented by Sriram Srivatsan, PCS

... Respondents/Petitioners

CORAM

**Justice (Retd.) S. RAMATHILAGAM, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)**

C O R R I G E N D U M

In exercise of powers under Rule 154 of National Company Law Tribunal Rules, 2016, the Order dated 01.07.2022 is rectified as under;

At Page 1 of 14 of the Order, in the appearance for Respondent, instead of "S.Sriram, PCS" shall be read as **S.Sriram, Party in person**".

At Page 7 of 14 of the Order, in the 2nd and 3rd line, instead of "Corporation by the security" shall be read as **"Corporation by the secretary"**

At Page 12 of 14 of the Order, at 18th para in the 7th line, instead of "Rs.24 Lakh" shall be read as **"Rs.25 Lakh"**


ANIL KUMAR B
MEMBER (TECHNICAL)


Justice (Retd.) S. RAMATHILAGAM
MEMBER (JUDICIAL)

DATED AT CHENNAI ON THIS 2ND DAY OF JULY 2022

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Order Pronounced on 1st July, 2022

CORAM

**Justice (Retd) S.RAMATHILAGAM, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)**

For Applicant : P.H.Aravindh Pandian, Sr. Advocate
For Edward James, Advocate

For Respondents : S. Sriram, PCS

ORDER:

Per: ANIL KUMAR B, MEMBER (TECHNICAL)

Under consideration is an Interlocutory Application I.A.No.2 of 2021 filed by Mr. Mayank Agarwal (herein referred to as applicant) under Rule 11 of the NCLT Rules, 2016.

The Applicant has sought the following prayers as main reliefs:

- a) *Declare that Company Petition No.75(CHE) of 2021 is not maintainable and dismiss the company petition at the outset;*
- b) *Direct Sriram S, Company Secretary to solely bear all cost associated with the present Company Petition No.75(CHE) of 2021;*

c) *Pass such other order(s) as this Hon'ble Tribunal may deem fit in the facts and circumstances of the present case.*

2. The respondent in this matter is the Company Secretary of M/s. Technology Frontier India Private Limited.

3. In the company petition No.75(CHE) of 2021 (Referred to as Main Application hereinafter) filed by the Company Secretary Mr. Sriram S, Mayank Agarwal has been referred as respondent 5. The respondent 5 is the nominee director appointed by Crest Investment Holdings Pte Ltd on the Board of Directors of the Petitioning Company.

4. **Background to the main petition CP/75/CHE/2021**

4.1 The main petition is pertaining to ensuring compliance of mandatory requirements in the Companies Act, 2013 under the provisions of Section 90 of Companies Act, 2013 which prescribes that every individual who holds beneficial interest over the company shall make a declaration specifying the nature of the interest in form BEN-1 within a period of 90 days of commencement; also every individual, who subsequently becomes a significant beneficial owner, or where his significant beneficial ownership undergoes any change shall file a declaration in Form No.BEN-1 to the reporting company, within thirty days of acquiring such significant beneficial ownership or any change therein. It may be noted that upon receipt of declaration in BEN-1, the



company has to file form BEN-2 with the Registrar of Companies, ROC within thirty days of receipt of such declaration.

4.2 Sub-section 4A of Section 90 of the Companies Act compels the companies to identify the individual and further requires him to comply with the provisions of the said section. It is the duty of the shareholders to show as to who is the real owner of the shares if they are not holding the shares in their individual capacity as per sub-section 5 of section 90 which mandates this prescription is reproduced here below:

4.3 And further as per sub-section 5 of section 90 of the Act reproduced as below:

(5) A company shall give notice, in the prescribed manner, to any person (whether or not a member of the company) whom the company knows or has reasonable cause to believe-

(a) to be a significant beneficial owner of the company;

(b) to be having knowledge of the identity of a significant beneficial owner or another person likely to have such knowledge; or

(c) to have been a significant beneficial owner of the company at any time during the three years immediately preceding the date on which the notice is issued,

and who is not registered as a significant beneficial owner with the company as required under this section.

By virtue of the above, aspect of seeking information is mandated.

5. This tribunal places on record that the provisions of significant beneficial ownership are newly introduced in the Companies Act, 2013 and did not find a place in the Companies Act, 1956 as there



has been an involvement of lot of these practices where the Ultimate Beneficial Owners (UBO) of a particular entity holding the shares are not disclosed; thereby this is relatively a new concept of reporting which has been envisaged under the Companies Act, 2013. The usage of the words "Company shall give notice" under Section 90(5) makes it amply clear that the Key Managerial Personnel have to do this activity of seeking information; in order to find out the UBO and thus in the present case the Company Secretary had sent the notice to the respondents on May 3rd 2021 along with the form to disclose their UBO of the shares held. Further, it is also seen that as per sub-section 6 of section 90 (reproduced below):

"The information required by the notice under sub-section (5) shall be given by the concerned person within a period not exceeding thirty days of the date of the notice"

6. The present application I.A.No.2 of 2021 in CP/75/CHE/2021 was filed to adjudicate on record the Maintainability of the Main Petition.

7. It is alleged by the Applicant that the Company alone is empowered to apply to this bench under section 90(7) of the Companies Act, 2013. It is submitted that the company acts through its Board of Directors and that in the present case the Company Secretary has not taken any approval from the Board of Directors to file the present petition. The applicant further goes on



to state that there is no Board resolution nor has any delegated authority to present the present petition.

8. It is further the submission of the Senior counsel representing the applicant that company acts through the Board of Directors and Section 179 of the Companies Act, 2013 empowers the Board of Directors to exercise all such powers and to do all such acts and things that a company is authorized to exercise and do.

9. In support of the arguments put forward, the Senior Counsel relied upon the judgment of **Nibro Limited Vs National Insurance Co Ltd & State Bank of Travancore Vs Kingston Computers, (2011) 11 SCC 524** where in as per the counsel it is a settled position of law that any suit or any other legal proceedings can be instituted by a director or officer of the company such as a Company Secretary only on the strength of valid Board Resolution duly passed authorizing them to do so and in the absence of such a Board resolution, if a suit or legal proceedings is instituted, then necessarily there has to be a resolution by the Board of Directors of the company ratifying the defect, failing which the suit or legal proceedings cannot be maintained.

10. It was further argued that the Company Secretary has no locus standi to file a petition under Section 90. It was propounded that the Company Secretary is not empowered by Section 205 or



any other provision of the Companies Act, 2013 to bypass or supersede the Board of Directors of a company and substitute the authority and powers of the Board of Directors in Company Secretary's own wisdom.

11. The Applicant further alleges certain aspect on professional misconduct on the part of the Company Secretary.

12. Per contra the submission of the Respondent Company Secretary in his written submission is that he has the locus standi on account of the following; that Board resolution was duly passed by the Board members attached with the Company Petition No.75 of 2021 from Pg. No.5-6, which expressly states the following lines:

"RESOLVED THAT pursuant to the provisions of Section 203 of the Companies Act, 2013...., Mr. Sriram S (M.No.: A 39023)..... be and is hereby appointed as the Company Secretary and Compliance Officer of the Company with effect from 23rd May 2015 to perform the duties as required under the Companies Act, 2013 and any other duties assigned by the Board of Directors from time to time."

13. To further substantiate on the maintainability of the petition the Company Secretary also relied upon the Order 29, Rule 1 of the Civil Procedure Code, 1908 which reads as follows:

ORDER XXIX - SUITS BY OR AGAINST CORPORATIONS.

1. Subscription and Verification of Pleading.



In suits by or against a corporation, any pleading may be signed and verified on behalf of the Corporation by the security of by any director or other principal officer of the corporation who is able to depose to the facts of the case.

It is the version of the respondent that the case of **United Bank of India v. Naresh Kumar and Others OA/463/2014** where **in Para 10 that** even in the absence of any formal letter of authority or power of attorney having been executed, a person referred to in Rule 1 of Order 29 can, **by virtue of the Office which he holds**, sign and verify the pleadings on behalf of the Corporation. This therefore implies that, the Company Secretary, being an Officer under Rule 29 have the authority to enter into pleadings on behalf of the Company in the absence of a formal authorization from the Board of the Company more significantly to ensure compliance by or on behalf of the Company in which he has been appointed in that capacity.

14. The respondent Company Secretary goes on to refer the provisions of Companies Act, 2013 and the rule wherein he submits that by virtue of Section 205 of Companies Act, 2013 he is authorized to represent and that it is his duty to do so. Section 205 of Companies Act, 2013 along with rules are quoted as under:

Section 205: Function of Company Secretary

(1) The functions of the Company Secretary shall include -

(a) to report to the Board about compliance with the provisions of this Act, the rules made there under and other laws applicable to the company;



(b) to ensure that the company complies with the applicable secretarial standards;

(c) to discharge such other duties as may be prescribed.

R/w Rule 10 Clause 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014.

10. Duties of Company Secretary:-

...

(4) to represent before various regulators, and other authorities under the Act in connection with discharge of various duties under the Act;

15. Heard both the sides, perused the documents filed on record; the relief sought for is for the purpose of dismissing the Main application on account of maintainability; to answer this question for the locus standi of the respondent / petitioner in the main application and maintainability, we refer to the following provisions of the Companies Act, 2013. The aspect of 'Officer in default' is first dealt with in order to understand the position of the Company Secretary in the sequence of events which are followed herein. The definition u/s 2(60) of Companies Act, 2013 is reproduced below:

"2. In this Act, unless the context otherwise requires-

....

(60) "officer who is in default", for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely:-

(i) whole-time director;



(ii) **key managerial personnel;**

(iii) where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;

(iv) any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;

(v) any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity;

(vi) every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board of participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance;

(vii) in respect of the issue or transfer or any shares of a company, the share transfer agents, registrars and merchant bankers to the issue of transfer.

Now coming to the definition of who is the **Key Managerial Personnel** under the Companies Act, 2013. The definition is reproduced below

.....

51) "key managerial personnel", in relation to a company, means-

(i) the Chief Executive Officer or the managing director or the manager,



(ii) the company secretary;

(iii) the whole-time director;

.....

16. The Company Secretary is the Secretary of the Company; the Secretary of the Company is the Secretary of the Company; he is not the Secretary of shareholders. He is appointed under the Companies Act pursuant to a Board Resolution in respect of which the appointment is given effect by filing the prescribed form with the Registrar of Companies, so as to ensure statutory compliances failing which he is the only Officer who receives the Show cause notice from the Registrar of Companies so also the Company. He would be required to face the penal consequences in the event of failure of compliances. He is answerable to the violations of the compliance requirement. Needless to mention that he is the Watchdog of protecting the Principles of Corporate Governance as well as the collective interest of all the stakeholders so also the Company; of course he is not a blood hound. The era in which the Company Secretary occupied the position of a glorified clerk in Companies has expired consequent upon evolution of corporate governance and the various compliance requirement in a complex regime so as to protect the interest of the company as well as its various stakeholders;

17. There is no idealistic overstatement in holding that Company Secretary is required to act not only with adequate diligence but with proper and necessary diligence while discharging his duties by sounding the knell in order to alert all concerned including the Board of Directors on occasions where he apprehends deviations from sound corporate principles and prudent governance practice in the best interest of the company and its stakeholders; he has to ensure the mandatory compliances by moving the Competent Authority, if not such compliances were failed at the behest of the Board or in the event of a lapse from the Board of Directors. Further in this context, the Directors Responsibility Statement required to form a part of Board's Report pursuant to Sub-section 5 of Section 134 of the Companies Act is also of paramount importance:-

"Section 134(5) The Directors Responsibility Statement referred to in clause (c) of Sub-section (3) shall state that

(a)

(b)

(c)

(d)

(e)

(f) the directory had devised proper system to ensure compliance with the provisions of all applicable laws and such systems were adequate and operating effectively.

(6)

(7)



(8) If a Company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.

18. Therefore, clause (f) of Sub-section 5 of Section 134 read with sub-section 5 makes it a mandatory prescription to devise and put in place proper system to ensure the compliance with all applicable laws and that such systems are adequate and operating effectively, the violation of which will drag the Company and every Officer in default to penal consequences including penalty up to Rs.24 lakh for the company and imprisonment to the Officer in default for a term up to three years or with a fine up to Rs.5 Lakh or with both.

19. Accordingly, we hold that the Company Secretary in the instant situation has acted diligently and promptly to ensure compliance of the mandatory provisions by moving this Tribunal.

20. It is important to distinguish that in the present case the Main Application CP/75/CHE/2021 has been filed by the Company Secretary in employment and from the above it clearly envisages the role of a Company Secretary to be a **key managerial personnel** who shall also be responsible for all the action against



the company if there is any default on its side; further the company is an artificial person and functions on the basis of the Board of directors and key managerial personnel. The law has categorically given clear framework in so far as ensuring the compliances and following good corporate governance practice is concerned to the Company Secretary by virtue of the Section 205 of the Companies Act, 2013.

21. To answer the question put forward whether the Company Secretary has the locus standi to file such application we answer the same in **Affirmative** by virtue of the above position of law, it is fairly clear that the company can be represented by the Company Secretary since he is a key managerial person under section 2(51) of Companies Act, 2013, officer in default as per sec.2(60) as per companies act 2013 and as per the power given under sec.205(1) (c) read with Rule 10 clause 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 it is abundantly clear that the Company Secretary can represent before various regulators and other authorities under the Act in connection with discharge of various duties under the Act. The NCLT being a quasi-judicial authority the Company Secretary can very well do the same.

✓



22. The prayer in clause 1(a) above is answered in negative. Hence, IA.No.2/2021 stands **dismissed**.

23. List the main Petition in **CP/75/(CHE)/2021** on **25.08.2022** for final hearing. Meanwhile both the parties are directed to file their written submissions/additional written submissions if any **within one month** from the date of this Order.

- Sd -

ANIL KUMAR B
MEMBER (TECHNICAL)

- Sd -

JUSTICE (RETD.) S. RAMATHILAGAM
MEMBER (JUDICIAL)