

Chapter 17

Empowerment of the Company Secretary Profession

COMPANY SECRETARY: PROTECTING CORPORATE GOVERNANCE PRINCIPLES

1) Responsibility on CS

There is a huge responsibility casted on the Company Secretary to ensure good governance and protect the interest of all stakeholders.

2) Officer in default

If they fail to perform their duty diligently, they will fall into the category of “officer in default” under the eyes of law.

3) Compliance of applicable law

Sometimes due to, varied reasons it engenders friction between the board and Company Secretary over the due compliance of the applicable laws, and such confrontation puts them in a bind.

4) CS against Board

Under such a scenario, one can rarely imagine the situation where Company Secretary went to the court or quasi-judicial body against the Board or other stakeholders in a bid to perform his duties.

5) NCLT, Chennai Bench

The National Company Law Tribunal (NCLT), Chennai Bench, dealt with a similar matter where Company Secretary approached it as his last resort for ensuring the due compliance.

The order was pronounced by the NCLT Chennai Bench on 01st July, 2022 in the matter of **Mayank Agarwal vs. M/s. Technology Frontiers (India) Private Limited**

Brief About the Case:

1) CS issued notice to ask SBO

The matter is pertaining to compliance with the Significant Beneficial Ownership provisions, initially Mr. Sriram Srivatsan (Company Secretary) issued a notice to the company whose holding in their company falls under the threshold of Significant Beneficial Ownership provisions and asked them to disclose their ultimate beneficial owner.

2) Company need to disclose but fail to comply

As per the Significant Beneficial Ownership provisions, upon issuance of the notice, the company is required to disclose its ultimate beneficial owner. In the instant case, the Company Secretary went to NCLT as the company was not complying with the regulatory requirements.

3) Interim application by Nominee Director that petition is not authorised

The nominee director (Mr. Mayank Agarwal) of the respondent company refuted the stance by filing an Interlocutory Application, by arguing that the Company Secretary does

not have a locus stand to file the petition as the board has not authorized him to file the same and the Companies Act, 2013 does not empower him to supersede the Board of Directors.

Historical Instances:

1) About Nominee Director

Mr. Mayank Agarwal (Applicant) is a nominee director appointed by M/s Crest Investment Holdings Pvt. Ltd. on the Board of Directors of the M/s. Technology Frontiers (India) Private Limited and Mr. Sriram Srivatsan is a Company Secretary (Respondent) of M/s. Technology Frontiers (India) Private Limited.

2) Contents of Interim Application

Mr. Mayank Agarwal (Applicant), filed an Interlocutory Application before NCLT Chennai Bench and following were the prayers as main relief:

- a) To declare that the Company Petition is not maintainable and dismiss the company petition at the outset;
- b) Direct Mr. Sriram Srivatsan, Company Secretary to solely bear all cost associated with the present petition.

3) Main Application by CS

The main petition was filed by Mr. Sriram Srivatsan, Company Secretary for ensuring compliance of mandatory requirements mentioned under the provisions of the Companies Act, 2013.

Section 90 of the Companies Act, 2013 states that:

“(1) Every individual, who acting alone or together, or through one or more persons or trust, including a trust and persons resident outside India, holds beneficial interests, of not less than twenty-five percent or such other percentage as may be prescribed, in shares of a company or the right to exercise, or the actual exercising of significant influence or control (herein referred to as “significant beneficial owner”), shall make a declaration to the company in form BEN-1, specifying the nature of his interest and other particulars, in such manner and within such period of acquisition of the beneficial interest or rights and any change thereof, as may be prescribed. Provided that the Central Government may prescribe a class or classes of persons who shall not be required to make declaration under this sub-section.”

“.....(4) Every company shall file a return of significant beneficial owners of the company in Form BEN-2 and changes therein with the Registrar containing names, addresses and other details as may be prescribed within such time, in such form and manner as may be prescribed.

(4A) every company shall take necessary steps to identify an individual who is a significant beneficial owner in relation to the company and require him to comply with the provisions of this section.

(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.

(6) The information required by the notice shall be given by the concerned person within a period not exceeding 30 days of the date of the notice.

(7) The company shall,

- (a) Where that person fails to give the company the information required by the notice within the time specified therein; or
- (b) Where the information given is not satisfactory

apply to the Tribunal within a period of 15 days of the expiry of the period specified in the notice, for an order directing that the shares in question be subject to restrictions with regard to transfer of interest, suspension of all rights attached to the shares and such other matters as may be prescribed.”

In this case, Company Secretary Mr. Sriram Srivatsan had sent the notice to the Applicant's company on 03rd May, 2021 along with the form to disclose their Ultimate Beneficial Ownership of the shares held.

The applicant filed this application to adjudicate the maintainability of the main petition filed by the Company Secretary.

Applicant (Mr. Mayank Agarwal) Contentions in this Case:

a) **Company can act only through BOD**

The Company {M/s. Technology Frontiers (India) Private Limited} alone is empowered to apply to NCLT under section 90(7) of the Companies Act, 2013 and the company acts through its board of directors and Company Secretary has not taken any approval from the board of directors to file the present petition and there is no Board Resolution nor has any delegated authority to present the present petition.

b) **CS is authorised only if Board Resolution is passed**

That any suit or any other legal proceedings can be instituted by a director or officer of the company such as Company Secretary only on the strength of valid Board Resolution duly passed authorizing them to do so and in absence of such board resolution if any suit or legal proceedings is instituted then there has to be a board resolution ratifying the defect, failing which the suit or legal proceedings cannot be maintained.

c) **CS not authorised u/s 90, 205 and cannot supersede Board**

That the Company Secretary has no locus standi to file a petition under section 90 and is

not empowered by section 205 or any other provisions 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.

d) **Professional Misconduct**

Certain aspects on professional misconduct on part of Company Secretary was also alleged by the applicant.

Written Submissions by the Respondent Company Secretary (Mr. Sriram Srivatsan) in this case:

a) **Compliance Officer duly appointed to comply with Companies Act,2013**

It was submitted that he has the locus standi on account of board resolution duly passed by the board of directors at the time of his appointment which states that he is appointed as the Compliance Officer of the company and he is required to perform the duties as required under the Companies Act, 2013 and any duties assigned by the board of directors from time to time.

b) **CPC-Plead on behalf of Corporation by Director or Principal**

The respondent also quoted Order 29, Rule 1 of the Civil Procedure Code, 1908 which states that 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 dispose to the facts of the case.

c) **No Formal Authorisation Needed**

That the Company Secretary being an officer as per the above quoted rule have the authority to enter into pleadings on behalf of the Company in 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.

d) **Section 205- Authorised to represent**

The respondent also refer the provisions of the Companies Act and the rule wherein he submits that by virtue of Section 205 of the Companies Act, 2013 he is authorized to represent and it is his duty to do so. Section 205 states the Functions of Company Secretary which include that it is his duty to report the board about compliance with the provisions of this Act, rules made there under and other laws applicable to the company and to ensure that the company complies with the applicable secretarial standards.

e) **Rule 10- Can represent various regulator to discharge duties**

The respondent also states that Rule 10 (4) of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 states that Company Secretary can represent before various regulators and other authorities under the Act in connection with discharge of various duties under the Act.

NCLT Observations:

The Bench observed that the Company Secretary is the secretary of the Company and not the Secretary of the shareholders. He is appointed under the Companies Act, 2013 pursuant to a board resolution in respect of which 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.

Company Secretary are the watchdog of protecting corporate governance principles and ensuring the interest of all stakeholders and not a bloodhound. He has to ensure that the company complies with all regulations, and in case of any failure on the part of the board, he should approach the competent authority.

The bench further stated that 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.

The bench also noted that the Company Secretary acted diligently by approaching the appropriate authority.

Pronouncement:

The Bench dismissed the Interlocutory Application and held that being Company Secretary falls under the definition of the Key Managerial Personnel (KMP) under Section 2(51) of the Act, and officer in default under Section 2 (60) of the Act and power enshrined to them under Section 205 (1)(c) of the Act, read with Rule 10 clause 4 of the Companies (Appointment and Remuneration of the Managerial Personnel) Rules, 2014, he has the power to represent the company before various regulators and other authorities in the discharge of the various duties under the Act and has locus standi in present case to file such application. NCLT being a quasi judicial authority the Company Secretary can very well represent before the same.

Conclusion:

This judgment and case throws the light on evolved duties of the Company Secretaries and expectations of the regulators from the Company Secretary. From the order, it is inferred that for the regulators, the diligent act is not by putting the compliance requirement over a mail, this will not absolve them from the officer in default. The regulators expect a leap beyond it by approaching the respective regulatory authority.