

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

HBE Action No: 40 of 2020

IN THE MATTER of a Statutory Demand dated 2nd June 2020 taken out by Viken Vijendra Sen Buildcare Repairs "(the Respondent)" against Omniverse Investment Pte Limited ("the Applicant") and served on the Applicant on the 3rd June 2020 vide email.

AND

IN THE MATTER of an application by the Applicant for an Order setting aside the Statutory Demand pursuant to Section 516 of the Companies Act 2015.

BETWEEN: OMNIVERSE INVESTMENT PTE LIMITED a limited liability company having its registered office at Unit 10C, Arts Village, Pacific Harbour, Navua, Fiji.

APPLICANT

AND: VIKEN VIJENDRA SEN Buildcare Repairs of Lot 2, Vunibau Road, Bayview Heights, Tamavua, Suva.

RESPONDENT

Counsel : Applicant: Ms Singh.K
: Respondent: Mr Kumar.V
Date of Hearing : 25.08.2020 & 29.09.2020
Date of Judgment : 30.09.2020

JUDGMENT

INTRODUCTION

1. This is an application filed by Applicant against Respondent for setting aside of statutory demand for a sum of \$265,000.00. Out of this a sum of \$99,417.57 was admitted in the affidavit in reply through an assessment. This was admitted debt and this was paid after institution of this action as undisputed amount, and the receipt of that was confirmed. Applicant is a company involved in property investments and Respondents engages in business of construction and engineering services and allied services. Applicant and Defendant entered into a construction agreement which included method of payment and resolution of disputes through arbitration. Without ascertaining the debt, a Statutory Demand was served to the Applicant on 3.6.2020 for a sum of \$265,000.00. As undisputed sum was paid, the remaining sum is \$165,582.43. Applicant disputes this remaining sum and Respondent desired to proceed with winding up. Respondent filed affidavit in opposition and in that annexed number of invoices and allege that Applicant had not paid the sum demanded and that the Respondent had complied with the variations requested by architect appointed by the Applicant, hence the sum demanded needs to be paid immediately. Respondent could not proceed with winding up action as the varied sum of the demand notice was genuinely disputed, in terms of the construction agreement.

ANALYSIS

2. Applicant filed this matter in terms of Section 516 and Section 524 of the Companies Act 2015 for setting aside of Statutory Demand Notice of Respondent.
3. It should be noted at the outset that Section 524 of Companies Act 2015 is irrelevant to this application as there are no pending action between the parties relating to the debt.
4. Section 516 of Companies Act 2015 states,
 - '516.—(1)A Company may apply to the Court for an order setting aside a Statutory Demand served on the Company.
 - (2)An application may only be made within 21 days after the demand is so served.
 - (3)An application is made in accordance with this section only if, within those 21 days—
 - (a) an affidavit supporting the application is filed with the Court; and

(b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the Company.’

5. The Applicant had filed this matter on 22.6.2020 and it is admitted fact that Statutory Demand was served on 3.6.2020. So Applicant had filed this application within 21 day time period.

6. Apart from that, Applicant had also filed an affidavit supporting the application and the application to the Respondent and there is no objection raised regarding noncompliance of statutory requirements in terms of Companies Act 2015.

7. Section 517 of Companies Act 2015 states,

‘517.—(1) This section applies where, on an application to set aside a Statutory Demand, the Court is satisfied of either or both of the following—

(a) that there is a genuine dispute between the Company and the respondent about the existence or amount of a debt to which the demand relates;

(b) that the Company has an offsetting claim.

(2)The Court must calculate the substantiated amount of the demand.

(3)If the substantiated amount is less than the statutory minimum amount for a Statutory Demand, the Court must, by order, set aside the demand.

(4)If the substantiated amount is at least as great as the statutory minimum amount for a Statutory Demand, the Court may make an order—

(a) varying the demand as specified in the order; and

(b) declaring the demand to have had effect, as so varied, as from when the demand was served on the Company.

(5)The Court may also order that a demand be set aside if it is satisfied that—

(a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or

(b) there is some other reason why the demand should be set aside.”

8. The two grounds on which statutory demand can be set aside are

- a. Defects in the demand and they will substantially cause injustice
- b. Other reasons

9. No defects in the said demand was pointed out, that would cause injustice.
10. At the hearing Applicant admitted that they have an outstanding debt, but stated that it was calculated by the architect after institution of this action for setting aside and sought time to pay the undisputed sum. This request was allowed, with the consent of the parties as the court has power to amend the demand notice in terms of Section 517(4) of Companies Act 2015.
11. Accordingly a sum of \$99,417.57 was paid and this was an admitted part of the debt and already it was paid upon ascertainment in terms of the construction agreement between the parties.
12. In terms of Section 517(4) demand is varied and now stands as \$165,582.43. This amount is above the threshold value of the debt for winding up of a company in terms of Section 515(a) of Companies Act 2015.
13. There was no admittance of said debt of \$165,582.43 or part of it by Applicant at any time from the material before me.
14. In terms of Section 517(5) (b) court can set aside demand notice for other reasons. This give discretion to court, but reasons needs to be justified in order to set aside it.

What are the reasons for setting aside of Statutory Demand.

15. At the outset it is pertinent to note first line of attack to winding up is the statutory demand and noncompliance of mandatory requirement under Companies Act 2015. (eg debt is below statutory threshold of \$10,000 or unascertained amount).
16. Applicant did not state that Statutory Demand was defective and or deficient in any manner, so the abovementioned reason is not relevant to this matter.
17. Alleged debt had arisen due to construction agreement annexed to the affidavit in support of Applicant. Any dispute under said agreement needs to be first subjected to arbitration.
18. Party autonomy is paramount in arbitration, and parties contracted for arbitration in case of dispute between the parties in terms of Clause 33 of the construction agreement entered between the parties relating to the construction , where dispute arose and it reads

‘Provided always that in case **any dispute or difference shall arise between** the Employer or the Architect on his behalf and the Contractor, either during the progress or **after the completion** or abandonment of the Works, as to the construction of this Contract or as to any matter or thing of **whatsoever nature arising thereunder** or in **connection therewith** (including any matter or thing left by this Contract to the discretion of the Architect or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation mentioned in clause 30(5)(a) of these Conditions or the rights and liabilities of the parties under clauses 25 or 26 of these conditions), then such dispute of **difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties**, or failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an Arbitrator, a person to be appointed on the request of either party by the President or a Vice-President for the time being of the Fiji Association of Architects.’(emphasis added)

19. Respondent had not resorted to arbitration in terms of the said clause 33 contained in the construction agreement. The alleged debt is disputed and falls within the scope of arbitration, in terms of clause 33 and that will ascertain the debt between the parties, as they had agreed between them. This method facilitate an industry expertise be utilized in a quick and efficient manner.
20. Without ascertainment of alleged variations and additional work and sum to be paid for additional work no action for winding up can be instituted.
21. Clause 11 of the building contract deals extensively as to the procedure relating variations and costing relating to that. Clause 2(2) of the building contract deals with the instructions relating architects.
22. Applicant’s reason for seeking setting aside was based on debt was disputed. If the varied debt (i.e \$165,582.43) is not admitted and not a liquidated sum then Respondent cannot rely on the legal fiction of liquidity of Applicant. It needs to be a debt in terms of the construction contract between the parties. This had not been ascertained before the alleged sum acquire the status of debt in terms of Section 515 of Companies Act 2015.
23. Unascertained debt is that either the debt is unliquidated in its present condition (eg the amount needs to be proved in court of law or any other agreed method such as arbitration, etc).

24. Liability of the parties for payment needs to be in terms of construction agreement entered, hence yet to be finalized in terms of the said agreement.
25. The varied debt of \$165,582.43 is the alleged amount of work that Respondent had done for Applicant and this was pursuant to payments to variations, of the initial plan.
26. Whether this work was carried out by the Respondent in terms of Fiji Standard Form of Building Contract entered between the parties and can be subjected to payment under said contract and cost of that cannot be ascertained in abstract manner as Respondent did when statutory demand was issued.
27. Respondent in the affidavit in opposition stated that he had waited for more than one year for settlement of the debt and the amount claimed by him to his knowledge is true.(see paragraph 6(h), and 6(l) of affidavit in opposition).
28. Respondent further stated that architect employed by Applicant , had requested changes to the layout and extra work was done and blame architect and quantity surveyor for their failure to do their tasks.
29. The above averment contained in the affidavit in opposition (see 6(k)) admitted a dispute between the parties as to the additional work requested by architect and assessment of them by a professionally qualified person such as quantity surveyor.
30. In the affidavit in reply filed by Applicant replied to the averments contained in the affidavit in opposition and stated inter alia
 - a. During construction there was considerable amount of discrepancies in budget.
 - b. Extension of time granted to Respondent to complete
 - c. Liquidated and ascertained damages.
 - d. Final payment of \$99,417.57 was made after institution of the action with the concurrence of architects and quantity surveyors.
31. In the circumstances the alleged debt of Respondent is genuinely disputed hence proceeding to winding up will doomed to fail, and statutory demand is set aside.

CONCLUSION

32. In my mind \$165,582.43 is not a liquidated sum and it is genuinely disputed by the Applicant. Parties had consented to arbitration in regard to disputes that covers the scope


of clause 33 of construction contract. The varied sum of demand notice remained unascertained, and cannot be subject of a debt in terms of Section 515 of Companies Act 2015. Statutory Demand Notice dated 2.6.2020 admittedly served to Applicant on 3.6.2020 is set aside. Considering circumstances of the case where Applicant had paid a substantial part of initial statutory demand, both parties had gained from this action, no costs are ordered.

FINAL ORDER

- a. Statutory Demand Notice dated 2.6.2020 is set aside.
- b. No costs.

Dated at Suva this 30th day of September, 2020.




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Justice Deepthi Amaratunga
High Court, Suva