

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**Companies Action HBM No. 06 of 2021**

**IN THE MATTER** of a Statutory Demand dated 27<sup>th</sup> January 2021 taken out by **CHINA NAVIGATION CO. PTE LIMITED** trading as **SWIRE SHIPPING** a company incorporated in Singapore and having its registered office at Lot 1 Foster Road, Walubay, Suva in the Republic of Fiji ("the Respondent") against **MY IDEA PTE LTD** trading as **FIVE SQUARES** a company incorporated in Fiji and having its registered office at 47 Ackland Street, Vatuwaqa, Suva ("the Applicant") and served on the Applicant on 27<sup>th</sup> January 2021 by hand delivery.

**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.**

**BETWEEN:** **MY IDEA PTE LTD** trading as **FIVE SQUARES** a company incorporated in Fiji and having its registered office at 47 Ackland Street, Vatuwaqa, Suva, Fiji.

**APPLICANT**

**A ND:** **CHINA NAVIGATION CO. PTE LIMITED** trading as **SWIRE SHIPPING** a company incorporated in Singapore and having its registered office at Lot 1, Foster Road, Walubay, Suva, Fiji.

**RESPONDENT**

**Counsel** : **Applicant: Mr Nambia. N**

: **Respondent: Mr Singh R.A**

**Date of Hearing** : **22.3.2021**

**Date of Judgment** : **31.3.2021**

**JUDGMENT**

**INTRODUCTION**

1. This is an application filed by the Applicant – Company (the Company) seeking to set

aside statutory demand notice served by the Respondent in terms of Section 516 of Companies Act 2015. This action was filed on 16.2.2021 and statutory demand was dated on 27.1.2021 and served on the same day to the Company. Statutory demand was for a sum of FJ \$20,938.93 and this was the alleged sum due from the Company as at 16.9.2019. The Company had inquired from the Respondent as to application of exchange rate for two invoices, Respondent had indicated that exchange rate applicable to International Freight was specific to a vessel and fluctuated. Both parties had business from 2018 and they had a business relationship hence application of exchange rate was accepted, in usual manner. The Company had not at any time disputed any invoice raised by Defendant for international freight. There was at least one Tax Invoices for USD5,330.80 which only dispute was applicable exchange rate on that. The Company had requested a rate of 0.45 and rate applied was 0.437. Even if the rate suggested by the Company was applied debt on that invoice created an undisputed debt of \$11,846.22 whereas the value of invoice was \$12,198.63. There were two other invoices which the Company state they were unaware, in the affidavit in reply. This calculation done in terms of Section 517(2) of Companies Act 2015, is sufficient to reject this application for setting aside as the debt was above the statutory minimum amount required for winding up. Respondent had even offered the Company to apply the Commercial Bank rate as a compromise, but the Company was using exchange rate to delay payments due for freight which are generally liquidated claims. If there was any issue as to applicable exchange rate the Company should first pay Commercial Bank rate, not the entire freight for which they have obtained services from international freight. Application for set aside demand is struck off.

## **FACTS**

2. On 27.01.2021, the Respondent through its Solicitors served the Applicant Company with a Statutory Demand Notice pursuant to Section 515 of the Companies Act 2015 claiming the sum of \$20,983.93.
3. This was a result of very long outstanding debt for more than one year which is unusual in International Freight.
4. The Company and Respondent had communicated with each other as to the application of exchange rate and this was no evidence of deviation from the practice between the parties for a considerable time.
5. Email correspondence between the parties were from August, 2019 to December, 2019 and the Company had inquired application of exchange rate for International Freight they obtained.
6. There was no dispute as to any invoice, but the dispute related to applicable exchange rate. The margin between the disputed rates were very small (i.e 0.43 -0.45).
7. Respondent had informed that they would incur the loss and accept Commercial Bank rate for the day as the practice had been to apply the rate for each vessel.

8. The Company without paying even undisputed sum, had already postponed payments for more than one year on this issue.
9. It is known that the parties were in a business relationship until sometime in January 2020.
10. There were numerous other transactions that were entered into between the parties during the years 2018 and 2019 which to the knowledge of the Company was deemed to be settled as no further correspondences was initiated thereafter.
11. On or about August 2019 the Company raised an issue regarding payment of freight outstanding. There were email correspondences. (see Annexed B to Affidavit in opposition).
12. The Applicant Company through its Solicitors have then filed an application for setting aside of the Statutory Demand on 16.2.2021.
13. 23.2.2021 it was served on the Solicitors for the Respondent.
14. It is understood that the Statutory Demand for the sum of \$20,938.93 consisted of two invoices (see paragraph 2.10 of written submission of the Company).
  - a. One dated 16 September 2019 being invoice number S00001189/C in the sum of \$12,198.63; and the other
  - b. Dated 27 August 2020 being invoice number S000001109/F in the sum of \$8,740.30.

## **ANALYSIS**

15. An application for setting aside of statutory demand is no longer an inherent right of a debtor company that is subjected to discretion of court. It is a statutory right of a company, granted in terms of Section 516(1) of Companies Act 2015.
16. There is no specific procedure set out in Companies Act 2015 or Companies (Winding Up) for an application under section 516 of Companies Act 2015.
17. Rule 4(1) of Companies (Winding Up) Rules 2015, states;  

“4(1) Except as otherwise provided in the Act, the Regulations and these Rules, the general practice of the court, including the practices and procedure in Chambers, applies with any necessary modifications to the matters to which these Rules apply.”
18. If there is no procedure provided in terms of Companies Act 2015, or the Rules of winding provided in the Companies Act 2015 Rule 5 of Companies (Winding Up) Rules 2015

applies and the court can decide whether the procedure adopted was proper.

19. The Company can institute this proceedings by way of originating summons, in terms of Order 7 rule 1 of the High Court Rules 1988.
20. The Company had not applied any accepted method of institution of action in High Court in terms of High Court Rules 1988.
21. The Company that institute proceedings , by way of originating summons was also obliged to fulfil the requirements in terms of High Court Rules 1988 cannot be circumvented. For an example, the Plaintiff is required to comply with Order 7 rule 3(1) of High Court Rules 1988.
22. The Company had instituted this action as an “Application for setting Aside Statutory Demand”, for which there is no procedure contained in High Court Rules 1988 to institute proceedings in terms of statutory provision such as Companies Act 2015.
23. This was the first irregularity of this application, apart from that the Company had admitted that it could not serve this application to Respondent within time.
24. It is mandatory for the Company to serve the application to court within 21 days from the service of statutory demand. The Company contend that the delay was due to registry issuing the application late. This may be due to irregular application they have filed, which was not in accordance with High Court Rules 1988.
25. Section 516 of the Companies Act 2015 states,
  - (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 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.**
26. The Company had filed purported ‘Application for Setting Aside Statutory Demand’ on 16.2.2021 and that was one day prior to expiration of 21 days from the date of service of statutory demand.
27. Section 516(3)(b) of Companies Act 2015 makes it mandatory not only to file the application within 21 days but also serve the Defendant “A copy of the application , and a copy of the supporting affidavit’ . If there was a delay in the registry at least ‘a copy of the application ‘and other documents filed in the registry could have been served with a note to indicate that it was yet to be issued from office, in order to comply with mandatory statutory requirements contained in Section 516 (3)(b) of Companies Act 2015 and cannot blame the registry or other procedure for time taken, probably due to their own mistake in not following any accepted method of institution of proceeding.

28. Plaintiff had not complied with High Court Rules 1988 in the way it had commenced proceedings, and had also not complied with mandatory requirement contained in Section 516(3)(b) of Companies Act 2015, so this matter can be struck off *in limine* for above reasons, but I have considered merits for obvious reasons.

29. Section 512 of the Companies Act 2015 States that;

"The Court must have jurisdiction to wind up any Company or Foreign Company registered in Fiji"

30. Section 513 of the Companies Act 2015 States that;

"A Company (which where applicable in this Part includes a Foreign Company) may be wound up by the Court, if—

- (a) the Company has, by Special Resolution, resolved that the Company be wound up by the Court;
- (b) the Company does not commence its business within a year from its incorporation or suspends its business for a whole year;
- (c) **the Company is Insolvent;**
- (d) the Court is of opinion that it is just and equitable that the Company should be wound up;
- (e) in the case of a Foreign Company and Carrying on Business in Fiji, winding up proceedings have been commenced in respect of it in the country or territory of its incorporation or in any other country or territory in which it has established a place of business. Solvency and Insolvency.(emphasis added)

31. Section 514 of the Companies Act 2015 states that;

- (1) **A Company or Foreign Company is Solvent if, and only if, it is able to pay all its debts, as and when they become due and payable.**
- (2) A Company or Foreign Company which is not Solvent is Insolvent. (emphasis added)

32. Section 515 of the Companies Act 2015 states that;

Unless the contrary can be proven to the satisfaction of the Court, a Company must be deemed to be unable to pay its debts-

- (a) **if a creditor, by assignment or otherwise, to whom the Company is indebted in a sum exceeding \$10,000 or such other Prescribed Amount then due, has served on the Company, by leaving it at the Registered Office 290 Companies-3 of 2015 of the Company, a demand requiring the Company to pay the sum so due ("Statutory Demand") and the Company has, not paid the sum or secured or**

**compounded for it to the reasonable satisfaction of the creditor within 3 weeks of the date of the notice; or**

(b) if during or after a period of 3 months ending on the day on which the winding up application is made-

(i) execution or other process issued on a judgment, decree or order of any Court in favour of a creditor of the Company is returned unsatisfied in whole or in part;

(ii) a Receiver or Manager has been appointed, of Property of the Company was appointed under a power contained in an instrument relating to a Floating Charge on such Property; or

**(iii) it is proved to the satisfaction of the Court that the Company is unable to pay its debts, and, in determining whether a Company is unable to pay its debts, the Court must take into account the contingent and prospective liabilities of the Company.** (Emphasis added)

33. Once a statutory demand is made the Company may seek setting aside of the statutory demand in terms of section 516 of Companies Act 2015, which was dealt earlier in this judgment.

34. Section 517 of the Companies Act 2015 states the scope of setting aside as;

(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. Effect of order setting aside Statutory Demand.** (emphasis added)

35. Section 519 of the Companies Act 2015 states that;

"Unless the Court makes, on an application to set aside a Statutory Demand, an order setting aside the Statutory Demand, the Court is to dismiss the application. Order subject to conditions"

36. The Company had disputed only exchange rate, not the invoices. If so they had ample time to dispute the same and Defendant had opportunity to confront with necessary supporting documents such as Bill of Lading etc.
37. Defendant had attached three invoices and did not explain at the hearing why it had done so. The total of three invoices attached to the affidavit in opposition is not the value statutory demand, but only two.
38. The dispute seemed to be only on two invoices. This lack of explanation even at the time of hearing prevents me from ordering a specific sum in terms of Section 517(4)(b) of Companies Act 2015, but the Company in the written submissions had indicated two invoices that relate to demand notice.
39. The Company in the written submission had indicated that statutory demand was relating two specific invoices dated 16.9.2019 being invoice number S00001189/C in the sum of \$12,198.63; and the other, dated 27.8.2020 being invoice number S000001109/F in the sum of \$8,740.30. The total value of the two is equal to value of statutory demand of \$20,938.93.
40. The Company had not provided exchange rate that they propose for both invoices. In the emails they had quoted 0.45 as exchange rate but not specific what they want.
41. Defendant as a compromise had agreed on the Commercial Bank's rate which they deal.
42. On 6.11.2019 informed the Company that they are charged for freight not on local Banks exchange rate, but on vessel exchange rate. As a 'goodwill' they were willing to absorb loss and offered the Company to accept Bank's exchange rate.
43. The Company without rejecting this generous offer and also countering it further disputing without suggesting a reasonable option. This is unacceptable as a party who had benefited and obtained the freight services from international shipping line, where payments needed to made without delay.
44. The conduct of the Company, was to create some doubt on exchange rate, which was non-existent, as the parties had a long relationship and to delay the payment cannot be accepted by the court and this is the requirement for the court to calculate the dispute and find out whether undisputed debt was above the statutory minimum for winding up in terms of Section 517(4) of Companies Act 2015.
45. Paragraph 8 of affidavit in reply had not denied that it had not obtained the freight services contained in annexed 'C' of the affidavit in opposition. This is for USD 5,330.80. Even if

invoice was FJ \$ 11,846.22, which is above the minimum statutory amount for winding up.

46. There is no dispute as to USD values quoted in the said invoices and by conduct the Company is estopped from deviation of the practice between the parties and allowed the Defendant to act upon their assurance of payment. The alleged dispute of exchange rate is no way justified non payment of entire invoice for international freight.

## CONCLUSION

47. This application can be struck off, *in limine* due to non compliance of mandatory provisions contained in Section 516 of Companies Act 2015 and also not making this application in terms of High Court Rules 1988 for institution of matter in terms of statutory provision. Without prejudice to above the Company had raised the issue of application of exchange rate but had never denied their liability in foreign currency (United State Dollar). According to the Company they have requested 0.45 as exchange rate, whereas Respondent had applied 0.43 in the invoice marked B which is for USD 5,330.80. Even if the Company's suggested rate of 0.45 is applied this invoice alone exceeds minimum debt in terms of Section 513 of Companies Act 2015. Section 517 require the court to make calculations based on evidence before them and if the sum due is above \$10,000 this application for setting aside cannot be granted. All what a creditor needs to seek winding up is a debt above \$10,000. The company cannot dispute the exchange rate and refuse to pay for services it obtained for freight. It needs to first pay undisputed invoices raised over one year ago on an acceptable exchange rate (such as minimum rate for the day) and can dispute remaining sum if there is further dispute. So the application for setting aside is struck off without cost.

## FINAL ORDER

- a. Application for setting aside is struck off.
- b. No costs

Dated at Suva this 31<sup>st</sup> day of March, 2021.



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Justice Deepthi Amaratunga  
High Court, Suva