ASNAH AHMAD v. MAHKAMAH PERUSAHAAN MALAYSIA & ORS

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
HAMID SULTAN ABU BACKER JCA
IDRUS HARUN JCA
[CIVIL APPEAL NO: W-01-4-01-2014]
27 MARCH 2015

LABOUR LAW: *Industrial Court – Joining of parties – Whether third party can be made liable to pay award notwithstanding it was not employer – Whether there was sufficient nexus between party to be joined and party named in reference – Test – Reasonable factual or legal nexus test – Industrial Relations Act 1967, ss. 29(a), (b), 32(1)(a), 56(1) and (2)(a)(i)*

The appellant, an employee of the second respondent, upon being constructively dismissed, obtained an award against the second respondent. At the time the award was made there was a winding up order against the second respondent. Subsequently, the second respondent's shares were acquired by EON Capital Bhd ('EON') who had taken over the day-to-day control of the effective management of the second respondent. A judicial review proceeding was filed in the name of the second respondent by EON as the controlling mind and the supporting affidavit stated, *inter alia*, that the second respondent was prepared to pay the 'dismissal award' into a stakeholders account. The judicial review application was unsuccessful in both the High Court and the Court of Appeal. The appellant, not knowing that EON had initiated the judicial review application, had filed a non-compliance proceeding in the Industrial Court. The non-compliance proceeding was proceeded with an application of joinder against the third to fifth respondents, who were instrumental and/or had nexus to EON who had interfered in the enforcement of the award by initiating a judicial review application. The application was not allowed by the Industrial Court and the appellant's subsequent application to quash the decision of the Industrial Court was also refused by the High Court. Hence, the appeal. The issue for the court's determination, *inter alia*, was whether the joinder was necessary to make the adjudication of the dismissal award effective and enforceable.

Held (allowing appeal with costs; setting aside decision of High Court and Industrial Court)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) The general jurisprudence relating to joinder of parties in the Industrial Court pursuant to ss. 29(a), (b), 32(1)(a), 56(1) and (2)(a)(i) of the Industrial Relations Act 1967 ('IRA') were, *inter alia*, that the third parties can be made liable to pay the award notwithstanding that they were not the employer and that third parties cannot resist joinder or

deny liability on the grounds that there is not privity or is a separate legal entity, when there is sufficient nexus between the party to be joined and the party named in the reference. (paras 2 & 3)

(2) The grounds relied on by the trial judge in dismissing the application for judicial review were, *inter alia*, that (i) the third to fifth respondents were not, at all material times, the appellant's employers; (ii) there was no fraud to justify lifting of the corporate veil; and (iii) the liquidator were more than able to represent the interests of the second respondent and the appellant should have filed a proof of debt. There is no requirement under the IRA to enable joinder that the parties must be the appellant's employers. In the circumstances, the grounds were erroneous and had no nexus to the industrial jurisprudence set out in the IRA. (para 9)

(3) The IRA has express powers and the more appropriate test is the 'reasonable factual or legal nexus' test, a 'wide net' to facilitate all maladies of third parties to answer to the Industrial Court for their involvement in the dispute and, if appropriate, be liable under the award upon hearing the merits (*Co-Operative Central Bank Ltd & Ors v. Rashid Cruz Abdullah & Ors And Other Appeals*, foll). No reasonable tribunal would say that there was no factual or legal nexus to the third to fifth respondents in relation to the award. (paras 11 & 12)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, pekerja responden kedua, setelah dibuang kerja secara konstruktif, telah memperolehi award terhadap responden kedua. Semasa award tersebut diberikan, terdapat perintah penggulungan terhadap responden kedua. Kemudian, saham-saham responden kedua telah diperoleh EON Capital Bhd ('EON') yang telah mengambil alih kawalan harian pentadbiran efektif responden kedua. Satu prosiding semakan kehakiman telah difailkan atas nama responden kedua oleh EON sebagai kuasa yang mengawal dan afidavit sokongan menyatakan, antara lain, bahawa responden kedua bersedia untuk membayar 'award pembuangan kerja' ke dalam akaun pemegang amanah. Permohonan semakan kehakiman tersebut tidak berjaya di Mahkamah Tinggi dan Mahkamah Rayuan. Perayu, tanpa pengetahuan bahawa EON telah memulakan permohonan semakan kehakiman, telah memfailkan prosiding ketidakpatuhan di Mahkamah Perusahaan. Prosiding ketidakpatuhan tersebut telah diteruskan dengan permohonan untuk percantuman pihak terhadap responden-responden ketiga hingga kelima, yang memainkan peranan penting dan/atau mempunyai kaitan dengan EON yang telah campur tangan dengan pelaksanaan award tersebut dengan memulakan permohonan semakan kehakiman. Permohonan tersebut tidak dibenarkan oleh Mahkamah Perusahaan dan permohonan perayu kemudiannya untuk membatalkan keputusan Mahkamah Perusahaan juga telah ditolak oleh Mahkamah Tinggi. Oleh itu, rayuan ini. Isu untuk pemutusan mahkamah, antara lain, adalah sama ada percantuman pihak perlu untuk menjadikan award pembuangan kerja efektif dan boleh dikuatkuasakan.

Diputuskan (membenarkan rayuan dengan kos; mengenepikan keputusan Mahkamah Tinggi dan Mahkamah Perusahaan)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Jurisprudens am berkaitan dengan percantuman pihak di Mahkamah Perusahaan menurut ss. 29(a), (b), 32(1)(a), 56(1) dan (2)(a)(i) Akta Perhubungan Perusahaan 1967 ('Akta') adalah, antara lain, bahawa pihak-pihak ketiga boleh dipertanggungjawabkan untuk membayar award walaupun mereka bukan majikan dan bahawa pihak-pihak ketiga tidak boleh menentang percantuman atau menafikan liabiliti atas alasan-alasan bahawa tidak ada priviti atau adalah entiti perundangan yang berasingan, apabila terdapat kaitan yang mencukupi antara pihak yang ingin dicantumkan dan pihak yang dinamakan dalam rujukan.

(2) Alasan-alasan yang disandarkan oleh hakim bicara dalam menolak permohonan untuk semakan kehakiman adalah, antara lain, bahawa (i) responden-responden ketiga hingga kelima bukan, pada setiap masa material, majikan perayu; (ii) tidak ada fraud untuk mewajarkan penyingkapan tirai pemerbadanan; dan (iii) pelikuidasi adalah lebih berhak untuk mewakili kepentingan responden kedua dan perayu sepatutnya telah memfailkan bukti keberhutangan. Tidak ada keperluan di bawah Akta bagi membolehkan percantuman bahawa pihak-pihak semestinya majikan perayu. Dalam keadaan tersebut, alasan-alasan tersebut adalah khilaf dan tidak ada kaitan dengan jurisprudens perusahaan yang dibentangkan dalam Akta.

(3) Akta tersebut mengandungi kuasa jelas dan ujian yang lebih wajar adalah ujian 'reasonable factual or legal nexus', satu 'jaringan luas' untuk memudahkan kesemua kekurangan pihak-pihak ketiga untuk menjawab kepada Mahkamah Perusahaan bagi penglibatan mereka dalam pertikaian tersebut dan, jika wajar, bertanggungan terhadap award selepas perbicaraan meritnya (*Co-Operative Central Bank Ltd & Ors v. Rashid Cruz Abdullah & Ors And Other Appeals*, diikuti). Tidak ada tribunal munasabah yang akan menyatakan bahawa tidak ada kaitan dari segi fakta atau undang-undang oleh responden-responden ketiga hingga kelima berhubung dengan award tersebut.

Case(s) referred to:
Hochtief Gammon v. Industrial Tribunal Bhubaneshwar Orissa And Ors 1964 AIR 1746 ***(dist)***
Co-Operative Central Bank Ltd & Ors v. Rashid Cruz Abdullah & Ors And Other Appeals [2004] 1 CLJ 849 CA ***(foll)***

Legislation referred to:
Industrial Relations Act 1967, ss. 29(a)(b), 32(1)(a), 56(1), (2)(a)(i)

For the appellant - Ambiga Sreenevasan (Shireen Selvaratnam & Azlan Zainal Abidin with her); M/s Zainal Abidin & Co
For the 3rd respondent - Ben Chan Chong Choon (Alane Neo Hwee Teng with him); M/s Mah-Kamariah & Philip Koh
For the 4th & 5th respondents - Alex Tan Chie Saian (Dennis Goh Teik Chuan with him); M/s Wong Kian Kheong

[Appeal from High Court, Kuala Lumpur; Judicial Review No: 25-84-04-2013]

Reported by S Barathi

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant's appeal is against the decision of the learned High Court Judge who refused to quash the decision of the Industrial Court, which refused to allow the appellant to join the third to fifth respondents in respect of a non-compliance proceeding related to an award obtained against the second respondent. We heard the appeal on 28 January 2015 and reserved judgment. My learned brothers Mohd Zawawi bin Salleh JCA and Idrus bin Harun JCA have read the judgment and approved the same. This is our judgment.

Preliminary

Jurisprudence relating to joinder of parties

[2] This judgment deals with the jurisprudence relating to joinder of parties in Industrial Court. The relevant sections which need to be considered under the Industrial Relations Act 1967 (IRA 1967) are ss. 29(a), (b), 32(1)(a) and 56(1), (2)(a)(i).

Section 29(a)(b)

29. The court may, in any proceedings before it:

(a) order that any party be joined, substituted or struck off;

(b) summon before it the parties to any such proceedings and any other person who in its opinion is connected with the proceedings.

Section 32(1)(a) reads as follows:

32. (1) Any award made by the court under this Act shall be binding on:

(a) all parties to the dispute or the reference to the court under sub-s. 20(3) appearing or represented before the court and all parties joined or substituted or summoned to appear or be represented before the court as parties to the dispute or the reference to the court under sub-s. 20(3).

Section 56(1), (2)(a)(i) reads as follows:

> 56. (1) Any complaint that any term of any award or of any collective agreement which has been taken cognizance of by the court has not been complied with may be lodged with the court in writing by any trade union or person bound by such award or agreement.
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> (2) The court may, upon receipt of the complaint:
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> (a) make an order directing any party:
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> (i) to comply with any term of the award or collective agreement.

[3] The general jurisprudence from the above sections as well as supportive case laws can be summarised as follows:

(i) IRA 1967 is a social legislation;

(ii) third parties can be made liable to pay the award notwithstanding that they were not the employer;

(iii) third parties cannot resist joinder or deny liability on the grounds there is no privity or is a separate legal entity, etc. when there is sufficient nexus between the party to be joined and the party named in the reference;

(iv) the threshold test to be employed at the joinder stage appears to be whether the employee can demonstrate by way of *prima facie* evidence that the party who are requested to be joined have directly and/or indirectly and/or otherwise assumed liability or can be made liable partly or wholly for the payment of the award or for that matter purported award in cases where award has not been delivered. In essence, the threshold to satisfy the Industrial Court is low based on the above sections as well as supportive case laws in this area of jurisprudence. As long as the complaint of the employee is not frivolous, vexatious and/or abuse of process of court, there should be no hindrance in permitting the joinder if nexus is shown; and

(v) the issue of liability can only be dealt with after the joinder and hearing on merits. The parties to be joined should not at joinder stage be allowed to submit on the merits. Their presence at the joinder stage is only to verify the complaint of the employee to ensure that the facts relied on by the employee are credible.

[4] Learned counsel for the third respondent's submission in essence they are not the employer; and we quote:

> ... it is highly undesirable to have one law for the Industrial Court and another law for other courts. There must only be one law for all.

is a misconceived submission as well as an affront to IRA 1967 as well as industrial jurisprudence. We will elaborate on this issue further in our judgment in addition to the reasons stated earlier.

Brief Facts

[5] The respondents are as follows:

(i) second respondent (Sime Securities Sdn Bhd) now in liquidation and the employer of the appellant;

(ii) third respondent is EON Bank Bhd;

(iii) fourth respondent MIMB is Investment Bank Bhd; and

(iv) fifth respondent is EONCAP Securities Sdn Bhd.

[6] The third respondent is represented by one firm of solicitors and the fourth and fifth respondents are represented by separate firm of solicitors.

[7] The basic facts are not in dispute. It can be summarised as follows:

(i) the appellant obtained an award for RM405,500 on 13 December 2007 against the second respondent. At the time the matter was referred to the Industrial Court the second respondent was not wound up. At the time the award was made, there was a winding up order against the second respondent.

(ii) the constructive dismissal was said to have taken place on 17 November 1998 and the award was only made on 13 December 2007.

(iii) second respondent shares were acquired by EON Capital Bhd (EON) on 28 October 2005 who had taken over the day-to-day control of the effective management of the second defendant.

(iv) the third to fifth defendant had nexus to EON Capital which is not necessary to elaborate here.

(v) in the name of Sime, judicial review proceedings were filed and the controlling mind was EON as stated in para. 3 above. Abdulalim bin Zakaria who was one of the Vice-President of EON, had filed the supporting affidavit for the judicial review application and in that it was stated that the second respondent was prepared to pay the 'dismissal award' into a stakeholders account. *We like to pause here for a moment to say that common sense will dictate this is prima facie indication of assumption of liability and for what purpose EON did or whether it will amount to admission of liability in the event the award is sustained are issues which the Industrial Court had to consider after the joinder has been allowed* (emphasis added).

(vi) second respondent's judicial review application managed by EON was not successful at the High Court. And the High Court dismissed it on 15 July 2009 and on appeal the Court of Appeal dismissed it on 5 January 2010.

(vii) the appellant not knowing that EON had initiated the judicial review application on 25 January 2008 had filed non-compliance proceedings in the Industrial Court on 30 January 2008. The non-compliance proceeding was proceeded with an application of joinder against the third to fifth respondents who were instrumental and/or had nexus to EON who had interfered in the enforcement of the award by initiating a judicial review application which was as stated earlier dismissed by the Court of Appeal.

[8] Learned counsel for the appellant Chevalier Ambiga Sreenevasan has summarised the issues relating to the joinder as follows:

> (3) The critical issue before the court (given Sime's liquidation) is whether the joinder is necessary to make the adjudication of the Dismissal Award effective and enforceable.
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> In determining this issue, the appellant will submit that it is necessary for parties to come before the court to explain its involvement in the proceedings relating to the Dismissal Award and to answer the question of whether they have assumed liability for the obligation that had been ordered by the Industrial Court (under the Dismissal Award described below).
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> (4) As can be seen from the conduct of the parties and the documentary evidence before the court, the parties sought to be joined had assumed liability from one another from onward merger exercises and clearly have an interest in the undertaking of Sime.
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> (5) As such, as a matter of law, the joinder of the parties ought to have been allowed and they ought to have been directed to explain with candour their involvement in the Dismissal proceedings and whether they had in fact assumed liability and if so, in what manner among themselves as to now distance themselves from the obligation that was imposed by the Industrial Court.

[9] The learned trial judge in dismissing the application for judicial review had in the grounds stated:

(a) the third to fifth respondents were not at all material times, the appellant's employers;

(b) there was no fraud to justify lifting of the corporate veil; and

(c) that the liquidator were more than able to represent the interests of the second respondent and the appellant should have filed a proof of debt.

The grounds stated above are erroneous and has no nexus to industrial jurisprudence as set out in IRA 1967.

[10] Learned counsel for the third to fifth respondents vehemently relied on the grounds of the learned trial judge to assert that the appeal must be dismissed.

[11] We have read the appeal record and the submission of the parties in detail. We would like to thank the counsel for the able submission. We are of the considered view that the Industrial Court has committed grave error of law in the application of fact which the learned trial judge was not able to correct, by issuing the order of *certiorari* and incidental directions. Our reasons *inter alia* are as follows:

(i) case laws in this area of jurisprudence must be confined to the facts and the nexus test as to liability. (See Annotated Statutes of Malaysia IRA 1967, 2009 Issue pp. 404 and 405). There is no requirement under the IRA 1967 to enable joinder that the parties must be the appellant's employers. This is a grave error of law and does not subscribe to the Act and the jurisprudence relating to joinder. In our view, the Supreme Court of India case of *Hochtief Gammon v. Industrial Tribunal Bhubaneshwar Orissa And Ors* 1964 AIR 1746 quoted by parties does not deal with an equipollent Malaysian provision.

(ii) our provision for joinder is much wider than the provision relied by the Indian Supreme Court in *Hochtief*'s case. In fact, the court there was not dealing with equipollent section, as s. 29(a)(b) of IRA 1967 which gives wide powers to the Industrial Court to join or summon any person who in the opinion of the court is connected with the proceedings. The distinction is like an apple and orange and there is no requirement that the person summoned must have an employer or employee relationship.

(iii) the test employed by the Indian Supreme Court had a restricted application to IRA 1967 and is also not based on employer-employee relationship. The test laid down by PB Gajendragadkar J reads as follows:

> The test always must be, is the addition of the party necessary to make the adjudication itself effective and enforceable? In other words, the test well be, would be non-joinder of the party make the arbitration proceedings ineffective and unenforceable? It is in the light of this test that the implied power of the Tribunal to add parties must be held to be limited.

(iv) Justice Gajendragadkar was dealing with 'implied powers' when propounding the test. IRA 1967 has express powers and that power is much wider than that found in Indian provision. The more appropriate test to be applied in the Malaysian context was propounded by Justice Gopal Sri Ram in *Co-Operative Central Bank Ltd & Ors v. Rashid Cruz Abdullah & Ors And Other Appeals* [2004] 1 CLJ 849. The test is 'reasonable factual or legal nexus' test a 'wide net' to facilitate all maladies of third parties to answer to the Industrial Court for their involvement in the dispute and if appropriate be liable under the award upon hearing the merits. His Lordship on the test observed as follows:

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> Nevertheless, having scrutinised the order dated 2 September 1993 pursuant to which the receivers were discharged and the appointees were appointed, we are unable to see any reasonable factual or legal nexus between BNM and the dispute presently before the Industrial Court. Even taking the most extreme position on the facts, we are unable to perceive a situation whereby BNM can be held responsible for the termination of the respondents. We have therefore come to the conclusion that Appeal No. W-01-67-1999 has merit. We allow it in so far as the judge directed the addition of BNM as a party to the proceedings before the Industrial Court. The order is hereby set aside.

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[12] In our view, no reasonable tribunal appraised with the facts of this case will say that there is no factual or legal nexus to the third to fifth respondents in relation to the award.

[13] For reasons stated above, we take the view the appeal must be allowed with costs. The decision of the High Court and Industrial Court must be set aside. And both the applications of joinder by the appellant in the Industrial Court must be allowed and the issue of liability must be heard on merits. Deposit to be refunded.

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We hereby order so.

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