IN THE INDUSTRIAL COURT OF MALAYSIA
[CASE NO: 6(15)/4-480/20]

BETWEEN

SYLVAIN MARCEL JACQUES PERRET

AND

NEARBUY SOUTH EAST ASIA SDN BHD

AWARD NO. 627 OF 2023

Notice of Application Encl. 43A

BEFORE	**:**	**Y.A. TUAN AMRIK SINGH - CHAIRMAN**
VENUE	**:**	Industrial Court Malaysia, Kuala Lumpur
DATE OF REFERENCE	**:**	21.02.2020
DATES OF MENTION	**:**	23.07.2020, 06.08.2020, 18.02.2021, 09.03.2021, 15.03.2021, 22.03.2021, 07.04.2021, 07.05.2021, 05.08.2021, 26.08.2021, 26.11.2021, 20.12.2021, 21.01.2022, 04.03.2022, 28.04.2022, 02.06.2022, 05.07.2022, 08.07.2022, 19.10.2022 & 17.11.2022
DATE OF HEARING OF APPLICATION	**:**	21.01.2022 & 07.02.2023
REPRESENTATION	**:**	*For the claimant - Danielle Dickman; M/s Lavania & Balan Chambers* *For the company - Absent*

REFERENCE:

This is a reference by The Honourable Minister of Human Resources, Malaysia to the Industrial Court of Malaysia pursuant to section 20(3) of the Industrial Relations Act 1967 ('the Act') in respect of the dismissal of **Sylvain Marcel Jacques Perret** (hereinafter referred to as "*the Claimant*") by his employer **Nearbuy South East Asia Sdn. Bhd.** (hereinafter referred to as "*the Company*") on 3 October 2019.

INTERIM AWARD

(Application for Joinder of Parties)

[1] The Claimant, having initiated the reference for wrongful dismissal against his employer, has filed an application for an order under sub section 29(g) to join "Darayus Happy Minwalla" ('the 2nd proposed joinee') who is the Chairman of the Board of Nearbuy Group of companies as a party to this proceeding and the application was supported by the Affidavit of the Claimant.

[2] The supporting grounds for the Claimant's application as perused from his affidavit in support are :

(a) That the 2nd proposed joinee was the chairman of the Board of Nearby Group;

(b) That all correspondence in respect of the Claimant's unpaid salaries were between the 2nd proposed joinee, Jamsheed who is the son of the 2nd proposed joinee and the Finance Manager of the Nearbuy Group;

(c) That the operation of Nearbuy Group and the Company are interchangeable as one single unit;

(d) That Nearby Group was at all material times the directing mind of the Company;

(e) That the Company's reasons for the failure to remunerate the Claimant were due to the financial issues within the Company and Nearbuy Group;

(f) That the 2nd proposed joinee had personally and on various occasions assured the Claimant of his commitment to honour the total outstanding salaries;

(g) That the 2nd proposed joinee is answerable to the Industrial Court for his involvement in the dismissal;

(h) That the Company is now incapacitated by virtue of its winding up order;

(i) That there exists sufficient factual and/or legal nexus between the Company and the 2nd proposed joinee.

[3] Based on the reasons stated in his affidavit in support, the Claimant urged the Court to allow the 2nd proposed joinee to be join as a party in the proceedings to make him personally liable in order to make the Court Award effective and enforceable.

[4] The Court is empowered to join any party to the proceedings and the relevant sections which relates to the joinder of parties in the Industrial Court were s. 29(a), (b), s. 32(1)(a) and 56(1), (2)(a)(i) of the IRA. These sections confers on the IRA is a social legislation and third parties could be made liable to pay the award although these third parties are not the employers. This power, that the Industrial Court can join or summon any person which the Court finds to be connected with the proceedings is derived from s 29(a) and (b) of the IRA. There is no requirement under the IRA that to enable the joinder, the parties must be the Claimant's employer.

[5] The test for joinder was first laid down in the seminal case of *Hochtief Gammon v. Industrial Tribunal Orrissa* [1964] AIR 1746 by Gajendragadkar CJ at page 1750 where it was said that:

> "… if it appears to the tribunal that a party to the Industrial Court dispute named in the order of reference does not completely or adequately represent the interest either on the side of the employer, or on the side of the employee, it may direct that other persons be joined who would be necessary to represent such interest. If the employer named in the reference does not fully represent the interests of the employer as such, other persons who are interested in the undertaking of the employer may be joined. Similarly, if the unions specified in the reference do not represent all the employees of the undertaking it may be open to the tribunal to add other such unions as it may deem necessary. The test always must is the addition of the party necessary to make adjudication itself effective and enforceable? In other words, the test well be, would the 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"

[6] The above principle was approved by the Court of Appeal in *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 4 CLJ 747; [1996] 1 MELR 42; [1996] 1 MLRA 665; [1996] 3 MLJ 489 where it was held:

> ".... If the employer named in a reference does not fully represent the interests of the employer as such, other persons who are interested in the undertaking of the employer may be joined. Similarly, if the unions specified in the reference do not represent all the employees of the undertaking, it may be open to the tribunal to add such other unions as it may deem necessary. The test always must be is the addition of the party necessary to make adjudication itself effective and enforceable? In other words, the test may well be: would the 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".

[7] The Court of Appeal in *Asnah bt Ahmad v. Mahkamah Perusahaan Malaysia & Ors* [2015] 2 MELR 423; [2015] 3 MLRA 521; [2015] 4 MLJ 613; [2015] 2 ILR 469; [2015] 3 CLJ 1053; [2015] 3 AMR 197 held that the more appropriate test for joinder of parties to be applied in the Malaysia context as propounded by Gopal Sri Ram in *Co-Operative Central Bank Ltd & Ors v. Rashid Cruz Abdullah & Ors And Other Appeals* [2004] 1 CLJ 849 which was the 'reasonable factual or legal nexus' and 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 on the merits The general jurisprudence can be recapitulate as follows:

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

(ii) 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;

(iii) the threshold test to be employed to the joinder stage appears to be whether the employer 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

(iv) 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. The 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".

[8] As has been enunciated by the Court of Appeal in the above cases on the

appropriate test to be applied, the Court has to decide whether:

(i) whether the Claimant's employer, the Company named in the Minister's reference fully represents the interests of the employer but if it does not, can the joining of any other person who are interested in the undertaking of the employer be joined as a party and;

(ii) whether the joining of the proposed joinee is necessary to make the adjudication itself effective and enforceable.

[9] It is trite that where it appears to the Industrial Court that if it is necessary to ensure an award in an Industrial dispute to be effective and enforceable, a party who is interested in the undertaking of the employer should be joined as a party in the proceeding. This proposition was given a broader interpretation by the Court of Appeal in *Asnah Ahmad's case (supra)* where it was stated as follows:

> "*case laws in this area of jurisprudence must be confined to the facts and the nexus test as to liability. ... 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"*

[10] In his supporting Affidavit, the Claimant point out that the 2nd proposed joinee being the Chairman of the Nearby Group and Nearbuy Group was at all material times the directing mind of the Company, the joining is necessary to answer to the Industrial Court for his involvement in the dismissal. The Affidavit further exhibited several email correspondences in which it clearly shows that 2nd proposed joinee is the person in authority in making financial related decisions for the Company and at all material time knew that the Company was owing salaries to the Claimant. Therefore, the Claimant has plainly demonstrated that 2nd proposed joinee represent the interest of the Company.

[11] Therefore, as the Company is now shown to have been insolvent and would not be able to reinstate the Claimant or pay him any compensation should the Industrial Court decide against the Company, the Claimant need only show that there exists some factual or legal nexus between the Claimant and the 2nd proposed joinee. I find that there is legal nexus for the Chairman of the Nearbuy Group to be made a party to this proceeding and thus, the addition of the 2nd proposed joinee is necessary to make the adjudication effective and enforceable.

[12] The Court in doing justice to a Claimant who has been unlawfully terminated from

his employment may in appropriate situations disregard the doctrine of corporate personality as stated in the Court of Appeal case of *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355 at page 360 where it was stated that :

> *"Accordingly in industrial law, where the interests of justice so demand, it may, in particular cases be appropriate for the Industrial Court to pierce or to disregard the doctrine of corporate personality".*

[13] In the much cited High Court case of *Hotel Jaya Puri Bhd v. National Union of Hotel Bar & Restaurant Worker & Anor* [1979] 1 LNS 32; [1980] 1 MLJ 109, the High Court affirmed the decision of the Industrial Court in lifting the corporate veil of the hotel and the restaurant as there was essential unity of group enterprise. It was held as follows:

> *"It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the Court has, in a number of cases, bypassed this principle if not made an inroad into it. The Court seems quite willing to lift "the veil of incorporation" (so the expression goes) when the justice of the case so demands".*

[14] This Court is satisfied that there is sufficient nexus between the Company and the 2nd proposed joinees and despite the fact that the Company has been wound up on 25.02.2020, this application before this Court can be allowed and in support of this decision, the Court find guidance in the case of *SAJ Ranhill Sdn Bhd v. SWM Greentech Sdn Bhd & Anor* [2020] MLRHU 302 where Awang Armadajaya Awg Mahmud JC (as he then was) held as follows:

> *"[10] There are 2 types of joinder of parties namely permissive joinder and compulsory joinder.*
>
> *[11] Permission joinder allows multiple plaintiffs to join in an action if each of their claims arise from the same transaction or occurrence, and if there is a common question of law or fact relating to all plaintiffs' claims. The same goes with Defendant(s). An example is s. 29(a) of the Industrial Relations Act 1967 which addresses this issue as it provides power to the Industrial Court to join/include parties to an unfair dismissal claim. This provides some sort of remedy to the employee since parties other than the employer could be joined to the unfair dismissa claim and be made liable for any award for compensation by the Industrial Court.*

[12] In an action pursuant to s. 29 (a) of the Industrial Relations Act 1967 there is a two fold test for the joinder of parties which are:

(i) Does the inclusion of the other party make the adjudication effective and enforceable?

(ii) Does the employer named in the unfair dismissal claim fully represent the interest of the employer? If not, other persons who are interested in the undertaking of the employer may be joined.

[13] Some examples of this joinder are :

Amran Ramakrishnan Abdullah v. CS Metal Industries (M) Sdn Bhd [2006] 5 MELR 842: The employer company was wound up. Upon application by the employee, the Industrial Court joined another company as a respondent to the unfair dismissal claim. The Industrial Court held that there was sufficient nexus between this company and the employer company since both companies share the same business and had common directors and shareholders. Aminuddin Ahmad v. EPC Oil & Gas Sdn Bhd [2014] MELRU 545; [2014] 1 ILR 444: The Industrial Court joined an individual shareholder of the employer company since she was the directing mind of the employer and was also the majority shareholder.

Shanmugam Muniandy v. Safemel Drilling Sdn Bhd [2015] MELRU 715: There was evidence that the proposed joindee company had taken over the business affairs and management of the employer company. For example, the employee's dismissal letter even carried the logo of the proposed joinee company. As such, the Industrial Court held that it was just and equitable to join the other company as a party to the unfair dismissal claim."

[15] It is the findings of this Court that the Claimant's right and remedy will be prejudiced and the Claimant is very likely to be left without compensation if the Court does not make an award in his favour. The Court therefore allows this Application.

[16] In arriving at this decision, the Court has acted with equity and good conscience and the substantial merits of the case without regard to technicalities and legal form as stated under section 30(5) of the Act.

CONCLUSION

[17] In conclusion, The Claimant's application for the joinder application is hereby

allowed. The aforenamed Darayus Happy Minwalla is joined as additional Respondent in the proceedings and Form L of the schedule in the rules to be issued.

HANDED DOWN AND DATED THIS 20th DAY OF MARCH 2023

(AMRIK SINGH)
CHAIRMAN
INDUSTRIAL COURT MALAYSIA
KUALA LUMPUR