IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

HON'BLE JUSTICE SUBRATA TALUKDAR
AND
HON'BLE JUSTICE KRISHNA RAO

M.A.T. 140 of 2021
With
I.A. No. CAN 1 of 2021

The Braithwaite Burn and Jessop Construction Company Limited
vs.
Smt. Saroj Agarwal & Ors.

With

M.A.T. 141 of 2021
With
I.A. No. CAN 1 of 2021

The Braithwaite Burn and Jessop Construction Company Limited
vs.
Smt. Saroj Agarwal & Ors.

For the Appellant	:	Mr. S.N Mookherjee Mr. Soumya Majumdar Ms. Sharmistha Ghosh Mr. Swarbhanu Bhattacharyya
For the Respondent No. 1	:	Mr. Surajit Samanta
Heard on	:	28/03/2022
Judgment on	:	15/07/2022

Subrata Talukdar, J: The facts of this appeal have stretched the limits of litigation. If the contention of the appellant is to be accepted then, arguably, the principles of service jurisprudence may require to be re-written.

At issue in these two analogous appeals is the legality of action taken by the appellant company *to determine the contract of employment* of the petitioner/ the sole respondent in these appeals, *forthwith for loss of substratum*. To the mind of this Court at the very first instance the loss employment on the ground of *loss of substratum* is a novel and hitherto perhaps a little discussed expression in service jurisprudence.

For a better understanding of what constitutes *loss of substratum qua* the writ petitioner as conveyed by the appellant company namely, the Braithwaite Burn and Jessop Construction Company Ltd., formerly known as Bharat Bhari Udyog Nigam Ltd., BBUNL (hereinafter referred to as the Company), it would be necessary to refer to a few correspondence. First of the correspondence is a Memorandum of the Company bearing Memo. No. BBUNL/PROJ/2013/1032 Dated 22nd October 2013 issued by one Mr. S. Nandi, the then General Manager (GM) (Project), Bharat Bhari Udyog Nigam Ltd (BBUNL), Kolkata which, insofar as the petitioner is concerned, reads as follows:

> *"In line with the discussions held on 17.10.2013, Manager (Marketing) is now being requested to make necessary efforts and initiation to clinch a new order of Rs. 12.00 Crore approx within 31.03.2014. Smt S. Banerjee or Shri U. Roy is hereby requested to extend necessary assistances to Manager (Marketing), over and above their present work and responsibilities, depending upon the situation."*

It would be relevant to mention at this juncture that the post of Manager (Marketing) was then held by the writ petitioner.

Next is the letter dated 5th November 2013 bearing Memo. No. 1058 of the Chairman-cum-Managing Director (CMD)/BBUNL which is addressed to the writ petitioner in her official capacity as Manager (Marketing) and reads as follows:

> *"Subsequent to my meeting with all the officers of BBUNL on 5/10/13, it is noted that on 17.10.2013 you had a meeting with General Manager (Project) on marketing activities. It has been agreed between you and GM (Proj) that you will procure order around Rs. 12 crore in this financial year. Please take necessary steps and action to meet your target with immediate effect.*
>
> *It has been noticed that in the recent past your performance is not up to the mark and you have not procured a single order during last two years or more.*
>
> *Management is viewing this poor performance of yours very seriously.*
>
> *You are requested to improve your performance by year end, else Management will be compelled to take appropriate action, as deemed fit."*

Although it is not difficult to comprehend that the Manager (Marketing) could not be solely responsible for bringing orders to the tune of Rs. 12 Crores and therefore there could be no question of the writ petitioner agreeing to the proposal of the GM (Project) to such effect as suggested by the letter of the CMD dated 5th November 2013 (*supra*), nonetheless the writ petitioner wrote back to the CMD on the 6th of November, 2013, *inter alia*, stating as follows:-

> *"1. During the meeting held on 17.10.2013 in presence of Manager (Legal) and PS to Chairman, Shri S Nandi, GM(P) informed that a target of Rs. 12.00 Crores has been kept by him for order booking and the undersigned should try to ex0plore the opportunities aggressively so that the target can be met. A copy of GM's memo dated 22.10.2013 is enclosed. Your kind goodself would kindly*

appreciate that the undersigned her capacity is not able to commit that she will procure and order of Rs. 12.00 Crores solely on her own. The undersigned had replied to GM, that she will earnestly try to abide by GM's instruction but it is not in her hands to get the order and explained to him the issues involved beyond her control for which BBUNL is not even able to qualify, participate or compete in the tenders. Further, it was also discussed in the meeting that for order on nomination basis, before the undersigned approaches the companies such as BBJ, Bridge and Roof etc, GM(P)'s intervention at senior level shall be necessary as decision regarding release of order on nomination basis is usually taken by senior level management and seniors may be reluctant to entertain junior level employees due to protocol.

2. Sir, during the last years, the undersigned explored to opportunities by way of writing introduction letters to various authorities viz. State Govt PWDs, Ministry of Defence etc requesting them to allot some orders to BBUNL on nomination basis. Further, the undersigned also tried to participate in some of the tenders but the company always stood the highest bidder. The clear example of which is Birla Technological Museum. Most of the time, the client themselves advised verbally that BBUNL being a giant PSU cannot compete with the small vendors who are quoting the lowest possible price. Several number of tenders such as Ministry of Defence, Bihar Medical Services, Eastern Railway etc to name a few, were downloaded and forwarded to Shri Nandi which were returned by him expressing that BBUNL shall not be able to participate in these tenders due to huge tender cost involvement and also due to likelihood of forfeiture of EMD etc etc. Copies of recorded emails and notesheets shall be produced, if required. BHEL is also not entertaining the company is company failed to complete the execution and withdrew from the Lakwa project at a stage which hampered the image and reputation of BHEL badly.

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5. Sir, I have never been able to appeal and place my facts or grievances to your kind goodself being non member of BBUNL association though association members met you several times for their grievances. Sir, Shri S Nandi alongwith Shri Gautam Roy had been unduly harassing me and Shri S Nandi had been putting undue setback in my career. At the direction of Shri S Nandi, a file was sought from Shri Gautam Roy through assistant for the work assigned to me, for which Mr Gautam Ray not only abused, used slang languages but also was left to attack me physically. These incidences took place in front of Shri S Nandi which are also recorded in writing. Sir, I had in writing requested several times to investigate the matter and incidence created by Shri S Nandi and Shri Gautam Roy but instead I was shifted to other department and told not to interact with Shri Gautam Roy to avoid further problems. At that time also, Sir, I had humbly requested Shri S Nandi that matters need to be resolved and not avoided as these are resulting in harassment and career setback for me. I am sincerely not aware why Shri S Nandi is repeatedly creating such circumstances (all recorded) for me which are not palatable for smooth functioning. "

The reply of the writ petitioner dated 6th November 2013 was followed by the letter of the CMD dated 8th April, 2014 which requires to be reproduced in full:

"It is a matter of deep regret and serious concern for the Company to note that you have failed to honour your commitment of putting your effort to procure order around Rs. 12 (Twelve) Crores for the financial year 2013-14 as instructed by the Company.

The Company being a juristic person is to accomplish its target through employees by virtue of contract of employment by and between the Company and the concerned employee. The substratum of contract of employment is effective discharge of assigned duties

> *and responsibilities. Records indicate and establish that you have not only failed to discharge your assigned duties and responsibilities but also did not abide by the reasonable instruction of the superior which warrants dismissal from service. The Company is unable to repose any confidence on you and your working as there is loss of substratum of employment for all practical purposes.*
>
> *In view of the same, the Company is left with no other alternative than to determine the contract of employment forthwith for loss of substratum.*
>
> *Should you desire to represent before the Company, you may do so within 72 (Seventy-Two) hours of the receipt hereof, failing which it will be presumed that you have nothing to represent and the contract of employment will stand determined perse.*
>
> *Please sign and return the Duplicate Copy sent hereof in token of your acceptance of the above."*

Thereafter, although the writ petitioner sought an opportunity from the Company to be granted the opportunity to file a full representation, such prayer was considered by the CMD by a communication dated 11th April 2014 addressed to the writ petitioner in the following words:

> *"At the outset, please note that the letter dated April 08, 2014 issued by the Company and duly receipted by you determining the contract of employment for loss of substratum stands perse.*
>
> *Without prejudice to the foregoing, please be it noted that M/s. Bharat Bhari Udyog Nigam Limited is a Government of India Enterprise and is an equal opportunity employer. The Company abides by the principles of justice, equity and good conscience. As such your statement of alleged harassment for being a lady employee does not stand at all.*

The Company reaffirms that the letter dated April 08, 2014 is absolutely equitable and has been issued for the greater interest of the organization since non-performance and failure to accomplish the target cannot continue perpetually in the pretext of different alibis as accomplishment of target is incumbent for individuals working in the marketing function.

However, the Company will permit you to represent as mentioned in the letter dated April 08, 2014 within April 24, 2014"

Subsequently by the letter dated 30th April 2014 bearing the reference No. BBUNL:P&A:SA/14/ the contents of the detailed representation dated 24th April 2014 addressed by the writ petitioner to the CMD was dealt with by the CMD, one Kallol Dutta, in the following words:-

"This has reference to your letter No. NIL dated April 24, 2014. The contents therein have been noted.

The letter under reference is inter-alia another instance of how you neglect your assigned duties and responsibilities and spent time in writing letter of such length to defend an otherwise defenseless action. The letter also manifests once again your modus operandi of implicating senior officials of the Company in some way or other whenever asked to discharge your duties and responsibilities properly. The Company is at a loss to understand that how an employee of your rank and position can neglect the assigned duties and responsibilities and write letters carrying no substance and on the contrary containing full of alibis.

Under the circumstances, the Company cannot give any cognizance to your letter dated April 24, 2014 and at the same time affirm as mentioned in its letter dated April 08, 2014 that no trust and confidence can be reposed on you and your working for all practical purposes.

> *In view of the above as mentioned in the letter dated April 08, 2014, your employment stands determined for all practical purposes for loss of substratum."*

Accordingly, the writ petitioner was handed over a cheque of Rs. 8 Lakhs and odd as *recompensed* salary in *lieu* of unavailed leave and notice pay. Gratuity of Rs. 10 Lakhs was also paid to the writ petitioner and the writ petitioner was instructed to make necessary applications for disbursement of Provident Fund (PF).

The appellant Company would argue through Mr. Soumya Majumdar, Learned Counsel, led by Mr. S.N. Mookerjee, Learned Senior Counsel, that there was no requirement of holding a Departmental Enquiry (for short *DE*) against the writ petitioner. It is submitted that the termination of service of the writ petitioner is *simplicitor* and only subject to payment of compensatory notice pay and other eligible benefits in terms of her *employment agreement*.

Learned Counsel for the Company would argue that the performance of the writ petitioner *qua* achieving a target of Rs. 12 Crores was part of her *condition* of *employment*. By expressing her unwillingness and inability to achieve the target, the writ petitioner had failed to perform and hence broken a *condition* of her *employment*. Failure to perform has tantamounted to a *loss of substratum.* Accordingly, the determination of her contract of employment was legal, valid and binding.

Learned Counsel for the Company/the Appellant draws the attention of this Court to *Clause (v)* of the Letter of Appointment issued by the Company to the writ petitioner dated the 10th of September 1998. It is submitted that after confirmation of the service of the writ petitioner, termination of her service is subject to giving notice of three months, or, salary for three months in *lieu* of notice at the option of the Company. In this connection, the contents of the letter dated 30th April 2014 (*supra*) addressed by the CMD to the writ petitioner are reiterated by pointing out to the payment of *notice pay* to the writ petitioner *as per terms of your* (her) *employment.*

Next, drawing the attention of this Court to *Rule 23 (vi)* dealing with Termination of Service, it is submitted that in terms of *Clause c) and e)* respectively thereof, termination of service is permissible in cases where an employee is appointed under a contract or agreement in terms of Clauses contained in such *service agreement/ Rules.*

Mr. Majumder painstakingly argues that the requirement on the part of the writ petitioner to procure a new order of approximately Rs.12 Crores is *sine qua non* to a *condition* of *employment* of the writ petitioner. Therefore, the failure on the part of the writ petitioner to fulfil her service condition by resiling from her responsibilities to procure a new order of Rs. 12 Crores, entitles the Company to terminate her service *simplicitor*. It is an admitted position that the writ petitioner could not fulfil the target assigned to her and reasons for such non-fulfilment were not acceptable to her *Controlling Authority,* viz. the CMD. It is clarified that thus the writ petitioner lost the *substratum* of her employment resulting in termination.

In the light of the facts as recorded above, Learned Counsel for the appellant/ the Company, takes the stand that holding of a *DE* was not mandatory.

Per Contra, Mr. Samanta, Learned Counsel appearing for the writ petitioner/ Respondent No.1 in this appeal, submits that the writ petitioner had served the Company for 26 years prior to her illegal termination on the 20th of April 2014. The writ petitioner was promoted on the 10th of November 2008 and confirmed in her promotional post on the 22nd of December 2009. It is submitted that all along the confirmed service of the writ petitioner stood governed by the *CDA Rules* of the Company. At the stage of being promoted to the post of Manager (Marketing) there was no official and/or formal clause directing the writ petitioner to fetch a new order of Rs. 12 Crores. Furthermore there was no formal clause fixing a target for the writ petitioner.

It is submitted that the *loss of substratum* alleged by the Company is a manufactured expression intended to create binding obligations on the writ petitioner when actually none such obligation exists or, could exist in facts and in law. Mr. Samanta submits that a target imposed on the writ petitioner at the instance of the then GM (Project) and incorporated as part of a Minutes dated 22nd October, 2013 issued by the then GM (Project) and elucidating the aforestated target of approximately Rs.12 Crores, cannot amount to a condition and/or term of employment/service of the writ petitioner.

It is submitted that assuming but not admitting that the writ petitioner committed *Misconduct* under *Rule 5 (i)* of the *CDA Rules* amounting to neglect of work or negligence in the performance of duties, the same is subject to proof in a properly held *DE*. It is asserted that the Company shied away from holding a *DE* on the ground that the alleged *loss* *of substratum* could not be subjected to proof of violation of service conditions.

Mr. Samanta clarifies that the *CDA Rules* were never invoked by the Company and the procedure for imposing penalties under the *CDA Rules* was circumvented on the basis of the mere subjective satisfaction of the CMD that the writ petitioner be terminated on the ground of *loss of substratum*.

Having heard the parties and considering the materials placed, this Court finds as follows:

A) That no *Misconduct* as defined by the *CDA Rules* has been alleged against the writ petitioner by the Company.

B) Particularly, the species of *Misconduct* as provided under *Rule 5 (i)* of the *CDA Rules* connected to *neglect of work or negligence in the performance of duty including malingering or slowing down of work* has not been shown to be the reason for termination of service of the writ petitioner.

C) The reason for termination of service of the writ petitioner is simply stated to be *loss of substratum.*

D) *Loss of substratum* is shown to have resulted in termination *simplicitor* following *Rule 23 (vi) c) and e)* of the *CDA Rules*. *Loss of substratum* has been inferred by the Company following the explanation offered by the writ petitioner connected to the target of fetching a new order of at least Rs. 12 Crores.

E) The target of Rs. 12 Crores has been treated to be a *substratum* of the employment of the writ petitioner. Such *substratum* was never a condition of service or employment of the writ petitioner and the word *substratum* does not find any place in the *CDA Rules*.

F) furthermore, *substratum* cannot be treated to be a *condition* of *employment/service* merely on the basis of an internal Memo of the GM (Project) fixing a business target and, who is not the appointing authority of the writ petitioner and, such internal *Memo* is not the letter of appointment of the writ petitioner to be treated as a *condition* of her *service/employment*.

G) The writ petitioner was a confirmed employee of the Company and prior to termination had put in 26 years of service. For invoking *Rule 23 (vi) c) and e)* of the *CDA Rules*, it would be necessary to prove violation of a contract or agreement of appointment by an employee so appointed or, a *Misconduct* as defined by the *CDA Rules.*

H) It is legally indefensible that fixation of a business target of Rs. 12 Crores on the basis of an Internal Company Memo can be treated to be a condition of service/ employment/appointment/promotion of the writ petitioner. Fixation of a target cannot be part of a binding service condition for the reason that: *a)* the target is likely to shift from year to year or from period to period; *b)* non-achievement of the target in the facts of this case cannot visit the writ petitioner alone with any penal consequences; *c)* No such penal consequence can be fixed merely on the basis of an Internal Company Memo.

I) In the event the Company/BBUNL desired to proceed against the writ petitioner, it would have to do so departmentally on the basis of properly framed charges against permanent employees based on *CDA Rules.*

J) Termination *simplicitor* at the behest of a few officers of the Company including its the then GM (Project) and the them CMD on the basis of an alleged *loss* of *substratum* related to a business target and, on the face of it, unprovable in a departmental proceeding, takes the colour of an exercise so arbitrary, so despotic being the very antithesis of a modern understanding of the Rule of Law.

K) This Court was not called upon to address the maintainability of an action *qua personal service* arising out of a *contract* of *employment* as decided by the Hon'ble Single Bench in favour of the writ petitioner.

In the light of the above discussion and for all of the above reasons, the order of the Hon'ble Single Bench is sustained. The order requires no interference or modification except, that this Court, in view of the brazen conduct of the two officers of the Company namely, the then GM (Project) and the then CMD, BBUNL, one Mr. S. Nandi and one Mr. Kallol Dutta respectively, *adds a zero* to the amount payable as costs to the writ petitioner by the Hon'ble Single Bench.

Accordingly, the writ petitioner shall now be entitled to costs assessed at Rs. 5,10,000/- (Rupees Five Lakhs Ten Thousand only) to be disbursed by the Appellant in the following manner: BBUNL/the Company one-third; the then CMD, BBUNL, one Mr. Kallol Dutta- *one-third*; and the then GM (Project), one Mr. S. Nandi – *one-third*.

The costs shall be realised from the then officers of the Company named above from their salaries or alternately, if retired or in the process of retirement, from their superannuation benefits.

M.A.T. 140 of 2021 with **I.A. No. CAN 1 of 2021** with **M.A.T. 141 of 2021** with **I.A. No. CAN 1 of 2021** stand accordingly **dismissed**.

Parties shall be entitled to act on the basis of a server copy of this Judgement and Order placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities

I agree.

(Krishna Rao, J.) **(Subrata Talukdar, J.)**

<u>Later</u>

Ld. Counsel for the Appellant prays for stay of the order.

Prayer for stay is considered and refused.

I agree.

(Krishna Rao, J.) **(Subrata Talukdar, J.)**