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**(1995) 11 AP CK 0047**  
**In the Andhra Pradesh High Court**  
**Case No : W.A. No. 408 of 1993**

Hindustan Aeronautics Ltd.

APPELLANT

Vs

M. Sataiah and Another

RESPONDENT

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**Date of Decision :** 08-11-1995

**Acts Referred:**

Employees State Insurance Act, 1948 — Section 73, 73(1)

**Citation :** (1996) 1 ALT 753 : (1996) 3 LLJ 95

**Hon'ble Judges :** T.N.C. Rangarajan, J;M.N. Rao, J

**Bench :** Division Bench

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## Judgement

T.N.C. Rangarajan, J.—This writ appeal arises from the order of Ramanujulu Naidu. J., modifying the award passed by the Labour Court and granting full backwages and other attendant monetary benefits to the writ petitioner on reinstatement.

2. The Factual background to the case is as follows :

The writ petitioner was working as a radio-wirer in Hindustan Aeronautics Limited since February 24, 1969. From, December 1, 1978 he was ill and under treatment at E.S.I., Hospital, Sanathnagar and Nizam's Orthopaedic Hospital, Panjagutta, Hyderabad. He was sending weekly certificates from the E.S.I., authorities for extension of the period of earned leave. On February 18, 1979, the company issued a notice to the petitioner stating that he was deemed to have abandoned the employment as he did not give any explanation for his absence from February 3, 1979 to February 18, 1979. Subsequently on February 21, 1979, the earlier order of February 18, 1979 was cancelled presumably on receipt of the E.S.I., certificates for the said period of absence. The petitioner continued to send the medical certificates as he continued to be ill. On May 26, 1979, the company again sent another letter informing him that he was deemed to have abandoned the service for being absent without permission from April 16, 1979 onwards. The writ petitioner replied by letter dated June 2, 1979 that he continued to be sick and had sent E.S.I., certificates by certificate of posting

and he is prepared to furnish duplicate copies. The Company accepted that his absence for the period from April 16, 1979 to April 23, 1979 was explained with reference to such certificates, but refused to consider the period April 23, 1979 to May 25, 1979 as properly explained. By letter dated April 23, 1979, the company accepted that his absence for the period from April 16, 1979 to April 23, 1979 was explained with reference to such certificates, but refused to consider the period from April 23, 1979 to May 25, 1979 as properly explained. By letter dated July 31, 1979, the company rejected the request of the writ petitioner for reinstatement. The petitioner, thereupon, sent the duplicate certificates for the period from April 23, 1979 to May 25, 1979, but the company refused to consider the same and rejected his request again on August 29, 1979. His further requests were also turned down by letter dated December 3, 1979 and May 8, 1982, the matter was taken up by the Union and failure report was submitted by the Assistant Commissioner of Labour on April 29, 1983. Thereupon the Government by G.O.Ms. No. 1050, dated July 8, 1983 referred the following question for adjudication by the Labour Court.

Whether the termination of services of M. Sataiah, staff No. 1684, Ex-workman by the Management of H.A.L., Hyderabad is justified ?

The writ Petitioner filed a claim-statement on February 24, 1984 stating the above facts and claiming reinstatement with full backwages from May 26, 1979 along with other attendant benefits. The company referred to standing Order No. 13(b) for the contention that the absence for more than ten days without justifiable cause resulted in deeming the petitioner to have abandoned the employment. It was also pointed out that the writ petitioner was not really sick but managed to get the medical certificates and since he did not report for duty and explain his absence, his services should be terminated. The Labour Court found that certificates had been given for the sickness for seven days from April 16, 1979 by Ex. W-4 which was contrary to Ex. M-19 which showed that the petitioner was found fit to join duty on April 16, 1979. He also noted that both the certificates had been issued by the Director of Medical Services and there was no such contradictory certificate for the period subsequent to April 22, 1979. Since he found that there was nothing to doubt the certificate given for the period April 23, 1979 to May 25, 1979, which was the period not accepted by the company, the Labour Court held that the order of discharge was contrary to the provisions of section 73 of the Employees' State Insurance Act and, therefore, illegal and it was accordingly, set aside. However, the Court was of the view that the petitioner had not pleaded that the order of termination was contrary to section 73 of the E.S.I., Act and, therefore, it was not proper to allow backwages, even though such backwages would have been allowed if the plea had been taken.

3. The writ petitioner-workman, therefore, challenged that order. The learned single Judge observed that having held that the order of termination of the petitioner was in flagrant violation of the provisions of Section 73 of the E.S.I.

Act, the Labour Court ought to have awarded backwages which could not be denied only on the ground that the plea based on section 73, was not taken. The learned Judge held that ignorance of Law on the part of the petitioner could not be a ground to deny him of what he is legitimately entitled to. He, therefore, modified the award passed by the Labour Court, by granting full backwages and other attendant monetary benefits.

4. In this appeal, the learned counsel for the company submitted that both the learned single Judge as well as the Labour Court had erred in relying on section 73 of the E.S.I., Act which did not apply to the facts of the Case. He further submitted that since the finding that the order of discharge was illegal ----- on the basis of section 73, could have been challenged by the company, the further benefit on the basis of such an erroneous finding cannot be granted even though that finding would remain as the company had not filed writ petition against the award. It was pointed out that the discharge was made in terms of Standing Order No. 13(b) of the company which deemed the employee to have abandoned the employment if he remained absent without Justifiable cause and it is for the company either to take him back or not, on the cause being shown, it was also submitted that E.S.I., certificates which were being given for medical benefits need to be accepted as given for justifying the absence particularly in the case of the petitioner who was habitually absent and there was also a suspicion that the certificates were not genuine since there was a contradictory certificate stating that he was fit to join duty on April 16, 1979, It was submitted that in the circumstance, the award of back-wages was untenable and should be set aside.

5. The learned counsel for the workman submitted that even though section 73 was not applicable on terms, the spirit of that section was that when a workman was ill and under treatment, he must be accepted as being sick and he cannot be deemed to have abandoned his employment during the period of sickness. He also submitted that the certificates given by the workman had been unreasonably rejected, and the termination was set aside as untenable, the granting of backwages would be a normal consequence of termination being non est. The learned counsel for the workman submitted that in the circumstances since the workman had been kept out of employment and had also not been able to get alternative employment, the order of the learned single Judge granting full backwages for the period should be upheld.

6. A perusal of the order of the learned single Judge and the award of the Labour Court indicate that section 73 of the E.S.I., Act was the basis of both the decisions. That section reads as follows :

"Employer not to dismiss or punish employee during the period of sickness etc.

(1) No employer shall dismiss, discharge or reduce or otherwise punish an employee during the period the employee is in receipt of sickness benefit or maternity benefit, nor shall he, except as provided under the regulations, dismiss, discharge, or reduce or otherwise punish an employee during the period

he is in receipt of disablement benefit for temporary disablement or is under medical treatment for sickness or is absent from work as a result of illness duly certified in accordance with the regulations to arise out of the pregnancy or confinement rendering the employee unfit for work.

(2) No notice of dismissal or discharge or reduction given to an employee during the period specified in sub-section (1) shall be valid or operative".

The Supreme Court has held in *The Buckingham and Carnatic Co.Ltd. Vs. Venkatiah and Another*, that the clause "during the period the employee is in receipt of sickness benefit" in Section 73(1) refers to the period of his actual illness and what Section 73(1) prohibits is that during that period the employee cannot be removed from service. In the present case, the order of removal was made on May 26, 1979 admittedly after the period of sickness even as claimed by the employee had ended on May 25, 1979. The Labour Court was, therefore, in error in setting aside the termination only on the ground that the order of discharge was contrary to Section 73 of the Act. The appellant-company had not filed any writ petition challenging this finding, whereas the workman filed the writ petition claiming consequential benefits of the setting aside of that order.

7. The contention of the company is that in as much as the said finding is contrary to the decision of the Supreme Court, the consequential benefit should not flow. However, this contention cannot be accepted without considering whether the finding is otherwise valid. In order to consider this question, we have to see the correct provision under which the action was taken. That was Standing Order No. 13, which reads as follows

13. Leave :

(a) Workman will be entitled to vacation leave, sick leave and casual leave and female worker will be entitled to maternity leave in addition to the above. The quantum of leave that workmen are entitled to, the manner in which it is to be applied for, and the manner in which it will be granted, will be governed by leave rules of the Company.

(b) If a workman remains absent continuously for more than ten days without prior permission or absents himself beyond the period of leave originally granted or subsequently extended, unless such absence was on account of sickness or other valid reasons, he is deemed to have abandoned the employment voluntarily and he loses his lien on employment. However, if the workman returns within eight days of the expiry of leave granted or extended and report for duty and submits satisfactory explanation, the management will consider his case leniently. But the Management may at its discretion impose punishment if deemed necessary.

8. The learned Counsel for the company submitted that according to the provisions of the Standing Order 13(b), if the workman was absent for more than ten days he loses his lien automatically and he may be reinstated only when he

reported to duty and submitted satisfactory explanation which must necessarily be sickness or other valid reasons. On the other hand, the learned counsel for the workman submitted the Standing Order No. 13(b) could not be invoked in a case where the absence was due to sickness or other valid reason and it is only when the absence was without such a reason that he could be deemed to have abandoned the service and his application for reinstatement has to be considered by the management leniently.

9. A reading of this Standing Order 13(b) shows that it consists of two parts. The first part enables the Company to deem the employee to have abandoned the employment where he is absent continuously for more than ten days without prior permission or overstays the leave already granted. But the exclusion provided is that such a deemed abandonment is not to be presumed where his absence is on account of sickness or other valid reasons. We are unable to accept the contention of the learned Counsel for the company that even in such a situation of sickness or other valid reason, the deemed abandonment could be presumed. This is because the phrase "unless such absence was on account of sicknesses or other valid reasons" precedes the phrase he is deemed to have abandoned the employment voluntarily". If we were to accept the view put forward by the learned counsel for the company there would be no need for the phrase "unless such absence was on account of sickness or other valid reasons" as even without that phrase, the meaning as put forth by the learned counsel for the company would enure in the first paragraph of this Standing Order. Again, if this phrase was only to qualify the satisfactory explanation, one would have expected this phrase to occur as suitably modifying the phrase "satisfactory explanation". Moreover, the second part of the Standing Order that the management will consider his case leniently indicates the dichotomy of absence which is due to sickness or other valid reasons, and absence which, is not due to sickness or other valid reasons, to satisfactorily explain, which calls for lenient treatment. It is also significant that the second part refers to the workman reporting within eight days of the overstay and submitting satisfactory explanation where such overstay, need not necessarily be due to sickness. On the other hand, if an employee had, for instance, been involved in an accident and gone into coma it is not possible to deem him to have abandoned the employment merely because he did not report for duty within ten days. No doubt, unauthorised absence may give rise to such a presumption as the workman is not expected to go on leave without prior permission. It is only for meeting such situations where the absence is without permission the Standing Order No. 13 has been framed. In the decision cited above, a similar Standing Order has been considered and the Supreme Court observed that it is true that in common law an inference that an employee has abandoned or relinquished services is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. That is the reason why the parties have agreed to the Standing Order that if the

employee is absent without leave, he is deemed to have terminated his contract of service, but before effect is given to the inference of relinquishment, an opportunity is given to the employee to offer explanation and when the explanation is satisfactory the inference is rebutted and the absence is treated as leave. If the explanation is not found to be satisfactory, the inference prevails and the employee is deemed to have terminated his contract of service. The exception to this procedure is sickness, for in a case where the employee is unable to take prior permission for being absent on account of sickness, there can obviously be no intention to abandon the service and such a presumption cannot be drawn. That is the reason why Standing Order No. 13 provides for excluding the case of sickness or other valid reason from the deeming provision. However, it is not in a case of every sickness that the deeming provision should be excluded, as it may lead to a situation where false medical certificates can be produced and the employee can remain absent without hazarding the risk of being deemed to have abandoned his employment. Therefore, the sickness referred to in Standing Order No. 13 could only be such sickness as to have incapacitated the employee from obtaining prior permission or filing immediate leave application for leave without delay.

10. This leads us to the question whether the sickness claimed by the writ petitioner in this case was of such a nature that he could not be deemed to have abandoned the employment. On this aspect, we have the contradictory medical certificates, one Ex. M19 according to which the petitioner was found to be fit to join duty on April 16, 1979, and the other Ex. W. 4 whereby he was certified to be sick for 7 days from April 16, 1979. It also appears that the respondent workman was an inpatient in E.S.I., Hospital, Sanathnagar from June 30, 1979 to July 25, 1979, but this period was beyond the period for which termination was made. So far as the relevant period is concerned, there is no clear evidence as to whether he was inpatient and thereby precluded from applying for prior permission. We are, therefore of the considered opinion that this was the case where because of absence without prior permission the employer can deem the workman to have abandoned the service with the result that he should be reinstated by the company by treating his absence leniently on his giving satisfactory explanation. The award reinstating him must therefore, be considered as accepting his absence as satisfactorily explained within the terms of Standing Order 13(b). In other words, this is not a case where the original termination was taken to be non est and not falling within Standing Order 13(b) at all with consequential entitlement to backwages and other monetary benefits. This is a case where the award of the Labour Court should be understood as having upheld the right of the management to consider the explanation and reinstate him after being satisfied with the explanation treating the case leniently. It is in this context we have to notice that the management has the discretion to impose punishment if deemed necessary. The case of the management all along is that the workman was a habitual absentee and in that background it would not be improper for the management, while reinstating him,

to decide that he may not be paid any backwages for the period of absence. The award of the Labour Court can, therefore, be Justified on this basis.

11. After the learned single Judge modified the award and granted full backwages, the company filed this writ appeal and obtained stay on condition that the company deposits half of the backwages and the employee was allowed to withdraw the same without furnishing security. This is case where due to prolonged delay in the litigation one of the parties has to pay the price for such delay. Having held that the explanation of the workman was satisfactory and was entitled to reinstatement, the denial of backwages would mean that he is deprived of the benefit to which he was entitled to. At the same time, granting of full backwages would mean that the company has to pay for no fault of its, expect that there was delay in the litigation process. The backwages is related to the period from May 26, 1979 to August 27, 1986, a period of seven years. We are of the view that the price for this delay has to lie where it falls, and in the present case it has to be shared by both the company and the employee. Since half the amount of backwages has already been paid and withdrawn by the employee, we are of the view that interests of justice would dictate that while disagreeing with the decision of the learned single Judge, we need not restore the award as such denying the full backwages, but content ourselves by holding that the employee will not be entitled to any further monetary benefits as backwages on his being reinstated. The writ appeal is partly allowed. No Costs.