

(1974) 03 BOM CK 0003

In the Bombay High Court

Case No : Special Civil Application No. 1541 of 1970

Rambhuwal Thakar Prasad

APPELLANT

Vs

Phoenix Mills

RESPONDENT

Date of Decision : 19-03-1974

Acts Referred:

Employees State Insurance Act, 1948 — Section 73
Industrial Disputes Act, 1947 — Section 33A

Citation : (1976) 1 LLJ 93

Hon'ble Judges : S.K. Desai, J;P.B. Sawant, J

Bench : Division Bench

Judgement

P.B. Sawant

1. This is a petition under Art. 227 of the Constitution of India challenging the order dated 24-3-1970 passed by the Industrial Court, Maharashtra in Appeal (IC) No. 82 of 1969 under the Bombay Industrial Relations Act, 1946 (hereinafter referred to as the said Act.).

Briefly the facts leading to this petition are as follows :

2. The petitioner was employed as a weaver, from the year 1960, with the respondent-Textile Mills. On an application made for leave for 30 days, the petitioner was granted leave from 16-8-1967 to 15-9-1967. The petitioner thereafter proceeded to his native place. The petitioner enjoyed the leave at his native place and thereafter by his letter dated 14-9-1967 he applied for extension of leave for about 20 days. Along with the application for extension of leave the petitioner had sent a medical certificate of one Dr. Singh to the effect that the petitioner was suffering from jaundice. The said application for extension of leave was received by the first respondent-Mills on 18-9-1967 and by their reply dated 22-9-1967 the first respondent-Mills informed the petitioner that the extension of leave was refused on the ground that there was shortage of labour. This reply was received by the petitioner on 26-9-1967. By consent of the parties we have taken the said reply dated 22-9-1967 on record in this petition. The

petitioner thereafter recovered from his illness on or about 3-10-1967 and, therefore, on that day he started for Bombay from his native place reaching Bombay on 5-10-1967. Thereafter he reported for duty to the first respondent-Mills on 6-10-1967 but the first respondent-Mills did not allow him to resume duty. The petitioner, therefore, by his letter dated 9-10-1967 made an approach to the first respondent-Mills under S. 42(4) of the said Act calling upon the 1st respondent-Mills to allow him to resume duty. By their reply dated 17-10-1967 the first respondent-Mills informed the petitioner that he had lost his lien over his substantive employment in terms of Standing Order No. 11 of the Standing Orders applicable to the petitioner. The petitioner thereafter filed his application before the third Labour Court, Bombay on 8-11-1967 being Application No. 579 of 1967. The Labour Court by its order dated 24-4-1969 held that the application for extension of leave made by the petitioner was refused by the first respondent-Mills on improper grounds and that the first respondent-Mills was not justified in not allowing the petitioner to resume his duty, and in view of the fact that he had made an application a day earlier to the day when the original leave granted to him was to expire and the said application was supported by a medical certificate, the petitioner had not lost his lien on his appointment automatically under the said Standing Order No. 11 as contended by the employer. The Labour Court further held after appreciating the evidence led before it that the petitioner was really ill during the relevant period and he was prevented from joining duty by genuine illness. In the result the Labour Court set aside the action taken by the first respondent-Mills in treating the services of the petitioner as having been terminated on the ground of loss of lien and granted reinstatement to the petitioner with continuity of service and full back wages from 6-10-1967, i.e., the day on which the petitioner reported for duty after returning from leave, till reinstatement.

3. Aggrieved by this order the first respondent-Mills preferred an appeal to the Industrial Court being Appeal No. 82 of 1969 under S. 84 of the said Act. The Industrial Court confined its decision only to the interpretation of the said Standing Order No. 11 and held that in view of the fact that petitioner had not returned within eight days of the expiry of the leave and given an explanation, to the satisfaction of the authority granting leave, of his inability to return before the expiry of leave, the said Standing Order No. 11 had come into operation and the petitioner had lost his lien on the appointment. The Industrial Court, therefore, held that the action of the management in treating the services of the petitioner to have come to an automatic termination was valid. In the result the Industrial Court set aside the order passed by the Labour Court. The Industrial Court, however, did not go into the other question, viz., whether the petitioner was genuinely ill during the relevant period and whether there was a justifiable reason for not returning for duty either immediately after the expiry of the leave originally granted or during the period of the eight days after the expiry of the original leave. It is this order dated, 24-3-1970 passed by the Industrial Court which has been challenged in this petition.

4. Mr. Shetty who appears for the petitioner has urged that the view taken by the Industrial Court that the services of the petitioner came to be automatically terminated on the failure of the petitioner to return within eight days of the expiry of the original leave and to give an explanation to the satisfaction of the authority is erroneous, and that in view of the fact that the petitioner was prevented from resuming duty on account of the uncontrollable circumstances, viz., his illness, it should be held that the said Standing Order No. 11 had not come into operation. On the other hand, Mr. Jahagirdar who appears for the first respondent-Mills has contended that the provisions of the said Standing Order No. 11 are very clear and that as per the said provisions, an employee has either to resume his duty immediately on the expiry of the leave originally granted to him or if for some reason he cannot do so, he has to return to his duty in any case within eight days of the expiry of the leave and further give an explanation to the satisfaction of the authority granting leave. If he fails to do so, the effect of the provisions of the said Standing Order is that his services come to an end automatically. There is no discretion left in the management in that behalf after the said period of eight days. In other words, it is the contention of Mr. Jahagirdar that even if there are valid reasons disabling an employee to return to duty and give an explanation within eight days after the expiry of the leave originally granted, it is not obligatory for an employer to take into account the said reasons. On behalf of both the petitioner and the first respondent-Mills, various decisions of the Supreme Court as well as of this Court were cited before us. Before we consider the said decisions, it is necessary to re-produce here the said Standing Order No. 11 which is as follows :

"Service for a total period of 12 months in a mill shall qualify an operative for a total period of one month's leave. Grant of such leave shall depend on the exigencies of the mill and shall be at the discretion of the company.

Any operative who desires to obtain leave of absence shall apply to an officer or officers appointed for the purpose by the company. It shall be the duty of such officer or officers to obtain the orders, on such application, of the authority appointed by the company on two days in a week fixed for the purpose; provided that if the leave applied for is of an urgent nature, that is, to commence on the date of the application or within three days thereof, the orders of the authority empowered to grant leave shall be obtained without any delay. If the leave asked for is granted, a leave pass shall be issued to the operative. If, however, the leave is refused or postponed, the fact of such refusal or postponement and the reasons thereof shall be recorded in writing in a register to be maintained for the purpose, and if the operative so desires a copy of such entry in the register shall be supplied to him. If the operative after proceeding on leave desires an extension thereof he shall make an application for the purpose to the authority granting leave either in writing or orally or through any other person. In any case, a written reply either of the grant or refusal of extension of leave shall be sent to the operative if his address is available and if such reply is likely to reach him before the expiry of the leave originally granted to him.

If the operative remains absent beyond the period of leave originally granted or subsequently extended, he shall lose his lien on his appointment unless (1) he returns within eight days of the expiry of the leave and (2) gives explanation to the satisfaction of the authority granting leave of his inability to return before the expiry of leave. In case the operative loses his lien on the appointment, he shall be entitled to be kept on the "badli" list."

It is, therefore, clear from the provisions of the Standing Order in question that if an employee after proceeding on leave desires extension of leave he has to make an application for such extension before the expiry of the leave originally granted to him. On such application being made the employer has to communicate to the employee whether the extension of leave applied for is granted or not. This obligation to communicate to the employee is conditional in that the employer is required to send his communication only if it is likely to reach the employee before the expiry of the leave originally granted to him. It is also clear that if for any reason the employee is unable to resume duty immediately on the expiry of the leave, then he may return within eight days of the expiry of the original leave and give an explanation to the satisfaction of the authority of his inability to return before the expiry of the original leave. If, however, he fails to do either of these two things, viz., to return to the duty immediately after the expiry of the leave originally granted or to return within eight days of the expiry of the leave and give satisfactory explanation he shall lose his lien on his appointment.

5. In the present case, there is no dispute that the application for extension of leave was made on 14-9-1967 and the leave originally granted was to expire on 15-9-1967. The application for extension was further received by the first respondent-Mills on 18-9-1967, i.e. within eight days of the expiry of the leave originally granted. That application was accompanied by a medical certificate and the extension applied for was for 20 days and the said 20 days were to expire on 5-10-1967. A reply to the said application for extension was given by the first respondent-Mills on 22-9-1967 and was received by the petitioner on 26-9-1967. In the reply the only reason given was that there was shortage of labour and there was no reference whatsoever to the reason given by the petitioner in the application for extension of leave. It is further not disputed that the employee reported for duty to the first respondent-Mills on 6-10-1967, i.e., immediately after the expiry of the extension of leave which was applied for by the petitioner and the first respondent-Mills relying on the provisions of the said Standing Order refused to accept the petitioner in employment.

6. Therefore, the short question which arises for consideration in this petition is whether the employee was precluded from returning to his job after the expiry of eight days of the leave originally granted and satisfying the authority concerned about the validity of the reasons which prevented him from joining duty immediately after the expiry of the leave originally granted to him. To state the question in a different form, whether the period of eight days given in the Standing Order for reporting and giving explanation is a period of limitation for

the purpose and whether an employer is under no obligation to consider the explanation given by the employee after the said period of eight days.

7. In support of his contention Mr. Jahagirdar first referred us to a decision of the Supreme Court in *Codialabail Press Vs. Monappa (K.)*, . The facts in that case were that the relevant standing order No. 8(ii) of the Standing orders applicable to the employee in question stated that an employee who abstained himself for eight consecutive working days without leave should be deemed to have left the company's service without notice thereby terminating his contract of service, and if he gave an explanation to the satisfaction of the management, the absence should be converted into leave without pay or dearness allowance. It further provided that if the absence was proved the satisfaction of the management to be one due to sickness, then such absence should be converted into medical leave for such period as the employee was eligible with permissible allowances. In other words, there was no limit of eight days for reporting and satisfying the authority as in the case of Standing Order with which we are concerned in this petition. Since there was no time limit the employee could at any time report for duty and prove to the satisfaction of the employer that his absence was on account of justifiable reasons. The employee in that case had gone on leave for six days which expired on 18-1-1957. He did not join duty on 19-1-1957 but remained absent without leave and without sending to the employer any communication for extending his leave. On 11-3-1957 he sent a letter to the employer stating that some time after reaching his village he suffered from fever and dysentery and was treated by Civil Assistant Surgeon. This letter was accompanied by a certificate issued by the said Surgeon. In the certificate it was stated that the employee suffered from chronic malaria and dysentery from 15-1-1957 to 7-3-1957. When the employee appeared before the manager of the company, he was sent to the Senior medical Officer of the company for examination. The said Medical Officer examined him and was unable to confirm that he was ailing for a period of nearly two months. Acting on this opinion of the Medical Officer, the employer refused to take back the employee on the ground that his explanation for his absence was unsatisfactory. The employer treated the case of the employee as falling under the provisions of the said Standing Order No. 8(ii) which are referred to earlier. The employee thereafter referred his dispute for adjudication to the Labour Court. The labour court held that it was not inclined to accept the case of the employee that the opinion of the Medical Officer of the employer was prejudiced against the worker. The Labour Court, however, held that the decision of the employer not to take back the employee was inconsistent with the provisions of S. 73 of the Employee's State Insurance Act 1948 and, therefore, the court directed the management to reinstate the employee. The employer thereafter moved the High Court by a writ petition for quashing the award of the Labour Court. The writ petition of the employer was allowed by a single Judge of the Madras High Court holding that S. 73 of the Act was inapplicable. Against the said decision of the single Judge. A Letters Patent Appeal was preferred before a Division Bench of

the said High Court and the Division Bench held that S. 73 applied to the case of the employee and that the refusal of the employer to take back the employee was illegal. In so holding, the Division Bench observed that in refusing to take back the employee, the employer had not properly discharged its obligation of examining the employee's explanation reasonably and that introduced an infirmity in the employer's decision not to take him back. In the appeal by a certificate the Supreme Court was called upon to decide the validity of the said decision of Division Bench. The Supreme Court while interpreting the provision of the said Standing Order No. 8(ii) observed as follows :

"This Standing Order is a part of the certified Standing Orders which had been revised by an arbitration award between the parties in 1957. The relevant clause clearly means that if an employee falls within the mischief of its first part, it follows that the defaulting employee has terminated his contract of service. The first provision in clause (ii) proceeds on the basis that absence for eight consecutive days without leave will lead to the inference that the absentee workmen intended to terminate his contract of service. The certified Standing Orders represent the relevant terms and conditions of service in a statutory form and they are binding on the parties at least as much, if not more, as private contracts embodying similar terms and conditions of service. It is true that under common law an inference that an employee has abandoned or relinquished service 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. Abandonment or relinquishment of service is always a question of intention and normally such an intention cannot be attributed to an employee without adequate evidence in that behalf. But where parties agree upon the terms and the conditions of service and they are included in certified Standing Orders, the doctrines of common law or considerations of equity would not be relevant. It is then a matter of construing the relevant term itself. Therefore the first part of Standing Order 8(ii) inevitably leads to the conclusion that if an employee is absent for eight consecutive days without leave, he is deemed to have terminated his contract of service and thus relinquished or abandoned his employment.

The latter part of this clause, however, provides that the employee can offer an explanation as to his absence and if his explanation is found to be satisfactory by the management, his absence will be converted into leave without pay or dearness allowance. How this clause is in substance a proviso to its first part. Before effect is given to the inference of relinquishment of service which arises from the first part of the clause, an opportunity is given to the employee to offer an explanation and if the said explanation is treated as satisfactory by the management, the inference of termination of contract of service is rebutted and the leave in question is treated as leave without pay or dearness allowance. This latter clause obviously postulates that if the explanation offered by the employee is not found to be satisfactory by the management, the inference arising from

the first part prevails and the employee shall be deemed to have terminated his contract of service with the result that the relationship of master and servant between the parties would be held to have come to an end."

8. The Court then itself examined as to whether the finding given by the Division Bench of the Madras High court that the employer had not properly discharged its obligation of examining the employees explanation was correct or not, by going through the facts on record and found that the certificate which was given by the Medical Officer of the employer had suggested that the certificate produced by the employee from the Civil Assistant Surgeon was not correct and that in fact the employee was not ill as alleged by him. The Court, therefore, held that the conclusion of the High Court with regard to the opinion expressed by the Medical Officer of the employer that it was vague was not proper. The court also further held that it was not open to the High Court to consider the propriety of the conclusion reached by the Labour Court on the said point while expressing its writ jurisdiction under Art. 226 of the constitution. Whether or not the employer should have accepted the certificate which was produced by the employee was according to the Court primarily for the employer to consider and in the absence of allegation about mala fides the High Court was not justified in making a finding against the employer on the ground that the employer had not discharged its obligation under the Standing Orders, of properly considering the explanation of the employee in regard to his absence. With the rest of the judgment which centres round the provisions of S. 73 of the employees State Insurance Act, we are not concern in this petition. What is necessary to note for our purpose is that in the said case, the Supreme Court in terms did state that it was necessary for the employer to give an opportunity to an employee to offer explanation and consider the explanation given by the employee and its validity. The Court further did not find anything wrong in the Labour Court going into question of the satisfactory or unsatisfactory nature of the explanation given by the employee. In fact the Supreme Court itself went into the facts on record and tried to find out whether consideration by the employer, of the explanation given by the employee for his absence without permission, was proper or not. It is, however true that in this case there was no time limited provided in the Standing Order in question, for the employee to return and give his explanation. Therefore, this case does not directly cover the case of an employee who returns to the employment and offers a satisfactory explanation after the time provided for the same had expired, as in the present case.

9. However, with regard to the duty cast on the employer to consider the employee's explanation, and the power of the Labour Court to examine whether the employer has discharged the duty properly or not, the decision does imply that there is such duty cast on the employer there is such power vested in the Labour Court. In this connection, it will not be out of place to refer to the decision of the Division Bench of the Madras High Court reported in Venkatayya v. Buckingham and Carnatic Co. Ltd. and another 1963 I L.L.J. 167 from which the appeal by certificate was decided by the Supreme Court in the above

decision. In its said decision the Madras High Court had in terms observed that whether the worker was ill or not is a question of fact which has got to be considered by the management on the basis such evidence as might be produced before them and cannot obviously a matter of conjecture or presumption. These observations of the Madras High Court which in terms lay down an obligation on the management to consider the evidence that might be produced by the employee in support of his explanation of absence, have not been disapproved by the Supreme Court. On the other hand as has been pointed out earlier, the Supreme Court itself scanned the evidence to find out as to whether the employee was in fact ill or not and has impliedly recognised that there is such an obligation cast on the management.

10. The next decision relied upon by Mr. Jahagirdar is National Engineering Industries Ltd. Vs. Hanuman, . The facts in that case were as follows : The employee had taken leave from 3rd April to 9th April, 1965 and in that connection he had produced a certificate from the Employee's State Insurance Dispensary. He should have joined his duty on 10-4-1965 but did not do so. According to the employee had sent another certificate from the said dispensary on 10-4-1965 for further leave and the said, certificate was sent another person. Thereafter he was given a fitness certificate on 19-4-1965. and he was required to join on 20-4-1965. He sought to report for duty on 20-4-1965 but he was not allowed to join on the ground that his services stood terminated under the provisions of Standing Order (i) in S.G. of the Certified Standing Orders applicable to him. As an industrial dispute was pending at the time in which he was concerned, the employee made an application under S. 33A of the Industrial Disputes Act, 1947 for reinstatement. Before the Labour Court, two questions arose for consideration. The first was whether the employee continued ill from 10-4-1965 to 19-4-1965 and whether he had sent a certificate in support of his illness from the dispensary. The second questions was whether the application was maintainable under S. 33A of the Act in view of the alleged automatic termination of the employee's service under the relevant Standing Order. On the first point the Labour Court held that the employee had continued ill from 10-4-1965 to 19-4-1965 and that he had sent the certificate on 10-4-1965. On the second question the Labour Court held that the services of the employee were not automatically terminated under the relevant Standing Order and in any case the employer should have taken the employee's explanation and in view of the fact that the employer had not taken the said explanation, there was denial of natural justice since the services of the employee were terminated without any enquiry. The Labour Court, therefore, granted the application of the employee and ordered his reinstatement with all back wages. The employer thereafter preferred an appeal by special leave to the Supreme Court against the said decision of the Labour Court. Two points were raised before the Supreme Court. On the first point, viz. Whether the employee was ill from 10-4-1965 to 19-4-1965 and whether had sent a certificate, the Supreme Court observed that it was slow to interfere with findings of fact but the findings recorded by the

Labour Court on the said point being perverse, the Court was obliged to interfere with the same, and after re-appreciating the evidence. The Court held that the findings of the Labour Court that the employee was ill during the relevant period and that a certificate was sent to the employer on 10-4-1965 could not be accepted. As regards the second point the Court pointed out that the provisions of the Standing Order in questions, viz., Standing Order No. (i) in S.G. was that a workman who did not report for duty within eight days of the expiry of his leave lost his lien on the appointment. Interpreting the said provisions of the Standing Order, the Court held that when the Standing Order provided that a workman who lost his lien on his appointment in case he did not join his duty within eight days of the expiry of his leave, it obviously meant that his services were automatically terminated on the happening of the contingency. The Court further held that it was not understandable as to how a workman who had lost lien on his appointment could continue in service thereafter. According to the Court when a Standing Order provided that a workman would lose his lien on his appointment if he did not join his duty within certain time after his leave expired, it would only mean that his services were automatically terminated when the contingency happened. The Court thereafter considered various decisions cited before it on the said point and held that the employee's service stood automatically terminated since he did not appear for eight days after the expiry of his leave on 9-4-1965. While concluding the decision, however, the Court referred to a contention raised on behalf of the employee that as per the Standing Orders in question, one of the major misdemeanours was "absence without permission exceeding ten consecutive days" and the Standing Orders provided that an enquiry should be held into the charge of the said misdemeanours before the services of the employee were terminated. In view of the said provisions in the Standing Order, it was contended that a different consequence would follow and there would not be any automatic termination of service. Negating the said contention, the Court observed that the said provision was an alternative provision and the employer was free to resort to any one of the provisions, unless it was shown that resort to one particular provision was mala fide. In the result the Court upheld the contention of the employer on both the points and set aside the order of the Labour Court.

11. An examination of this decision of the Supreme Court shows that on the first question, viz., whether the employee was or was not ill in fact during the relevant period and whether he had sent a certificate in support of his illness or not, the Court reappraised the evidence on record and set aside the finding of the Labour Court on the said question. Since the Court came to the conclusion that the employee was not in fact ill and that he had not sent the medical certificate as claimed by him, there was no valid explanation for his absence without leave or permission. It is in these circumstances that on the second point, the Court held that the Standing Order in question came into operation and as a consequence of its coming into operation, the services of the employee stood terminated automatically. What is important to note for our purpose is that

the Supreme Court has not taken the view in this case that whatever the merits of the explanation offered by the employee, the Standing Order in question comes into operation as a matter of course after the expiry of the eight days and the services of the employee stand terminated. For if that were the view of the Court, the Court would not have examined the validity of the finding given by the Labour Court on the first point and reappraised the evidence on record and set aside the same. The Court would have further disapproved of the action of the Labour Court in framing the first point for determination and investigating the same, since it was unnecessary to do so. Not only the Court did not do so, but before recording its finding on the second point, it satisfied itself that the explanation given by the employee was in fact not valid. It can at once be appreciated that if the ratio of the said decision is as contended on behalf of the petitioners, viz., that there is no obligation on the management to consider the explanation if it is given after the expiry of the eight days, then there was no need to find out whether the explanation was valid or invalid. It appears that such a proposition was not even canvassed before the Supreme Court. Apart from the fact that there is a complete absence of any such statement or observation in the said decision, the entire discussion in the case points to the contrary. In fact it can be said that the Supreme Court has in terms approved of the action of the Labour Court in going into the question about the validity of the explanation. It is only when the Court was satisfied that the finding of the Labour Court on the said question was perverse, that it turned to the other question, viz., the effect of the provisions of the Standing Order. It is because the explanation given by the employee in that case was found to be unsatisfactory that the Court held that the provisions of the Standing Order in question came into operation and as a result, the employee lost his lien on his appointment. In other words, what the Supreme Court has laid down in that decision is that an employee has a right to give his explanation and satisfy the employer about the justness of the same after the expiry of the eight days provided for in the Standing Order. If he gives a satisfactory explanation, then the provisions of the Standing Order will not come into operation and his services will not stand terminated. The Supreme Court has nowhere laid down in the said decision that an employee is precluded from reporting for duty and giving his explanation after the expiry of the eight days provided in the Standing Order. Mr. Jahagirdar relied heavily on this decision in support of his contention that after the expiry of the said eight days, the employee has no right to report for duty and give his explanation, and made serious efforts to persuade us to read in this decision such a preposition. For the reasons indicated earlier, we are unable to agree with Mr. Jahagirdar that the said decision lays down or purports to lay down any such proposition.

12. We may now refer to the decisions of our Court which were cited before us. In *Chipping & Painting Employees' Association Private Limited v. A. T. Zambre*, reported in 70 B.L.R. 506, the facts were that the employee was covered by the provisions of the Dock Labour (Regulation of Employment) Act, 1948, and the

scheme made thereunder providing for listing by the Bombay Dock Labour Board of the workmen doing the work engaged into by the employer. The employee was a listed worker under the said scheme. The employee was alleged to have been injured on 26-6-1965 and he was granted leave on that ground till 12-7-1965. The employee remained absent from 13-7-1965 till 10-12-1965 without submitting any application for extension of leave. He was, therefore, treated by the employer as having abandoned his services in terms of Standing Order No. 19 of the Standing Orders applicable to him. On behalf of the employee, the union made a demand for his reinstatement which was referred for adjudication to the Labour Court. The Labour Court granted the application made by the union and ordered reinstatement of the employee. Against the said order the employer had preferred a writ petition before this Court. The relevant Standing Order No. 19 provided that a worker who fails to report for work for one month or more without prior permission of the Association or fails to report for work within a fortnight of the expiry of leave originally granted or subsequently extended shall be deemed to have voluntarily abandoned his services in the pool and shall not be allowed to resume his "duties." The provisions of the very same Standing Order further provided for an appeal by the employee to the Appellate Authority and it was in the sole discretion of the Appellate Authority to condone the employee's absence on such conditions as it might prescribe. Interpreting the said provisions of the Standing Order and on the facts of that case, the Court held that the injury which was sustained by the employee did not appear to be of a kind which prevented the employee from going to his employers and applying for extension of leave, if it was necessary. According to the Court there was no justification or justifiable cause for the failure of the employee to report for duty. The employee had also not made any application for condonation of delay. The Court also found that in his application to the Labour Court, there were no facts stated from which justifiable cause for failure to report could be inferred. It was also found that the medical certificate had certified that the employee could resume his duties immediately which was on 12-11-1965, and in spite of that the employee did not resume his duties, but reported for duty only on 10-12-1965. The Court, therefore, held that the decision of the Labour Court on the facts was wrong and that in terms of the Standing Order in question the services of the employee had come to an end. It may also be mentioned here that the Labour Court had also gone into the question as to whether there was in fact any intention to abandon the services on the part of the employee. This Court, however, had that in view of the deeming provisions of the Standing Order it was not open for the Labour Court to go into the further question, viz., whether there was in fact an abandonment or the intention to abandon the service on the part of the employee. It is, therefore, clear from the said decision that it is open for an employee to justify his absence when he reports for duty and the employer has to consider the validity or otherwise of the explanation offered by the employee for his absence. It is also clear that the Labour Court has the power to find out as to whether the explanation given by the employee was justifiable or not and whether the employer had considered the same. In fact this Court itself

examined the justifiability of the explanation given by the employee. It is further laid down in this decision that in the absence of a justifiable explanation of the employee, the deeming provisions of the Standing Order in question step in, creating a fiction of law and then it is not open for the Court to examine whether there was or was not an intention to abandon the service. In support of this proposition this Court referred to the Supreme Court decision in *Buckingham and Carnatic Co. v. Venkatayya*, (supra). This decision, therefore, far from supporting the first respondent, reinforces the view that whatever the time when the employee reports for duty and submits his explanation, the same has got to be considered by the employer.

13. In Special Civil Application No. 2466 of 1972 decided on 20-6-1973, the Division Bench consisting of Vaidya and Dudhia, JJ., have also taken a similar view, by relying on the earlier decision of another Division Bench of this Court in Special Civil Application No. 1855 of 1962 decided on 12-1-1963 by Tambe and Palekar, JJ. This Court in that case held that the Standing Orders must be construed liberally and practically and the rules required to be interpreted equitably. In that case the employee had taken leave from 11-5-1970 to 5-6-1970 and proceeded to his native place. He fell sick at his native place and was, therefore, unable to reach his place of duty on 6-6-1970. He sent a telegram on 4-6-1970 informing the company about his inability to reach in time. He also sent a medical certificate requesting the company to extend his leave upto 27-6-1970. He thereafter reported for duty on 27-6-1970 and as directed by the Labour Officer of the company, made an application in writing. The company, however, refused to permit him to resume duty and gave him a letter accordingly. The company relied upon Standing Order No. 12(6) of the Standing Orders applicable to the employees which among other things provided that if an employee remained absent beyond the period of leave originally granted or subsequently extended, he would be liable to lose his lien on his appointment unless he returned within eight days of the expiry of the sanctioned leave and explained to the satisfaction of the authority granting the leave, his inability to resume immediately on the expiry of his leave. The said Standing Order also provided that an employee not reporting for duty within 15 days of the expiry of his leave would be treated as having left the service from the date on which he was due to return for work. The Labour Court before whom the application was filed by the employee for reinstatement took the view that since the employee had not reported within eight days of the expiry of the leave sanctioned to him, there was no question of his giving any explanation after the said eight days. In appeal the Industrial Court set aside the order of the Labour Court relying on the decision of this Court in Special Civil Application No. 1855 of 1962 (supra) which had taken the view that the leave originally granted amounted to and included the time within which an employee should return and explain to the satisfaction of the authority his inability to resume immediately. This Court, therefore, in that case approved the said view taken earlier and rejected the contention of the employer to the contrary.

14. The next and the latest decision of this Court is in Special Civil Application No. 2823 of 1973 decided on 5-2-1974 by a Division Bench of this Court consisting of Deshpande and Dudhia, JJ. In that case the employee had gone on leave from 10-8-1971 to 16-8-1971 as she was pregnant. The delivery took place on 19-8-1971 which resulted in her prolonged illness. She had not recovered from her illness and her services were terminated on 2-10-1971 by the employer on the ground of her overstaying the leave, although she had pleaded illness in her explanation and had tried to explain her failure to get the leave extended. The dispute was referred to the Labour Court on 21-1-1973 and the Labour Court accepting the case of the employer, rejected the case of the employee. In the writ petition filed against the said decision of the Labour Court, this Court in that case referred to the decisions of the Supreme Court in *The Buckingham and Carnatic Co.Ltd. Vs. Venkatiah and Another*, and of this Court in *Chipping and Painting Employers, Association Private Limited Vs. A.T. Zambre and Another*, and held as follows :

"The very fact that liability to lose the lien on overstaying the leave is made defensible by returning to work within eight days and by explaining the delay, itself militates against any absolute liability having been intended under this clause. It is not difficult to conceive of manifold vicissitudes and contingencies in human life beyond the control of the workman which may render overstaying of the leave inevitable even beyond eight days. Rule-makers could not have contemplated the loss of lien on the job of the workman whose overstaying the leave beyond eight days may result from dislocation of communications, or the detention of the workman by the Government for no fault of his. This is only one of the many illustrative contingencies which enables avoiding of the liability of overstaying the leave. Continuous illness furnishes yet another illustration of the valid ground to avoid the liability of which overstaying is likely to expose any workman. It is difficult to believe that authors of the Standing Orders could have intended to furnish overstaying the sick leave as an excuse to terminate the services even when sickness prevents the worker from going to work. Existence of a valid ground thus avoids the loss of lien. This appears to us to be implicit in the scheme of the clause itself. Thus the failure of the workman to report on duty after the expiry of the originally granted leave or his failure even to report within eight days of such expiry makes the worker only "liable to lose his lien on his appointment" and exposes him to the possibility of the loss of the job. This by itself cannot result in his loss of the job or appointment. He would not lose the job if he has valid and unavoidable cause for such late reporting. This appears to us to be the true construction of Clause 13(40) of the Model Standing Order. Looked at from this point of view, it is difficult to hold that the petitioner lost her lien on the appointment merely because she could not join the duty immediately after the expiry of her leave on 17th August, 1971 or within eight days therefrom. The assumption that overstaying the leave itself in the absence of anything more, results in automatic termination of services is wholly unwarranted. As long as the failure to join the duty is attributable to some valid ground or the

other, the petitioner cannot be said to have lost her lien on the appointment within the meaning of this clause. The petitioner's continuous illness did furnish valid explanation. Termination of her services thus is wrong and the order must be held as null and void. We find it difficult to accept the contention of Mr. Shetye to the contrary and uphold the order passed by the Labour Court."

The Court also further held as follows :

"It is necessary to add that the ratio of the three cases cited by Mr. Shetye is inapplicable to the facts of the case for one more reason. In all these cases, it was found as fact that workman concerned did not have any valid ground to overstay. The pleas of the workmen therein about illness were not accepted as true on facts. The question of the effect of the existence of the valid ground for overstaying on the statutory fiction did not fall for consideration at all in these cases. On the contrary effect of such valid ground fell directly for consideration in two unreported judgments of this Court, namely, the judgment dated 20th June, 1973 in Special Civil Application No. 2466 of 1972 (Vaidya & Dudhia, JJ.) and judgment dated 12th January, 1963 in Special Civil Application No. 1855 of 1962 (Tambe and Palekar, JJ.). Relevant clauses of the Standing Orders have been liberally construed therein. We are fortified in our view by the observations made therein."

15. The aforesaid survey of the decision of this Court and of the Supreme Court on the point, shows that even after the expiry of the eight days of the leave originally granted or subsequently extended, the employee has a right to report for duty and offer explanation for his absence without leave or permission. It is obligatory on the employer to consider such explanation and if he is not satisfied with the explanation to indicate to the employee the reasons for which he considers the explanation unsatisfactory and give an opportunity to the employee to prove the same. The employee will then be entitled to prove his explanation by producing the relevant evidence. It is only when the employee fails to justify his absence in spite of the opportunity given to him as aforesaid, that the deeming provisions of the Standing Order in question providing for the legal fiction of the abandonment or automatic termination of service comes into operation, and not till then. It will also be open for an industrial adjudicator to examine the question as to whether an employer has discharged his obligation properly or not. According to us any other view of the Standing Order in question will not only be contrary to the principles of industrial law so far developed, but will be highly unjust and fraught with great mischief. For then it will mean that irrespective of the justifiability of the reasons preventing an employee from reporting for duty within the stipulated period, his services will be terminated on the expiry of the said period. The serious consequence of the loss of job will ensue automatically on account of reasons which may be beyond his control. He will not be entitled to the benefit even of the most elementary safeguard, namely, of the right to be heard, before he is visited with the most drastic penalty. Whereas before he is met with a minor punishment he has the advantage of a full fledged

departmental enquiry, he is to be deemed to have been deprived of even the opportunity of offering his explanation, when his services are to stand terminated. Such an interpretation will make a mockery of the right to the security of employment which the labour has come to acquire over the period of years.

16. It was contended on behalf of the respondent-employers that the view which we are taking will render the limitation of eight days provided in the Standing Order for reporting and giving explanation, nugatory. We, however, do not think so. The said period of limitation does serve a purpose. If the employee fails to justify his absence for the said period of eight days and for each day thereafter, it will not be open for him to plead that he had no intention to abandon the service. The legal fiction of the abandonment of service will thereafter come into operation, irrespective of the intention on the part of the employee.

17. In the present case on the facts which we have stated, it is apparent that the employee had made an application for extension of leave on 14-9-1967, i.e., prior to the day on which the leave originally granted to him was to expire. The said application was accompanied by a medical certificate stating that the employee was suffering from jaundice. The application for extension of leave was for 20 days. In the reply which was given by the company on 22-9-1967, there is no reference to the reason for extension of leave been refused on a totally irrelevant and extraneous ground, viz., shortage of labour, without even referring to the reason for the extension of leave. It is, therefore, clear that the first respondent-Mills has not at all considered the application and therefore, the explanation given by the employee for his absence from duty from 16-9-1967 was not at all accepted. Even after reporting for duty on 6-10-1967, all that was done by the first respondent-Mills was to refuse to accept the employee in service without giving him an opportunity to explain the reasons for his absence from 16-9-1967 onward on which date he was supposed to resume his duty on the expiry of the leave originally granted to him. This is obviously contrary to the principles of natural justice. The action of the employer treating the services of the employee as automatically terminated is, therefore, clearly bad in law in view of the legal position which we have stated hereinabove. The Industrial Court rested its decision solely on the provisions of Standing Order No. 11 which it has wrongly construed to mean that the employee has no right to report for duty and give his explanation after the expiry of 8 days of the period of leave originally granted. The impugned order of the Industrial Court will have, therefore, to be set aside.

18. Mr. Jahagirdar, however, has pointed out that the Industrial Court had considered only one question, viz., as to whether the services of the employee had come to an end automatically as a result of the provisions of the said Standing Order, and in view of its interpretation that it was not open for the employee to report for duty and give an explanation after the said period of eight days, it had set aside the order of the Labour Court, without going into the

question as to whether in fact the employee was ill or not during the relevant period. Mr. Jahagirdar, therefore, contends that the matter will have to be remanded to the Industrial Court for a decision of the Industrial Court on the said question as to whether the employee was or was not in fact ill during the relevant period. We find that there is considerable force in this contention. Since the Industrial Court was an appellate Court, it had powers to review the entire evidence which was let before the Labour Court and to come to its own conclusion on all question of facts. The question as to whether the employee was or was not ill is a question of fact and since the Industrial Court has not given its decision on the said point, the matter will have to be remanded to the Industrial Court for a decision on the said question. Mr. Shetty who appears for the petitioner in this petition could not dispute this position.

19. We also find from the decision of the Labour Court that while making the order of reinstatement, the Labour Court has also granted full back wages to the employee from 6-10-1967 till reinstatement. It was pointed out to us by Mr. Jahagirdar that in his cross-examination the employee had admitted that he had not tried to seek employment anywhere after he returned from his native place. The Labour Court seems to have completely missed this part of the evidence and without taking into consideration the effect of this admission on the part of the employee and without discussing the evidence led by the parties in that behalf, has made the said order with regard to back wages. Since we are remanding the matter to the Industrial Court for considering the question as to whether in fact the employee was or was not ill during the relevant period, the Industrial Court will also now consider afresh the question as to whether in view of this evidence the employee was entitled to any back wages from 6-10-1967 till 24-4-1969 which is the date on which the Labour Court made its order. We had during the course of the proceedings before us required the petitioner-employee to file his affidavit stating the period for which he was employed from 24-4-1969 to this day and the earnings which he had made so far. The petitioner filed his affidavit in that behalf on 12-3-1974 and has given particulars of his employment and unemployment during the relevant period. In view of the fact that we are remanding this matter for further enquiry to the Industrial Court, we do not propose to go into this question here. It will now be open for both the parties to lead evidence with regard to the question as to whether the employee is entitled to back wages and to what extent, in the light of our decision in Special Civil Application No. 2823 of 1973 decided on 5-2-1974. The Industrial Court may take evidence itself or send the matter back to the Labour Court for investigation in this behalf. We, however, make it clear that on this question both the parties will be at liberty to lead whatever evidence they want to execute before the relevant forum which might ultimately decide this question.

20. In the result we set aside the impugned order of the Industrial Court dated 24-3-1970 and remand the matter back for re-consideration in the light of what we have stated earlier. In the circumstances of the case, there will be no order as to costs.