

**(2010) 09 BOM CK 0019**  
**In the Bombay High Court**  
**Case No : Writ Petition No. 760 of 2009**

Pralhad Kishor Bondre

APPELLANT

Vs

Ramkrishna Shikshan Prasarak Sansthan, The Head Master,  
Swami Vivekanand Vidyalaya and The Education Officer, Zilla  
Parishad (Secondary)

RESPONDENT

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**Date of Decision : 20-09-2010**

**Acts Referred:**

Constitution of India, 1950 — Article 226, 227

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,  
1977 — Section 9

Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule  
28(5), 29, 36, 37

**Citation :** (2011) 3 ALLMR 696 : (2011) 1 BomCR 23 : (2011) 1 MhLj 166

**Hon'ble Judges :** R.K. Deshpande, J

**Bench :** Single Bench

**Advocate :** M.I. Dhatrak, for the Appellant; Saoji, h/f., Anand Parchure, for  
Respondent Nos. 1 and 2 and S.S. Doifode, AGP, for the Respondent

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## Judgement

R.K. Deshpande, J.—This petition is preferred by the employee challenging the judgment and order dated 17-11-2008 passed by the School Tribunal, Amravati, dismissing Appeal No. 32 of 2008 filed by the petitioner challenging the termination of his services with effect from 29-5-2008.

2. The facts, which led to filing of this petition, are as under:

The petitioner was appointed as Junior Clerk in the School run by respondent No. 1 in the year 1984. He was promoted as Senior Clerk on 8-8-1996. The petitioner was absent from duty from 3-5-2007 to 24-6-2007. On 25-6-2007, the petitioner went to join the duty; however, the Management did not permit him to sign the muster roll. He, therefore, preferred Appeal No. 32 of 2008 before the School Tribunal, Amravati, u/s 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short, "the MEPS Act") along with Misc. Application No. 3 of 2008 challenging otherwise termination of his

services with effect from 25-6-2007 and seeking condonation of delay in filing the appeal.

3. In response to the aforesaid appeal and misc. application, the Management appeared before the School Tribunal and submitted that the services of the petitioner were not terminated. On the other hand, a notice dated 25-6-2007 was issued to the petitioner calling upon him to submit his explanation and directing him to resume the duty. Thereafter on 2-6-2007 and 8-7-2007, the show cause notices were issued to the petitioner, to which he did not reply, and hence again the 3 show cause notice was issued to the petitioner on 9-8-2007. Instead of joining the duty, the petitioner approached the School Tribunal, although he was served with the statement of allegations dated 17-10-2007, to which he had given reply on 29-10-2007. It was further stated before the Tribunal that the Management in its meeting held on 10-11-2007 decided to hold an enquiry against the petitioner. Thereafter, the enquiry was to be initiated and conducted in accordance with law. In view of this, the Tribunal passed an order dismissing the application for condonation of delay filed by the petitioner by holding that no cause of action had arisen for the petitioner to file an appeal as his services were not terminated by the Management.

4. The Management sought permission of the Education Officer to place the petitioner under suspension vide its communication dated 29-8-2007. The Education Officer (Secondary), by his letter dated 6-9-2007, directed the Block Education Officer to conduct an enquiry in respect of the suspension of the petitioner. The Block Education Officer, after conducting an enquiry, submitted his report on 17-9-2007, stating that the petitioner was ill, which fact was established from the certificate produced by the petitioner, and, therefore, taking a sympathetic view, the petitioner should be given one more opportunity. Thereafter, the Extension Officer (Education) also submitted his report to the Education Officer (Secondary) on 28-1-2008, pursuant to the instructions received by him, stating that it was the first occasion when the petitioner was absent without permission from 3-5-2007 and prior to that he had never committed such an act, and there were no complaints against him and, therefore, taking a sympathetic view of the matter, the petitioner should be permitted to be continued in service.

5. The Management thereafter constituted an Enquiry Committee consisting of three persons, namely Shri U.S. Chavan, who was the convenor of the Enquiry Committee; Shri V.T. Panchal, State Awardee Teacher; and Shri S.P. Sapkal, who was the representative of the petitioner. The meetings of the Enquiry Committee were held on several dates. According to the Management, the representative of the petitioner was absent on several occasions. The Management examined seven witnesses. Although the petitioner cross-examined the witnesses of the Management, he did not enter the witness box nor examined any witness. The two members, namely the convenor of the Enquiry Committee and the State Awardee Teacher, submitted their joint report on 26-5-2008, whereas the

representative of the petitioner submitted his report on 29-5-2008. The Management terminated the services of the petitioner on 29-5-2008 itself, which was the subject-matter of challenge in Appeal No. 32 of 2008 filed by the petitioner before the School Tribunal, Amravati, u/s 9 of the MEPS Act.

6. The petitioner was absent from duty for 54 days from 3-5-2007 to 24-6-2007. Hence, the following charges were levelled against the petitioner by the Management:

(a) The petitioner was willfully and persistently negligent in discharge of his duty as Clerk.

(b) The petitioner was absent from duty from 3-5-2007 without applying any kind of leave.

(c) The petitioner was not residing at the Head Quarter causing inconvenience to the administration and the School.

The stand of the petitioner in response to the charges was that prior to 3-5-2007, his brother, namely Ramprasad Kisan Bondre died in an accident and thereafter his father suffered a paralysis stroke and hence he was admitted in the hospital in Buldana. Similarly, on 2/3-6-2007, the petitioner was admitted in the hospital for a treatment for jaundice. Thereafter although he went to join the duty on 25-6-2007, he was prevented from signing the muster roll. In response to the charge of absence from Head Quarter, the stand of the petitioner was that he was residing in the rented house of one Shri Bhagwan Kisan Aghav at Sonoshi, Taluq Sindkhedraja, District Buldana.

7. The enquiry report submitted by the two members of the Enquiry Committee on 26-5-2008 recorded the finding that the petitioner was guilty of the charges levelled against him. It was further recorded that the petitioner in fact admitted that he was absent from duty for 54 days, i.e. from 3-5-2007 to 24-6-2007 without prior permission. It was recorded that the explanation given by the petitioner was totally false and he was not found to be admitted in the hospital. It was also recorded that the petitioner was not found to be residing in the rented house of Shri Bhagwan Kisan Aghav at Sonoshi. Basically, the said findings were recorded, as the petitioner had failed to examine any witness to substantiate his defence. The petitioner had neither examined the doctor, nor produced the certificate showing that he was ill. He had also not produced any rent receipt showing that he used to live in the rented premises.

8. The third member of the Enquiry Committee submitted his report on 29-5-2008 holding that the charges against the petitioner were not established. It was the finding recorded by the third member of the Enquiry Committee - Shri S.P. Sapkal, who was the representative of the petitioner, that the appointment of one Shri B.H. Jadhav, who recorded the proceedings of the Enquiry Committee, was not contemplated by any Rules, and that he had not recorded the statements given by the witnesses correctly, more particularly, in the cross-

examination. The entire thrust of the report is that the recording of the proceedings of the Enquiry Committee was not done correctly by said Shri Jadhav, who, according to the representative of the petitioner, was the brother-in-law of the President of the Society, against whom certain allegations were levelled. The Management seems to have terminated the services of the petitioner on the very same day, i.e. on 29-5-2008, on which the representative of the petitioner submitted his report.

9. Before the School Tribunal, in Appeal No. 32 of 2008 filed by the petitioner challenging the order of termination of his services dated 29-5-2008, there was no oral evidence led by any of the parties. The Tribunal has recorded the finding that the petitioner had failed to prove that the Management had initiated the enquiry and had constituted the Enquiry Committee in contravention of Rule 36 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (for short, "the MEPS Rules"). It was held that the Enquiry Committee was constituted in accordance with Rule 36 of the MEPS Rules, as it consisted of Shri U.S. Chavan, who was the convenor of the Enquiry Committee/representative of the Management; Shri V.T. Panchal, who was the State Award Teacher; and Shri S.P. Sapkal, who was the representative of the petitioner, and the proceedings of the Enquiry Committee were signed by all the members of the Committee as well as by the petitioner. The Tribunal has further recorded the finding that the petitioner had failed to establish that the enquiry was not conducted in accordance with Rule 37 of the MEPS Rules. It was held that the enquiry was conducted fairly and as per the procedure prescribed by Rule 37 of the MEPS Rules. It was further held that the petitioner had failed to establish that the findings recorded by the two members of the Enquiry Committee were not based upon relevant considerations. Similarly, the finding was also recorded that the petitioner had failed to prove that the impugned order of termination was in any manner illegal or void.

10. On the aspect of proportionality of punishment, the Tribunal has observed that the Court would not normally interfere with the findings regarding guilt of the employee and also that of the punishment imposed by the disciplinary authority on the misplaced ground of sympathy or mercy. It was also observed that the two members of the Enquiry Committee held the charges proved against the petitioner to be very serious in nature and taking into consideration the problems faced by the Management, the punishment of termination of services of the petitioner proposed by the Enquiry Committee was rightly accepted by the Management.

11. Shri Dhatrik, the learned Counsel appearing for the petitioner, has essentially urged a point of disproportionality of the punishment. He urged that keeping in view the reports submitted by the two authorities, namely, the Block Education Officer on 17-6-2007, and the Extension Officer (Education) on 28-1-2008, it was established that the petitioner was absent from duty for genuine reasons for 54 days from 3-5-2007 to 24-6-2007 and for that purpose,

imposition of the punishment of termination of services was shocking. He relied upon the provisions of Rule 28(5)(c) of the MEPS Rules and the explanation below the same in Clause (c) regarding willful and persistent negligence of duty and the provisions of Rule 29 of the said Rules regarding penalty. He urged that even assuming that the petitioner was willfully and persistently negligent in duty, as contemplated by Rule 28 of the MEPS Rules, the Management is given choice to impose any of the five penalties specified in Rule 29. According to him, the termination of services is the last option in order of preferences given in Rule 29 and the same has to be resorted to in exceptional circumstances. He submits that the Management did not apply its mind to the order of preferences. He, therefore, submits that keeping in view the aforesaid two reports submitted by the Block Education Officer and the Extension Officer (Education), it can be said that the punishment of termination of services was disproportionate to the act of misconduct. According to him, the petitioner has rendered about 22 years of unblemished service, which should have been given due weightage by the Management as well as by the School Tribunal. He, therefore, prays that the punishment of termination of services imposed upon the petitioner is liable to be set aside and the case of the petitioner shall be considered for some lesser punishment, as prescribed in Items (1) to (4) of Rule 29 of the MEPS Rules.

12. Shri Saoji, learned Counsel appearing for the Management, has, on the other hand, urged that the Management as well as the School Tribunal have considered the gravity of misconduct and it was found that the punishment of termination of services was the only proportionate punishment. According to him, the discretion exercised by the Management was based upon the relevant considerations and simply because the order of punishment passed does not indicate any consideration about the selection of punishment, that by itself would not vitiate the said order. He submits that the charges levelled against the petitioner are established on the admission given by the petitioner himself and the explanation furnished by him was found to be totally false. According to him, the Management is competent to impose any of the five punishments specified in Rule 29 of the MEPS Rules and it is the choice of the Management - looking to the gravity of misconduct - to decide which punishment should be chosen for being imposed upon the petitioner. According to him, there is nothing shocking in the punishment of termination of services imposed by the Management, keeping in view the facts and circumstances of the case.

13. The charge of misconduct alleged against the petitioner has been established in the enquiry conducted by the Management and it is on the basis of the admission given by the petitioner that he was absent from duty from 3-5-2007 to 24-6-2007 without any prior intimation or permission. The explanation furnished by the petitioner for his absence for 54 days has also not been found to be correct. The Tribunal has scrutinized the evidence and has recorded the finding that there was no illegality either in the constitution of the Enquiry Committee or in conducting the proceedings of the Committee. The learned Counsel for the petitioner is unable to point out any perversity in recording such a finding.

Hence, the same is treated as final and no interference is called for by this Court in exercise of writ jurisdiction under Articles 226 and 227 of the Constitution of India.

14. On the question of proportionality of punishment, Shri Dhatrak, learned Counsel appearing for the petitioner, has relied on the decision of Delhi High Court in Bhagirath Singh (Ex. Const. Driver) v. Union of India, reported in 2005 III CLR 466, and the decisions of the Apex Court in Mavji C. Lakum v. Central Bank of India, reported in 2008 III CLR 73, and Chairman-cum-Managing Director, Coal India Limited and Anr. v. Mukul Kumar Choudhuri and Ors. reported in 2009 III CLR 645. As against this, Shri Saoji, learned Counsel appearing for the Management, has relied upon the decisions of the Apex Court in Mithilesh Singh Vs. Union of India (UOI) and Others, , and Tushar D. Bhatt Vs. State of Gujarat and Another, .

15. It is no doubt true that an employee is liable to be punished for the act of willful and persistent negligence of duty, as contemplated by Rule 28(5)(c) of the MEPS Rules. It is also not in dispute that the term "willful negligence of duty" has been defined in explanation (c)(ii) of Sub-rule (5) of Rule 28 of the MEPS Rules to mean persistent absence from duty without previous permission. The petitioner was absent from duty continuously from 3-5-2007 to 24-6-2007 without prior permission. Hence, it could be an act of persistent absence from duty without prior permission. Rule 29 of the MEPS Rules, which deals with "penalties", is relevant and the same is reproduced below:

Penalties: Without prejudice to the provisions of these rules, any employee guilty of misconduct, moral turpitude, wilful and persistent neglect of duty and incompetence, as specified in Rule 28, shall be liable for any of the following penalties, namely:

- (1) warning, reprimand or censure.
- (2) withholding of an increment for a period not exceeding one year.
- (3) recovery from pay or from some other amount as may be due to him of the whole or part of any pecuniary loss caused to the Institution by negligence or breach of orders.
- (4) reduction in rank.
- (5) termination of service.

Provided that, an employee of a private school aggrieved with decision of imposing a minor penalty as specified in Clause (1) of Rule 31 may prefer an appeal to the Deputy Director of the region concerned within 45 days from the date of receipt of the order of punishment.

As per the aforesaid provision, an employee, who is found guilty of willful and persistent neglect of duty, as specified in Rule 28, shall be liable for any of the penalties specified in Items (1) to (5) of Rule 29 reproduced above. Thus, it is for

the Management to choose any of the penalties specified in Items (1) to (5) of Rule 29 for the act of willful and persistent negligence of duty which is proved. The law on the point of selection of penalty for imposition needs to be seen.

16. The Apex Court in *Chairman-cum-Managing Director, Coal India Limited and Anr. v. Mukul Kumar Choudhuri*, cited *supra*, has discussed the principles of proportionality in paras 18 to 22, which are reproduced below:

18. "Proportionality" is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise-the elaboration of a rule of permissible priorities.

19. de Smith states that "proportionality" involves "balancing test" and "necessity test". Whereas the former (balancing test) permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter (necessity test) requires infringement of human rights to the least restrictive alternative. [Judicial Review of Administrative Action (1995), pp. 601-05, para 13.085; see also Wade & Forsyth: Administrative Law (2005), p.366].

20. In Halsbury's Laws of England (4th Edn.), Reissue, Vol.1(1), pp.144-45, para 78, it is stated:

The court will quash exercise of discretionary powers in which there is no reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. The principle of proportionality is well established in European law, and will be applied by English courts where European law is enforceable in the domestic courts. The principle of proportionality is still at a stage of development in English law, lack of proportionality is not usually treated as a separate ground for review in English law, but is regarded as one indication of manifest unreasonableness.

21. The doctrine has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without abuse of discretion. There can be no "pick and choose", selective applicability of the government norms or unfairness, arbitrariness or unreasonableness. It is not permissible to use a "sledgehammer to crack a nut". As has been said many a time; "where paring knife suffices, battle axe is precluded.

22. In the celebrated decision of *Council of Civil Service union v. Minister for Civil Service* (1985) AC 374: (1984) 3 WLR 1174: (1984) 3 All ER 935 (HL) Lord

Diplock proclaimed: (All ER p. 950h-j)

Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case-by-case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality"....

(emphasis supplied)

It has been held that there can be no "pick and choose" selective applicability of the government norms or unfairness, arbitrariness or unreasonableness. It has been further held that it is not permissible to use a "sledgehammer to crack a nut". The "proportionality" involves "balancing test" and "necessity test". The "balancing test" permits scrutiny of excessive onerous penalties or infringement of rights of interest and a manifest imbalance of relevant considerations. The "necessity test" requires infringement of human rights to the least restrictive alternative. It has further been held that the court will quash the exercise of discretionary powers in which there is no reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct.

17. A Judicial review of punishment imposed, is held permissible on the broad grounds of (i) illegality, (ii) irrationality, and (iii) procedural impropriety, in a decision of the Apex Court in *Tata Cellular Vs. Union of India*, . It has further been held that it does not rule out addition of further grounds in course of time. An "illegality" implies violation of an express provision of law or the principles of natural justice or the decision-making authority exceeding its powers. It also means that the decision-maker must understand correctly the law that regulates his decision-making power. An "irrationality" implies absurdity, violence of commonsense, senseless, illogical, unreasonable and disproportionate. It applies to a decision, which is so outrageous in its defiance of logic or of accepted moral standards that no reasonable or sensible person, who had applied his mind on the question to be decided, could have arrived at. Lastly, the "procedural impropriety" means the defects resulting in non-application of mind to the relevant factors and/or considering irrelevant factors having bearing on the manner in which a decision is taken or exercise of power for any collateral purpose or assailing a decision-making process.

18. The Apex Court in its decision in *Chairman cum Managing Director, Coal India Limited and Another Vs. Mukul Kumar Choudhuri and Others*, , was dealing with the punishment of dismissal from service on the ground of unauthorized absence from duty for more than six months. The misconduct was held to be proved and

the question of imposition of punishment was considered and it was held that the punishment of removal from service was not only unduly harsh but grossly in excess to the allegations. The relevant portion contained in paras 19, 20 and 21 of the said judgment is reproduced below:

19. The doctrine of proportionality is, thus, well-recognized concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain and sole power of the decision-maker to quantify punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a manner which is out of proportion to the fault. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review.

20. One of the tests to be applied while dealing with the question of quantum of punishment would be: would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment.

21. In a case like the present one where the misconduct of the delinquent was unauthorized absence from duty for six months but upon being charged of such misconduct, he fairly admitted his guilt and explained the reasons for his absence by stating that he did not have any intention nor desired to disobey the order of higher authority or violate any of the Company's rules and regulations but the reason was purely personal and beyond his control and, as a matter of fact, he sent his resignation which was not accepted, the order of removal cannot be held to be justified, since in our judgment, no reasonable employer would have imposed extreme punishment of removal in like circumstances. The punishment is not only unduly harsh but grossly in excess to the allegations.

19. Keeping in view the aforesaid principles, the action of imposing punishment of termination of services taken by the Management in the present case, needs to be scrutinized. Rule 29 of the MEPS Rules, reproduced above, prescribes different kinds of penalties for various acts of misconduct enumerated therein. The penalties in Clauses (1) to (5) of Rule 29 represent the order of preference or priorities of penalties. No doubt, it is a right of employer to select any of the punishments in Clauses (1) to (5) for imposition. However, there can be no arbitrary or unreasonable "pick and choose" method for selection of penalty/penalties at the whims and fancies of the employer. The selection has to be objective, i.e. to genuinely punish an employee in proportion to the act of misconduct proved against him, and it must subjectively satisfy the conscience of a reasonable and prudent employer. The process of subjective satisfaction should be to strike the balance of relevant considerations to see that the infringement of human rights is to the least restricted alternatives. It must be seen that the irrelevant factors are ignored and there is a reasonable nexus between the

objective, which is sought to be achieved and the means used to that end. The very essence of decision-making consists of the attribution of relative importance to the factors and consideration of the case. As has been said by the Apex Court, using a sledgehammer to crack a nut would be arbitrary, unreasonable and wholly out of proportion, violating the Wednesbury's principle of proportionality or reasonableness.

20. To strike the balance between the misconduct and the penalty, the gravity or rigour of misconduct has to be tested on each of the items of penalties specified in the order of preferences in Clauses (1) to (5) of Rule 29 of the MEPS Rules. The employer has to proceed in the order of preference of penalties till it is found that the rigour or gravity of misconduct proved, is satisfied. Once the employer reaches to such an item of satisfaction, he has to stop at that point. To proceed beyond that to impose more severe punishment, would create an imbalance between the misconduct and the penalty and may amount in itself to conclusive evidence of vindictive or bias attitude of employer. In that event, in the absence of valid reasons, the punishment imposed would become vulnerable, shocking the conscience of the Court. Therefore, the fact that 19 the employer has adopted such process of subjective satisfaction should also be borne out from the record showing application of mind to the relevant factors, like nature of duty, measure, magnitude and degree of misconduct and ignorance of irrelevant factors, in the form of reasons to impose such punishment/penalty. This would enable the Court to judge that the punishment imposed is not vitiated on the ground of procedural impropriety and that the employer has acted fairly to choose the penalty genuinely and not for any collateral purpose of getting rid of an employee under the garb of imposing punishment. This is an in-built requirement of Rule 29 of the MEPS Rules.

21. The charge against the petitioner was of willful and persistent negligence in discharge of his duties as a Clerk for 54 days from 3-5-2007 to 24-6-2007. The petitioner was found to be absent during the said period without applying for any kind of leave. It was found that the petitioner was not residing at the headquarter, causing inconvenience to the administration and the School. It is not in dispute that the petitioner had rendered total 22 years of service when the punishment was imposed upon him. It is also not in dispute that he had rendered totally unblemished service and this was his first instance when he was charged for the misconduct. From the enquiry report and the findings of the Tribunal, it is apparent that the petitioner failed to lead any evidence to substantiate his explanation. The material available on record, including the reports of the Block Education Officer and the Extension Officer (Education), indicate that there can be two views in respect of acceptance of the explanation furnished by the petitioner. What could be the intention of the petitioner in committing the act of misconduct alleged? Can it be to lose a job, which he has unblemishly rendered for 20 22 years? Without anything more, can it be said that he did it with deliberate intention to cause inconvenience to his employer? The answer would obviously be in the negative. Simply because an employee has failed to establish

his defence before the Enquiry Committee, that by itself is not enough to show his intention to cause inconvenience to his employer. The petitioner has candidly admitted that there was no mental stability during the period because of some family/domestic problems. The employer is expected to take into consideration all these factors. However, there is nothing on record of the employer or of the Tribunal to show that such consideration has been there. For all such reasons, I find that imposition of punishment of termination of service seems to be totally irrational and unduly harsh, as there subsists no relationship between the object of imposing punishment and the means used for that purpose. It is in ignorance of vital aspects and no reasonable employer would have imposed extreme punishment of termination in like circumstances. The punishment of termination, therefore, cannot be said to be proportionate to the gravity of misconduct and it shocks the conscience of the Court. The order of imposing punishment of termination passed by the Management and confirmed by the School Tribunal cannot, therefore, be sustained.

22. Once it is held that the punishment of termination is found to be disproportionate to the gravity of misconduct proved, then the course that should be adopted by this Court is to set aside the order of punishment and to remand the matter back to the disciplinary authority for considering any other punishment lesser than that of termination from service. Rule 29 of the MEPS Rules, quoted above, requires the 21 authorities to apply their mind to various kinds of punishments mentioned therein and to select any one of those punishments after considering the gravity of misconduct. This has to be done by keeping the observations made in this judgment. The right of the Management to choose or select appropriate punishment to be imposed cannot be taken away and the matter will have to be left to the discretion of the disciplinary authority to decide as to what lesser kind of punishment it should impose upon the petitioner - except that of termination from service.

23. The learned Counsel for the respondent-Management relied upon the decision of the Apex Court in *Mithilesh Singh Vs. Union of India (UOI) and Others*, . The gravamen of charge in the said case against an employee was that he had left duties as well as Taran Taran Station without permission. He returned after 25 days, for which he had asked for leave. On misconduct being found to be proved, he was dismissed from service. The question was whether the punishment of dismissal imposed upon him was disproportionate to the charge. In para 10 of the said judgment, the Apex Court noted that from the factual position, which is undisputed that the appellant was posted at Taran Taran in Punjab, a terrorist-affected area and was, at the relevant time, working in the Railway Protection Special Force. Any act of indiscipline of such an employee cannot be lightly taken. It was held that no mitigating circumstance has been placed by the appellant to show as to how the punishment should be characterized as disproportionate and/or shocking. On the contrary, as established in the disciplinary proceedings, it was held that the appellant left the arms and ammunition 22 unguarded and not in any proper custody and this

aggravated the aberrations. In view of this, it was held that the order of removal from service cannot be faulted with. From this judgment, it seems that the nature of duty and the nature of charge also plays an important role in the matter of decision on the question of disproportionate punishment. Looking to the nature of duty and the charge proved against an employee before the Apex Court, the punishment of removal from service was not found to be disproportionate with the act of misconduct.

24. The ratio of the said judgment in Mithilesh Singh would not apply to the facts of the present case and the decision of the Apex Court in Chairman-cum-Managing Director, Coal India Limited and Anr. v. Mukul Kumar Choudhuri and Ors., which has been cited earlier, governs the question of disproportionate punishment. It is not the law laid down in Mithilesh Singh's case that absence from duty is always a serious misconduct, irrespective of nature of duty and has to be treated as misconduct always resulting in termination from service. The employee in the present case was a Clerk. No doubt, some inconvenience might have been caused to the institution due to his absence from duty and from headquarter. However, that by itself is not enough to impose the punishment of dismissal from service. Similarly in another decision of the Apex Court in Tushar D. Bhatt Vs. State of Gujarat and Another, , it was a case of avoidance to join the place of transfer and it was not a case of simpliciter absence from duty. Hence, the said judgment is also not applicable to the facts of the present case.

25. In the result, the instant writ petition partly succeeds. The 23 judgment and order passed by the School Tribunal, Amravati, on 17-11-2008 in Appeal No. 32 of 2008, stands modified as under:

The order of termination dated 29-5-2008 passed by the Management is hereby quashed and set aside. The petitioner is directed to be reinstated in service with continuity in service, without any back wages; by the Management. The matter is sent back to the Management for deciding the question of imposing any of the penalties, as specified under Clauses (1) to (4) of Rule 29 of the MEPS Rules within a period of two months from the date of passing of this judgment. Needless to say that before passing the order of punishment, the petitioner shall be given an opportunity of hearing in the matter.

26. Rule is made absolute in above terms. No order as to costs.

27. The learned Counsel appearing for the respondent/Management seeks stay of the judgment passed by this Court for a period of four weeks so as to enable the respondent/Management to prefer an appeal in accordance with law.

The prayer is opposed by the learned Counsel for the petitioner.

In view of the findings recorded in this judgment, I do not find any reason to stay the judgment passed by this Court.

The prayer for stay is, therefore, rejected.