

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 962 OF 2022

**SANTOSH
SUBHASH
KULKARNI**

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Date: 2023.07.27
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Rajaram Balu More
Age 57, C/o BEST Kamgar Sanghatana,
CITU Centre, Bhaktawar Building, Second
Floor, Andheri (W), Mumbai – 400 058 ...Petitioner

Versus

General Manager, BEST Undertaking
BEST Bhavan, BEST Marg,
Mumbai – 400 001 ...Respondent

Mr. Gayatri Singh, Senior Advocate, a/w Deepali Kasul, i/b
Veda Thakur, for the Petitioner.

Mr. Saurabh Pakale, a/w Sumit Palsule-Desai, i/b M. V. Kini
and Co., for the Respondent.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 11th APRIL, 2023

PRONOUNCED ON: 26th JULY, 2023

JUDGMENT:-

1. Rule. Rule made returnable forthwith and, with the consent of the learned Counsel for the parties, heard finally.

2. By this petition, the petitioner takes exception to a judgment and order dated 27th September, 2018 passed by the learned Member, Industrial Court at Mumbai in Appeal (IC) No.27 of 2017, whereby the appeal preferred by the respondent – employer came to be allowed by setting aside the judgment and order dated 18th January, 2017, passed by the learned Judge,

Labour Court, Mumbai, in Application (BIR) – M No.69 of 2011 under which the petitioner had been directed to be reinstated in service with continuity of service but without backwages.

3. The petition arises in the backdrop of the following facts.

(a) The petitioner was employed with the BEST Undertaking, the respondent, as a Driver, since the year 1994. On 24th January, 2011 the respondent served a charge-sheet alleging misconduct under Section 20(f) of the Certified Standing Order. It was, *inter alia*, alleged that the petitioner had remained absent without prior authorization for a total period of 51 days during the period January, 2010 to December, 2010. Out of which, 25 days absence was without any application for leave. For the rest period, though the applications were preferred they were rejected as no leave was available to the credit of the account of the petitioner.

(b) In the Disciplinary Enquiry, the employer examined its witness. The petitioner also adduced his evidence. After the conclusion of the enquiry, the Enquiry Officer found the petitioner guilty of the misconduct within the meaning of Clause 20(f) of the Standing Order i.e. habitual absence without leave or absent without leave for more than 15 consecutive days. By

an order dated 15th May, 2011 the petitioner came to be dismissed from service.

(c) The petitioner preferred appeal before the Departmental Authorities. The First and Second Appellate Authorities dismissed the appeals by order dated 13th May, 2011 and 31st May, 2011, respectively.

4. Being aggrieved, the petitioner preferred Application (BIR) M No.69 of 2011 under Sections 78 and 79 read with Section 42(1) of the Maharashtra Industrial Relations Act, 1946 (“the Act, 1946”) assailing the legality and propriety of the order of dismissal passed by the respondent – employer.

5. The learned Judge, Labour Court, by an order dated 7th July, 2012 found the enquiry conducted against the petitioner fair and proper and the findings recorded by the Enquiry Officer not perverse.

6. The petitioner carried out the matter in appeal before the Industrial Court in Appeal (IC) No.12 of 2013. The learned President, Industrial Court, was persuaded to interfere with the aforesaid findings recorded on the preliminary issues by the learned Judge, Labour Court. The learned President, Industrial Court, was of the view that the Labour Court had not properly appreciated the material on record and thus the application was

remitted back to the Labour Court with a direction to decide the preliminary issues afresh in accordance with law.

7. Post remand, the petitioner examined himself and the Union Representative, who defended him in the departmental enquiry. After appraisal of the evidence, the learned Judge, Labour Court, by an order dated 20th October, 2016, returned the findings that the enquiry conducted against the petitioner was fair and proper and the findings not perverse. The petitioner did not assail the aforesaid findings and thus the Labour Court proceeded to consider the aspect of proportionality of the punishment.

8. By a judgment and order dated 18th January, 2017 the Labour Court found the punishment of dismissal from service shockingly disproportionate. The learned Judge, Labour Court, was of the view that the period of absenteeism was not too long and the past service record of the petitioner was not adverse. The learned Judge, Labour Court, thus declared the order of dismissal illegal, quashed and set aside the same and directed the respondent to reinstate the petitioner on the post of Driver with continuity of service but without backwages.

9. The respondent carried the matter in appeal before the Industrial Court in Appeal (IC) No.27 of 2017. By the impugned

judgment and order, the learned Member, Industrial Court, was persuaded to allow the appeal. The learned Member, Industrial Court, was of the view that the fact that the petitioner had been, in the past, found guilty of identical misconduct of absenteeism on five occasions and saddled with penalties, was lightly brushed aside by the learned Judge, Labour Court. Nor were there circumstances to arrive at the conclusion that the punishment was shockingly disproportionate. Thus, the Labour Court could not have interfered with the punishment imposed by the employer, reasoned learned Member, Industrial Court. Resultantly, the punishment of dismissal from service imposed by the employer came to be restored.

10. Being aggrieved, the petitioner has invoked writ jurisdiction.

11. I have heard Ms. Gayatri Singh, the learned Senior Advocate for the petitioner and Mr. Pakale, the learned Counsel for the respondent, at some length. With the assistance of the learned Counsel for the parties, I have perused the material on record including the orders passed by the Disciplinary Authority, Appellate Authorities and the Courts below.

12. Ms. Singh mounted a multi-fold challenge to the impugned order. Firstly, the learned Member, Industrial Court, according to Ms. Singh, was in error in interfering with the order of punishment. Amplifying the submission, Ms. Singh would urge that on the own showing of the employer, the unauthorized absence was for a period of 25 days only. Moreover, the alleged unauthorised absence of 51 days was computed by the authorities by lumping the distinct periods together. Secondly, the enquiry itself was vitiated as the enquiry officer, who conduct the enquiry and returned the finding of misconduct, had himself rejected the application for sick leave. Thus, there was a clear bias which vitiated the findings of the enquiry officer. Thirdly, in view of the provisions contained in Leave Regulations, the grant of leave, except the sick leave, was in the discretion of the Competent Authority. In the case at hand, the application for sick leave was rejected on an unsustainable ground.

13. Lastly, according to Ms. Singh, the punishment of dismissal from service can only be said to be shockingly disproportionate, by any standard. The extenuating circumstances, which were brought on the record were not at all considered by the Disciplinary Authority as well as the learned

Member, Industrial Court. The situation in life, brought about by the terminal illness of petitioner's daughter and the mental illness of his son was not at all factored in. In the totality of the circumstances, the punishment of dismissal from service is *ex facie* disproportionate to the gravity of the misconduct and, therefore, the impugned order deserves to be interfered with, urged Ms. Singh.

14. In contrast, Mr. Pakale submitted that the learned Member, Industrial Court, was wholly justified in interfering with the order passed by the Labour Court as latter had failed to consider the past service record of the petitioner. Mr. Pakale further submitted that since the order passed by the Labour Court on preliminary issues as to the fairness of the enquiry and the findings being not perverse were not assailed and, consequently, attained finality, it is not open for the petitioner to again agitate the said issues. At any rate, the material on record does not indicate that there was either actual bias or likelihood of bias. Thus, the enquiry cannot be said to have been vitiated as urged on behalf of the petitioner. Mr. Pakale would also urge that the petition also suffers from laches as the impugned order was sought to be assailed after almost three and half years. In the circumstances, no case for exercise of

extraordinary writ jurisdiction is made out, submitted Mr. Pakale.

15. To begin with, it is imperative to note that the findings on the preliminary issues recorded by the learned Judge, Labour Court, by order dated 20th October, 2016, that the enquiry was fair and proper and findings not perverse, were not assailed by the petitioner. In the impugned order also, the learned Member, Industrial Court, thus proceeded on the premise that those findings attained finality and only the issue of legality and propriety of punishment was open for consideration in the appeal under Section 84 of the Act, 1946. Nonetheless, I deem it appropriate to delve into the submissions canvassed on behalf of the petitioner as regards the fairness of the enquiry especially on the count of alleged bias as the Enquiry Officer had rejected the application for leave.

16. On first principles, the fact that the Enquiry Officer in the capacity of the controlling officer had rejected the application for leave, by itself, without anything more, would not justify an inference that the enquiry was vitiated on account of bias. It does not appear that the petitioner raised the apprehension of bias during the course of the Disciplinary Enquiry. In contrast, the material on record indicates that the Enquiry Officer had

provided a fair opportunity to the petitioner to both cross-examine the departmental witness and adduce evidence in the rebuttal and after considering the entire material submitted the enquiry report.

17. The fact that the Enquiry Officer also happened to be the authority empowered to sanction the leave need not necessarily lead to an element of bias. Had the petitioner brought material on record to show that either the conduct of the enquiry proceedings or the outcome thereof was actuated by a design to bring about a particular result prejudicial to the petitioner or for that matter there was reason to entertain such apprehension, the submissions on behalf of the petitioner could have merited consideration. In the absence of any foundation for existence of actual bias or apprehension of bias, the submissions canvassed before this Court do not advance the cause of the petitioner.

18. A reference to a Division Bench judgment of this Court in the case of *Dawn Mills Co. Ltd. vs. Sukhdev Prasad Dhaneshwar and anr.*¹ can be made with advantage. In the said case, the charge-sheet was signed by the employers Manager, its Labour Welfare Officer and Department Head, the Manger thereafter held an enquiry into the allegations, the

1 1989(1)CLR H.C.79.

Manager made a report thereon on 4th May, 1976 and, lastly, the Manger ordered the dismissal of the employee on the very day. The application preferred by the employee under Sections 78 and 79 of the Act, 1946 came to be dismissed. The Industrial Court dismissed the appeal. When the employee carried the matter in writ, a learned Single Judge of this Court remanded the matter back to the Labour Court for taking evidence on the ground that the involvement of the Manager on all four stages of the domestic enquiry violated the principles of natural justice as the learned Judge was of the view that, “the employer became a judge in his own cause.”

19. In writ appeal, the Division Bench set aside the order of the learned Single Judge holding that the Manager was discharging his functions under the Standing Orders when he commenced disciplinary proceeding against the employee, conducted the enquiry thereinto and awarded punishment after consideration of the findings. He was not a judge in his own cause for there was nothing to show nor was it argued that he had any personal interest in the matter.

20. The Division Bench also adverted to the aspect of apprehension of bias and held that in a situation where an officer is discharging functions under the Standing Orders no

bias can or should be inferred. The observations in paragraphs 8 and 9 are material and hence extracted below:

“8. Miss Menon referred to three judgments of the Supreme Court which must be considered more fully. In *S. Parthasarathi v. State of Andhra Pradesh A.I.R. 1973 S.C. 2701* the test as to the likelihood of bias was set out. The reviewing authority had to make a determination on the basis of the whole evidence before it whether a reasonable man would, in the particular circumstances, infer that there was a real likelihood of bias. If a right minded person would think that there was a real likelihood of bias on the part of an Enquiry Officer, he should not have conducted the inquiry. Nevertheless, there had to be a real likelihood of bias, no mere surmise or conjecture. There had to exist circumstances from which a reasonable man would think it probable or likely that the Enquiry Officer would be prejudiced against the delinquent. To much the same effect are the observations in *Dr. G. Surana v. University of Lucknow, A.I.R. 1976 S.C. 2428*. In deciding the question of bias it was held, human probabilities and the ordinary course of human conduct had to be taken into account. What had to be seen was whether there was a reasonable ground for believing that the person or body concerned was likely to have been biased. In other words, whether there was a substantial possibility of bias animating of the person or body against the aggrieved person. The Supreme Court noted that it was relevant that in the case before it the aggrieved person had not made an issue in regard to bias but had appeared before the body concerned. The last of the three judgments is in the case of *Ranjit Thakur v. Union of India 1986(1) L.L.J.256*. The case concerned a court martial. The Supreme Court found that the test of real likelihood of bias was whether a reasonable person in possession of relevant information would have thought that bias was likely.

9. In the instant case, looking to the position that the highest administrative officer of the appellants was the disciplinary authority by virtue of the Standing Order and was, therefore, obliged to issue the charge-sheet, hold the inquiry, consider its findings and impose punishment if necessary, we do not think that bias can or should be inferred. It is also necessary to Point out that the 1st respondent did not apprehend bias before the inquiry had commenced. We find it difficult to subscribe to the observation of the learned single judge that the domestic inquiry should have been held by an independent person who was not interested in the affairs of the company. All officers of the company could be said, in a very broad sense, to be interested in the affairs of their employer and every

officer, therefore, would be disqualified from holding what, essentially, is a domestic inquiry.”

21. Mr. Pakale was justified in placing reliance on a decision of the Supreme Court in the case of *G. N. Nayak vs. Goa University and others*², wherein the Supreme Court explicated the concept of bias in the following words:

“33. Bias may be generally defined as partiality or preference. It is true that any person or authority required to act in a judicial or quasi-judicial matter must act impartially.

“If however, ‘bias’ and ‘partiality’ be defined to mean the total absence of preconceptions in the mind of the judge, than no one has even had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions and the processes of education, formal and informal, create attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices.”

34. It is not every kind of bias which in law is taken to vitiate an act. It must be a prejudice which is not founded on reason, and actuated by self-interest – whether pecuniary or personal. Because of this element of personal interest, bias is also seen as an extension of the principle of natural justice that no man should be a judge in his own cause. Being a state of mind, a bias is sometimes impossible to determine. Therefore, the Courts have evolved the principle that it is sufficient for a litigant to successfully impugn an proving circumstances from which the operation of influences affecting a fair assessment of the merits of the case can be inferred.”

(emphasis supplied)

22. To conclude, the controlling officer was discharging the function of sanctioning leave in the official capacity. No personal bias was either attributed or apprehended. A case of official bias does not seem to have been made out. Thus, I am

2 (2002) 2 Supreme Court Cases 712.

not impelled to accede to the submissions of Ms. Singh that the enquiry was vitiated on account of the alleged bias.

23. On the aspect of the findings of absenteeism, this Court is required to keep in view the remit of the supervisory jurisdiction. Nay the limits of the power of judicial review by the Court and Tribunal over the proceedings and findings of the domestic Tribunal. Judicial review is not an appeal from a decision. It is, in essence, review of the decision making process. While reviewing the proceedings and orders of the domestic Tribunal, the Court/Tribunal is empowered to delve into the questions: whether the enquiry was held by a competent officer, was the enquiry conducted in conformity with the Rules, whether the principles of natural justice were adhered to and were the findings based on some evidence. Neither the technical rules of evidence nor the standard of proof envisaged thereby apply to the disciplinary proceeding. The High Court/ Tribunal while exercising the power of judicial review cannot normally substitute own conclusion for the one arrived at by the disciplinary authority. The Court/Tribunal would however be within its right in determining whether the finding is based on no evidence and the authority arrived at the

findings which no prudent person would arrive at on the basis of the material and in the circumstances of the given case.

24. On the aforesaid touchstone, the submissions canvassed by Ms. Singh that the findings of absenteeism suffered from non-consideration of the governing leave regulations deserves to be appreciated. There is evidence to indicate that out of 51 days of absence, the petitioner had given application for 21 days sick leave supported by certificates of a private medical practitioner and five days casual leave. Those applications were rejected as there was no leave to the credit of the petitioner's account. Apart from the said period, 25 days absenteeism was purely without authorization. The submissions of Ms. Singh that the respondent – employer had charged the petitioner by lumping periods of absence together is not borne out by the charge-sheet and the leave record, extracted in the order passed by the disciplinary authority, which gives a complete bifurcation of the month-wise periods of absence.

25. It is true under the leave regulations, the grant of leave except sick leave shall depend upon the exigency of undertaking and shall be at the discretion of the competent authority. However, the matter cannot be appreciated only from the perspective of the petitioner having submitted an application for

medical leave. The fact that there was no leave to the credit of the petitioner's account is required to be considered in juxtaposition with the multiple counts of absenteeism for which the petitioner was saddled with penalties. In the least, a tendency to exhaust the available leaves was clearly made out.

26. In any event, an unauthorised absence of 25 days without any application for leave, of whatsoever nature, in itself, furnished a justifiable ground for initiating disciplinary action against the petitioner. In the totality of the circumstances, the findings on the charge of misconduct of absenteeism cannot be said to be based on no evidence or such that no reasonable person could have arrived at the same, especially having regard to the nature of the services rendered by the respondent, a public utility service provider.

27. The reliance placed by Ms. Singh on the judgment of the Supreme Court in the case of *Krishnakant B. Parmar vs. Union of India and another*³, wherein the Supreme Court expounded the principle that in a departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that absence was willful and in the absence of such finding the absence would not amount to

3 (2012) 3 Supreme Court Cases 178.

misconduct does not advance the cause of the petitioner, in the facts of the instant case. The nature of the duties performed by the petitioner cannot be lost sight of. The services rendered by the respondent Undertaking also bear upon the determination. The unauthorized absence had the propensity to adversely affect the smooth functioning of the transport Undertaking to the discomfort of the persons from whom the services are rendered by the respondent – employer.

28. This takes me to the challenge on the ground of the proportionality of punishment. An endeavour was made to draw home the point that the extenuating circumstances were not at all adverted to by the learned Member, Industrial Court. An order of reinstatement in service without backwages, passed by the learned Judge, Labour Court, thus could not have been interfered with in a light manner.

29. I find it difficult to unreservedly accede to the aforesaid challenge to the impugned order. The learned Judge, Labour Court had simply observed that the petitioner had served the respondent Undertaking for 17 years and his past service record was not worst. No effort was made by the learned Judge, Labour Court, to meaningfully weigh the past service record of the petitioner. In contrast, the learned Judge, Industrial Court,

correctly noted that the petitioner had been punished for the misconduct of the absenteeism on five occasions during the period 2001 – 2010, albeit with minor penalties of reduction in pay scale for a term. The learned Member, Industrial Court, was therefore justified in interfering with the order passed by the learned Judge, Labour Court, to the extent the punishment was declared to be illegal and a direction to reinstate the petitioner was issued.

30. The legal position as regards the interference in an order of punishment imposed by the disciplinary authority is also well settled. The principle of proportionality is a recognized ground for interference in an order passed by the disciplinary authority. However, the Court/Tribunal can interfere with penalty imposed by the domestic Tribunal only when it comes to the conclusion that the penalty is wholly disproportionate to the gravity of the misconduct and shocks the conscience of the Court/Tribunal. Ordinarily, while exercising the power of judicial review, the Courts/Tribunals cannot substitute its own conclusion as regards penalty and impose some other punishment, which it considers just. Where the Court comes to the conclusion that the penalty is shockingly disproportionate, the Court may normally direct the disciplinary or the appellate authority to

reconsider the aspect of penalty and, only in exceptional cases, the Court would be justified in imposing appropriate punishment, primarily with a view to shorten the litigation having regard to the circumstances of the case.

31. A Three Judge Bench of the Supreme Court in the case of *B. C. Chaturvedi vs. Union of India*⁴ had an occasion to consider whether the Tribunal was justified in interfering with the punishment imposed by the disciplinary authority. After advertng to the previous pronouncements, the Supreme Court enunciated the legal position as under:

“18. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority *shocks* the *conscience* of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary authority/appellate authority to *reconsider* the penalty imposed, or to shorten the litigation, it may itself, in *exceptional* and *rare cases*, impose appropriate punishment with cogent reasons in support thereof.”

32. In the case of *Coimbatore District Central Cooperative Bank vs. Coimbatore District Central Cooperative Bank Employees Assn. and another*⁵, the Supreme Court elaborately considered the doctrine of proportionality in the matter of

4 1995(6) SCC 749.

5 (2007) 4 Supreme Court Cases 669.

imposition of punishment in a domestic enquiry. The Supreme Court expounded the principle of proportionality as under:

“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.”

33. A reference to the decision of the Supreme Court in the case of *Ranjit Thakur vs. Union of India and Others*⁶, wherein the principle of proportionality was considered in the context of imposition of the punishment by the Court Martial may also be advantageous. The Supreme Court enunciated the applicability of the principle in the following words:

“25. "Judicial Review generally speaking, is not directed against a decision, but is directed against the “decision-making process”. The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence are would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review.”

(emphasis supplied)”

6 (1987) 4 Supreme Court Cases 611.

34. In the case of *Chairman and MD, V. S. P. and ors. vs. Goparaju Sri Prabhakara Hari Babu*⁷, the Supreme Court reiterated the limited nature of the jurisdiction and the circumstances in which the Court can resort to the doctrine of proportionality as under:

“16. The jurisdiction of the High Court in this regard is rather limited. Its power to interfere with disciplinary matters is circumscribed by well known factors. It cannot set aside a well reasoned order only on sympathy or sentiments.

17. Once it is found that all the procedural requirements have been complied with, the Courts would not ordinarily interfere with the quantum of punishment imposed upon a delinquent employee. The Superior Courts only in some cases may invoke the doctrine of proportionality. If the decision of an employer is found to be within the legal parameters, the jurisdiction would ordinarily not be invoked when the misconduct stands proved. {See *Sangeroid Remedies L.td. v. Union of India and Ors.* [(1999) 1 SCC 259]}.

The High Court in exercise of its jurisdiction under Article 226 of the Constitution of India also cannot, on the basis of sympathy or sentiment, overturn a legal order.”

(emphasis supplied)

35. Keeping in view and applying the aforesaid principles to the facts of the case, the aspect as to whether the punishment is an outrages defiance of logic or shocks the conscious of the Court has to be answered with reference to the attendant facts and circumstances. The nature of the misconduct, the circumstances of the case, the situation in life of the employee, the adverse impact of the misconduct on the employer and the past service record of the employee and the like factors bear

7 2008 AIR SCW 2244.

upon the said determination.

36. On the aspect of the nature and gravity of the misconduct, the fact that unauthorized absenteeism of the drivers derails orderly functioning of the transport Undertaking cannot be gainsaid. Whether the employee was prone to unauthorized absenteeism also merits consideration. It is in this context, the past service record/conduct of the employee assumes significance.

37. The petitioner had been punished for the misconduct of absenteeism on five occasions as under:

Sr. No.	Order Dt.	S.O.	Punishment given
1	19.12.01	S.O. 20 (f)	One pay scale reduced for one year
2	12.03.07	S.O. 20 (f) & (K)	One pay scale reduced for two years
3	23.05.08	S.O. 20 (f) & (K)	Two pay scale reduced for one year
4	01.06.09	S.O. 20 (f)	Two pay scale reduced for two years
5	10.06.10	S.O. 20 (f)	Suspended for two months.

38. The aforesaid efforts on the part of the employer to discipline the employee manifest a continuous course of absenteeism. If viewed in the context of the past misconducts, the unauthorized absence in question can not be termed as an aberration.

The learned Member, Industrial Court, was thus justified in giving due weight to the past misconducts of the petitioner.

39. Ms. Singh attempted to salvage the position by urging with tenacity that the personal hardships, which forced the petitioner to remain absent, were not taken into account by the Disciplinary Authority and the learned Member, Industrial Court and that renders the sentence vulnerable. First, the daughter of the petitioner was terminally ill. Second, the son of the petitioner was suffering from mental illness.

40. I have given careful consideration to this submission and was anxious to ascertain the causes ascribed by the petitioner during the course of disciplinary proceeding, especially mental illness of the petitioner's son as that would require continuous care and personal attention. Before the Enquiry Officer, the petitioner submitted that the absence was on account of the illness of his daughter and personal illness. There was no whisper about the alleged mental illness of the petitioner's son. In fact, it does not appear that the petitioner had urged the ground of mental illness of his son either before the Departmental Authorities or the Industrial Adjudicators. In the absence of any foundational premise, in the disciplinary proceeding and before the courts below, I find it rather difficult

to sustain the challenge based on the circumstances brought about by the mental illness of the petitioner's son.

41. The conspectus of aforesaid consideration is that if viewed through the prism of the past misconducts of the petitioner and a continuous course of absenteeism resulting in no leave being available to the credit of the petitioner, the sentence of dismissal from service cannot be said to be shockingly disproportionate to the misconduct. It could be urged, having made multiple efforts, and failed, to discipline the petitioner, the employer was constrained to impose the major penalty of dismissal. This choice of punishment by the employer does not warrant interference in exercise of judicial review. Thus, the challenge to the impugned order on the count of proportionality of the punishment also fails.

42. Resultantly, the petition deserves to be dismissed.

43. Hence, the following order.

: O R D E R :

- (i) The petition stands dismissed.
- (ii) Rule discharged.
- (iii) No costs.

[N. J. JAMADAR, J.]