Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 6859 of 2021

Union of India and Ors. **....Appellants**

Versus

Mudrika Singh **.... Respondent**

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

A Introduction

1 The Union of India and officials of the Border Security Force[1] are in appeal against a judgment of a Division Bench of the Calcutta High Court dated 18 December 2018 which quashed disciplinary proceedings against the respondent and reinstated him to his initial position in the BSF.

2 In April 2006, at the time of the alleged misconduct, the respondent was a Head Constable in the BSF and was deployed to the Seventy-second Battalion. On 2 May 2006, the Commandant directed the Deputy Commandant to prepare a record of evidence[2] against the respondent for an offence constituting "disgraceful conduct" under Section 24(a) of the Border Security Force Act 1968[3]. The specific allegation, as set out in the order, was as follows:

> "DISGRACEFUL CONDUCT OF AN UNNATURAL KIND
>
> In that he, between 0200 Hrs to 0600 Hrs on 16.04.2006 while on Naka duty under BOP Sahab Khan committed sodomy on the person of No. [xyz] Const [xyz] of the sam(e) Battalion."

3 The incident in question is alleged to have taken place on the night intervening 16 and 17 April 2006. The complainant, a Constable in the BSF, was on Naka duty between 02:00 to 06:00 hours when the respondent is alleged to have committed an act of sexual assault on him. The complainant submitted a written

[1] "**BSF**"
[2] "**RoE**"
[3] "**BSF Act 1968**"

complaint on 19 April 2006. Under the BSF Act 1968, such conduct is liable to be prosecuted under Section 24(a) which reads as follows:

> "**24. Certain forms of disgraceful conduct**.—Any person subject to this Act who commits any of the following offences, that is to say,—
>
> (a) is guilty of any disgraceful conduct of a cruel, indecent or unnatural kind; or
>
> […]
>
> shall, on conviction by a Security Force Court, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned."

4 The RoE was prepared by the Deputy Commandant and submitted to the Commandant. On 10 June 2006, the Commandant noted that on a scrutiny of the RoE proceedings, it was found that there was an inconsistency in the statements of the witnesses as regards the date on which the incident had occurred. Hence, on 10 June 2006, the Commandant called for the preparation of an additional RoE. Following the receipt of the additional RoE, the Commandant issued an order to convene a Summary Security Force Court[4] to try the respondent. In the course of the evidence which was recorded pursuant to the direction of the Commandant seeking an additional RoE, the complainant stated that the incident took place on 17 April 2006. The respondent was provided with copies of the RoE, additional RoE and the charge sheet on 3 August 2006.

[4] "**SSFC**"

5 On 7 August 2006, the SSFC convened at the Headquarters of the seventy-second Battalion of the BSF, at Narayanpur, Malda (West Bengal) for enquiring into the charge under Section 24(a) the BSF Act 1968. The respondent pleaded not guilty to the charge. Four prosecution witnesses were examined and the respondent was furnished with an opportunity to cross-examine them and to call for defence witnesses. The SSFC found the respondent guilty of the charge and demoted him to the rank of a Constable as a punishment.

6 On 6 September 2006, the respondent filed a statutory petition under Section 117[5] of the BSF Act 1968 before the Director-General of the BSF to challenge the conviction recorded by the SSFC on 7 August 2006. The statutory petition was heard by the appellate authority – the Director-General of BSF and was disposed of by an order dated 18 October 2006. While the charge against the respondent was found to have been established, the punishment of reduction to the rank of Constable was commuted, having regard to the fact that the respondent had over 22 years of unblemished service with 21 rewards to his credit. The respondent was informed that the Director-General of the BSF had commuted the sentence of reduction to the rank of Constable by substituting it with the following:

[5] "**117. Remedy against order, finding or sentence of Security Force Court**.—(1) Any person subject to this Act who considers himself aggrieved by any order passed by any Security Force Court may present a petition to the officer or authority empowered to confirm any finding or sentence of such Security Force Court, and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates.
(2) Any person subject to this Act who considers himself aggrieved by a finding or sentence of any Security Force Court which has been confirmed, may present a petition to the Central Government, the Director-General, or any prescribed officer superior in command to the one who confirmed such finding or sentence, and the Central Government, the Director-General, or the prescribed officer, as the case may be, may pass such order thereon as it or he thinks fit."

> "(i) 'To forfeit 05 years services for the purpose of promotion';
>
> (ii) 'To forfeit 07 years past service for the purpose of pension'; and
>
> (iii) 'To be severely reprimanded."

7 The respondent moved the High Court at Calcutta under Article 226 of the Constitution. A Single Judge of the High Court, by an order dated 7 May 2009, set aside the order of punishment on the ground that:

(i) The original RoE was insufficient to prove the charge; and

(ii) The order of the Commandant for preparing an additional RoE was beyond jurisdiction.

8 The judgment of the Single Judge has been upheld by the impugned judgment of the Division Bench of the High Court on 18 October 2018 on the ground that:

(i) The Commandant did not have jurisdiction to direct the preparation of an additional RoE under Rule 51 of the Border Security Force Rules 1969[6] as it stood at the relevant time; and

(ii) No reasons were furnished by the SSFC or the Appellate Authority - Director General of BSF - for holding the respondent guilty.

[6] "**BSF Rules 1969**"

B Submissions

9 Ms Madhavi Divan, Additional Solicitor General appearing on behalf of the appellants has urged the following submissions:

(i) The High Court has taken a hyper-technical view of the matter and has failed to appreciate that the provisions of the BSF Act 1968 and BSF Rules 1969 are robust enough to cover the present case;

(ii) The Commandant directed the preparation of an additional RoE by his order dated 10 June 2006. It is evident from a reading of the original RoE and additional RoE that this is not a case of “insufficient evidence” as envisaged under Rule 59 of the BSF Rules 1969, but a case of "clarificatory evidence";

(iii) In a minor inaccuracy, the complainant had stated that the incident took place on 16 April 2006 when he was detailed to Naka duty, whereas the incident actually took place on the intervening night of 16 April 2006 and 17 April 2006. It was this inaccuracy which was sought to be corrected in the additional RoE;

(iv) There is no provision under the statute or under the rules prohibiting the Commandant from directing the recording of additional evidence;

(v) In 2011, Rule 51 was amended by the insertion of clause (2) under which an express power has been conferred on the Commandant to direct the recording of further evidence. This provision is clarificatory in nature;

(vi) In any event, Rule 6 is wide enough to cover any alleged limitation in Rule 51. Rule 6 provides:

> "6. Case unprovided for. - In regard to any matter not specifically provided for in these rules, it shall be lawful for the competent authority to do such thing or take such action as may be just and proper in the circumstances of the case."

(vii) The conclusion of the High Court that the Commandant did not possess the authority to order the recording of additional evidence and that he had usurped the power of the superior authority under Rule 59, is perverse; and

(viii) Neither the provisions of Rule 149 nor those of Section 117(2) require the SSFC or the Director-General to give reasons in support of their decision. This principle is settled by the judgment of this Court in **Union of India** v. **Dinesh Kumar**[7].

10 On the other hand, Mr Rabin Majumder appearing on behalf of the respondent has urged the following submissions:

(i) Rule 6 of the BSF Rules 1969 applies only to a matter which is not specifically provided in the Rules. On the contrary, Rule 51 specifically enunciates the power of the Commandant. In the absence of specific conferment of power to order the preparation of an additional RoE at the material time, the Commandant had no power to do so;

(ii) The power to record further evidence is conferred only on a superior authority convening a Court under Rule 59;

(iii) Where a Commandant decides under Rule 51(2)(iv) to apply to a competent officer to convene a court for the trial of a person, only such

[7] (2010) 3 SCC 161

officer or authority can exercise any of the powers provided in Rule 59 which includes returning the case for recording further evidence, if the evidence on record is insufficient;

(iv) As a result of the order of the Commandant, the evidence of the same witnesses was recorded twice over and without the authority of law. In the process of doing so, the Commandant usurped the power of the superior officer or authority who exercises specific powers under Rule 59;

(v) The SSFC has not recorded any reason to support the conclusion that the charge against the respondent was proved;

(vi) The facts of the case would indicate that:

(a) The RoE prepared by the officer detailed by the Commandant by his order dated 2 May 2006 was insufficient to prove the charge;

(b) The preparation of the additional RoE was ordered to furnish the prosecution witnesses who had already been examined, cross-examined and re-examined – with a second chance to prove the charge; and

(c) The authority which decided the statutory petition under Section 117 has not found that the RoE prepared in accordance with the order of the Commandant dated 2 May 2006 was insufficient to prove the charge;

(vii) The decision of the SSFC is vitiated by incurable illegality, since the order passed on the basis of additional RoE prepared in terms of Commandant's order dated 10 June 2006 was without jurisdiction;

(viii) The Division Bench of the High Court was justified in holding that the SSFC is required to furnish a modicum of reasons in support of its conclusion of guilt, and some application of mind must be demonstrated. Rule 151 requires reasons to be furnished for awarding the sentence when a finding of guilt is returned. A range of sentences has been prescribed and reasons to support the order of a particular sentence is necessary; and

(ix) The High Court was justified in holding that the finding of guilt cannot be based on an *ipse dixit* order of the superior officers. Unless the ultimate decision is informed by reason, it will fall foul of Article 14 of the Constitution.

11 The rival submissions will now be analysed.

C Analysis

12 Essentially, down to its core, the controversy in the present case turns upon two aspects: *firstly*, whether the Commandant prior to the amendment of Rule 51 in 2011 had jurisdiction to direct the preparation of an additional RoE; and *secondly*, whether the finding of guilt which has been recorded by the SSFC stands vitiated in the absence of reasons. Now, before we analyse the first of the above two facets, it

becomes necessary to understand the circumstances in which the Commandant directed the Assistant Commandant to prepare an additional RoE on 10 June 2006.

13 On 2 May 2006, the Deputy Commandant of the Seventy-second Battalion was detailed to prepare a RoE on the allegation that the respondent had committed an offence under Section 24(a) of the BSF Act 1968. The allegation was that when he was on Naka duty from 02:00 hours to 06:00 hours on 16 April 2006, the respondent had committed an act of sexual assault on a Constable. In the course of preparing the RoE, the complainant, examined as PW1, reported that:

> "I joined 72 BN BSF on 19 Feb 2006 and further posted to B-Coy of Unit B-Coy is deployed in Sahebkhale Sub-Sector. I went to BOP Sahebkhali on 03 April 06 and afterward had been performing duty in BOP Sahebkhali. I was on Naka/Patrolling duty from 0200Hrs to 0600 Hrs on 16 April 06 alongwith No.84001083 HC Mudrika Singh. At 0400Hrs on 16 April 06 while both of us were sitting on OP Machan (OP No.2) HC Mudrika Singh caught my Penis. HC Mudrika Singh bounded me to undergo sex with him by force. Which incident I reported to Coy Commder on same day at 0800 hrs. But I did not do sex with him."

Besides the complainant, the evidence included the statement of PW2, who produced an extract of the General Duty Register on 17 April 2006. PW2 deposed that the respondent and the complainant left for patrolling at 01:50 hours on 17 April 2006 and returned at 06:25 hours on 17 April 2006.

14 PW2's evidence demonstrates that there was an evident error in PW1's reference to 16 April 2006. The incident took place in the night which intervened 16 and 17 April 2006, *i.e.*, in the early hours of 17 April 2006. It was in this backdrop, that on 10 June 2006, the Commandant ordered the Assistant Commandment to

prepare an additional RoE so as to clarify the date on which the incident had occurred. Significantly, after the SSFC's order dated 7 August 2006 by which the respondent's rank was reduced to that of a Constable, in the course of his statutory petition he clearly stated that:

> "That I was charged with false allegation that at about 4.00 hrs on 17th April, 2006 while on Nake duty in AOR of BOP Sahebkhali I caught hold of the Penis of No. [xyz] constable [xyz] of the same Unit."

The defence of the respondent was that:

> "That I categorically say that because constable [xyz] was lying or Machan on 17.4.2006 at about 04.50 hrs. and was sleeping I awoke him and told him to keep watch upon the weapons and sets otherwise there can be stolen and I further told him that if he sleeps during duty hours then I would report (sic) him to the (sic) Commandant. I say that because I gave the warning to [xyz] for his negligence in duty he made false allegation against me for taking revenge."

The above extract would make it abundantly clear that there was no ambiguity, insofar as the respondent is concerned that the alleged conduct with which he was charged, had taken place in the early hours of 17 April 2006. As a matter of fact, the defence of the respondent also pertains to the same incident on 17 April 2006 and the respondent contended that the complainant had levelled a false allegation upon being found to be sleeping while on duty.

15 In this backdrop, it becomes necessary to emphasize that the additional RoE which was ordered by the Commandant was essentially in the nature of a clarification having regard to the discrepancy about the date of the incident namely, whether it was on 16 or 17 April 2006. This was evidently because the incident took

place on the intervening night of 16 and 17 April. As noted above, the respondent himself has in the course of his statutory petition, sought to highlight the events which had transpired in the early hours of 17 April 2006 when he was on duty. After settling the issue of insufficiency of evidence, we advert to the two questions of law that have been raised in the appeal: *(i)* whether the Commandant has the jurisdiction to direct preparation of an additional RoE; and *(ii)* whether the SSFC is under an obligation to record reasons under Rule 159 of the BSF Rules 1969 when it determines the guilt of an accused.

C.1 Jurisdiction of the Commandant

16 The unamended Rule 51 of the BSF Rules 1969 provided as follows:

> "**51. Disposal of case against an enrolled person by Commandant after record or abstract of evidence**.-
>
> (1) Where an officer has been detailed to prepare the record of evidence or to make an abstract thereof, he shall forward the same to the Commandant.
>
> (2) The Commandant may, after going through the record or abstract of evidence including additional evidence:
>
> (i) Dismiss the charge, or
> (ii) rehear the charge and award one of the summary punishments; or
> (iii) try the accused by a Summary Security Force Court where he is empowered so to do, or
> (iv) apply to a competent officer or authority to convene a Court for the trial of the accused."

Under sub-rule (1) of Rule 51, an officer who is detailed to prepare the RoE has to forward it to the Commandant[8]. Thereafter under Rule 51 (2), the Commandant may, after going through the record, proceed with any of the course of actions detailed in (i) to (iv), which includes trying the accused by an SSFC. The High Court has noticed that as a result of the amendment in 2011[9], what is previously included in Rule 51(2) has been, in substance, incorporated in Rule 51(3) of the amended BSF Rules 1969. A new sub-rule (2) has been introduced which reads as follows:

> "(2) if the Commandant considers the evidence recorded insufficient but considers that further evidence may be available, he may remand the case for recording additional evidence."

The amended Rule 51 of the BSF Rules 1969 thus provides for the following:

> "51. Disposal of case against enrolled person by Commandant after record or abstract of evidence.—
>
> (1) Where an officer has been detailed to prepare the record of evidence or to make an abstract thereof, he shall forward the same to the Commandant.
>
> (2) If the Commandant considers the evidence recorded insufficient but considers that further evidence may be available, he may remand the case for recording additional evidence.
>
> (3) The Commandant may, after going through the record or abstract of evidence including additional evidence, if any:—
>
> (i) dismiss the charge after recording the reasons thereof[sic]; or
>
> (ii) rehear the charge and award summary punishments; or
>
> (iii) try the accused by a Summary Security Force Court where he is empowered so to do:

[8] Section 2(1)(f) of the BSF Act 1968 defines it thus: "2. (1)(f) 'Commandant', when used in any provision of this Act with reference to any unit of the Force, means the officer whose duty it is under the rules to discharge with respect to that unit, the functions of a Commandant in regard to matters of the description referred to in that provision"
[9] S.O. 2628(E) on 25 November 2011

> Provided that the Commandant while convening a Court may reframe the charge; or
>
> (iv) apply to a competent officer or authority to convene a Court for the trial of the accused."

17 The High Court inferred that "the incorporation of the amendment demonstrates that at the relevant point of time, the Commandant did not have the power to direct additional evidence to be recorded". Yet, the High Court also observed that the 2011 amendment to the BSF Rules 1969 could be of a clarificatory nature:

> "At the same time, the amendment can be regarded to be clarificatory in nature, in the sense that it was not required to be specifically provided but was inherent to the general authority of the Commandant; and the amendment has been brought by way of abundant caution and to clarify the powers of the Commandant instead of conferring any new authority unto such officer."

However, the High Court declined to inquire further into this line of interpretation on the ground that "there is no submission which has been put forth by either side to throw any light on the relevant provision". On this ground, the Division Bench held that the view of the Single Judge "appears to be a possible view" and does not call for interference. The legal position needs to be analysed.

18 Rule 48 of the BSF Rules 1969 provides for the preparation of a record of evidence:

> "**48. Record of evidence**.- (1) **The officer ordering the record of evidence may either prepare the record of evidence himself or detail another officer to do so.**

(2) The witnesses shall give their evidence in the presence of the accused and the accused shall have right to cross-examine all witnesses who give evidence against him:

Provided that where statement of any witness at a court of inquiry is available, examination of such a witness may be dispensed with and the original copy of the said statement may be taken on record. A copy thereof shall be given to the accused and he shall have the right to cross-examine if he was not afforded an opportunity to cross -examine the witness at the Court of Inquiry.

(3) After all the witnesses against the accused have been examined, he shall be cautioned in the following terms; "You may make a statement if you wish to do so, you are not bound to make one and whatever you state shall be taken down in writing and may be used in evidence." After having been cautioned in the aforesaid manner whatever the accused states shall be taken down in writing.

(4) **The accused may call witnesses in defence and the officer recording the evidence may ask any question that may be necessary to clarify the evidence given by such witnesses**.

(5) All witnesses shall give evidence on oath or affirmation: Provided that, no oath or affirmation shall be given to the accused nor shall he be cross-examined.

(6) (a) The statements given by witnesses shall ordinarily be recorded in narrative form and the officer recording the evidence may, at the request of the accused, permit any portion of the evidence to be recorded in the form of question and answer.

(b) Witnesses shall sign their statements after the same have been read over and explained to them.

(6A) The provisions of section 89 of the Act shall apply for procuring the attendance of the witnesses before the officer preparing the Record of Evidence.

(7) Where a witness cannot be compelled to attend or is not available or his attendance cannot be procured without an undue expenditure of time or money and after the officer recording the evidence has given a certificate in this behalf, a written statement signed by such witness may be read to the accused and included in the record of evidence.

(8) After the recording of evidence is completed the officer recording the evidence shall give a certificate in following form :-

> "Certified that the record of evidence ordered by... ..Commandant... .....was made in the presence and hearing of the accused and the provisions of rule 48 have been complied with".
>
> (**emphasis supplied**)

19 Rule 48 of the BSF Rules 1969 clarifies that an officer ordering the RoE may either prepare it himself or detail any officer to do so. The witnesses have to give their evidence in the presence of the accused who has a right to cross-examine them. The accused may call witnesses in defence. An officer recording the evidence is empowered under sub-rule (4) of Rule 48 to ask a question that may be necessary to clarify the evidence given by a witness. It is on the basis of the RoE (or the abstract of evidence, as the case may be) that the Commandant is empowered to take the actions which are referred to in the unamended sub-rule (2) of Rule 51, as it then stood. Under Rule 51(2) which was applicable then, the Commandant was empowered to dismiss the charge; re-hear the charge and award one of the summary punishments; try the accused by SSFC; or apply to a competent officer or authority to convene a court for the trial of the accused.

20 The unamended sub-rule (2) of Rule 51, as was applicable to the facts of the present case, cannot be construed to impose a prohibition on the Commandant to seek clarification, and for that purpose of ordering an additional RoE, to facilitate or aid the further processing of the case. Rule 51(2) does not contain any such prohibition. On the contrary, sub-rule(1) to Rule 48 indicates that the officer ordering the RoE may either prepare an RoE himself or detail another officer to do so. Sub-

rule(4) to Rule 48 empowers the officer to ask any question that may be necessary to clarify the evidence. If such a power is conferred upon the officer ordering the RoE while preparing the RoE himself, it would follow by necessary implication, that such a power is available to the Commandant even when the RoE is ordered to be prepared by another officer. The purpose of seeking such a clarification is to facilitate the emergence of the truth as regards the genesis of an incident which is the subject matter of the enquiry. The mere fact that a specific provision empowering the Commandant to call for further evidence was introduced in 2011 cannot result in the conclusion that absent such a power being expressly incorporated, the power did not vest in the Commandant.

21 An amendment to a statute or to statutory rules may often be clarificatory in nature. It is clarificatory in the sense that it expressly recognizes a power that already vests in the authority. In those circumstances, when an amendment is purely clarificatory or declaratory in nature, it is deemed to operate retrospectively.[10] For instance, a Constitution Bench in **Shyam Sunder** v. **Ram Kumar**[11] held that an amending act or a declaratory act need not explicitly mention its declaratory nature to be operative retrospectively. Speaking on behalf of the Constitution Bench, Justice V N Khare (as he then was) noted:

> "39. Lastly, it was contended on behalf of the appellants that the amending Act whereby new Section 15 of the Act has been substituted is declaratory and, therefore, has retroactive

[10] G P Singh, PRINCIPLES OF STATUTORY Interpretation (13th edn, 2012); **Commissioner of Income Tax** v. **Vatika Township**, (2015) 1 SCC 1, para 32 (Constitution Bench); **Ghanshyam Mishra and Sons** v. **Edelweiss Asset Reconstruction Company**, 2021 SCC OnLine SC 313 (three-judge Bench)
[11] (2001) 8 SCC 24

> operation. Ordinarily when an enactment declares the previous law, it requires to be given retroactive effect. **The function of a declaratory statute is to supply an omission or to explain a previous statute and when such an Act is passed, it comes into effect when the previous enactment was passed**. The legislative power to enact law includes the power to declare what was the previous law and when such a declaratory Act is passed, invariably it has been held to be retrospective. **Mere absence of use of the word "declaration" in an Act explaining what was the law before may not appear to be a declaratory Act but if the court finds an Act as declaratory or explanatory, it has to be construed as retrospective**. Conversely where a statute uses the word "declaratory", the words so used may not be sufficient to hold that the statute is a declaratory Act as words may be used in order to bring into effect new law."
>
> (**emphasis supplied**)

In **Zile Singh** v. **State of Haryana**[12], Chief Justice R C Lahoti, speaking for a three-judge bench elaborated on the principle of retrospective operation applicable to clarificatory statutes thus:

> "13…. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only — "nova constitutio futuris formam imponere debet non praeteritis" — a new law ought to regulate what is to follow, not the past. (*See* **Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edn., 2004 at p. 438**.) **It is not necessary that an express provision be made to make a statute retrospective** and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (ibid., p. 440).
>
> 14. **The presumption against retrospective operation is not applicable to declaratory statutes**…. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If **a new Act is "to explain" an earlier Act, it would be without object unless construed retrospectively.** An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous

[12] (2004) 8 SCC 1

> Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended…. An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. **A clarificatory amendment of this nature will have retrospective effect** (ibid., pp. 468-69).
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> 16. **Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to "explain" a former statute, the subsequent statute has relation back to the time when the prior Act was passed**. **The rule against retrospectivity is inapplicable to such legislations as are explanatory and declaratory in nature.**"
>
> (**emphasis supplied**)

22 This Court has often recognized amendments to service rules as clarificatory in nature, thereby having a retrospective operation[13]. In our view, the power to order additional RoE is incidental to realize the purpose of Rules 48 and 51. In any event, residual powers under Rule 6 would protect this action. Since the express power to direct additional RoE under Rule 51 was incidental to the exercise of the existing powers, the amendment to Rule 51 which was brought in 2011 must be construed to be clarificatory. In fact, the High Court proceeded on this line of analysis by observing that the amendment is clarificatory. However, it chose to not take it to its logical conclusion on the tenuous ground that no submission had been put forth by either side to throw light on the relevant provision.

23 In our view, and for the reasons that we have indicated, the fact that the incident took place in the present case prior to the date of the amendment, *i.e.*, 25 November 2011, would make no difference once the amendment, in the true sense

[13] **S B Bhattacharjee** v. **S D Majumdar**, (2007) 10 SCC 513 (two-judge Bench); **O P Lather** v. **Satish Kumar Kakkar**, (2001) 3 SCC 110 (two-judge Bench)

of the expression, is construed to be clarificatory in nature. Against this backdrop, the Commandant was acting within his jurisdiction in ordering an additional RoE to clarify the date of the incident. As we have seen earlier, strictly speaking, this is not a case of insufficient evidence. During the course of the RoE, the respondent himself stood by the complainant's version of the date and time on which the alleged incident took place, which was the night when the respondent was detailed to Naka duty as Head Constable. The only issue for which additional RoE was warranted was in regard to the confusion in regard to the precise date on which the incident took place, considering the confusion caused by the incident having occurred on the intervening night of 16 and 17 April 2006. Save and except for this, the RoE which was prepared initially was comprehensive in nature and contained all necessary details of the incident, which were sufficient to sustain the final conclusion.

24 The submission of the respondent that the Commandant has usurped the power of a superior officer or authority under Rule 59 is patently incorrect. Rule 59 provides for the action which has to be taken by a superior authority on receiving the application for convening a court. In that context, Rule 59(1) provides as follows:

> "**59. Action by a Superior Authority on receiving an application for convening a court.-** (1) As soon as a superior officer receives an application for convening a court, he shall scrutinise the charge and the evidence against the accused, where necessary in consultation with the Chief Law Officer or a Law Officer and he:
>
> (i) shall direct the Commandant to dismiss the charge where the evidence against the accused is insufficient and further evidence is not likely to be available and may direct him to do so if he considers it inadvisable to proceed with the trial; or

(ii) may return the case to Commandant for being tried by a Summary Security Force Court or being dealt with summarily if he considers that the same can be adequately so tried or dealt with; or

(iii) may return the case for recording further evidence, if he considers the evidence recorded insufficient but considers that further evidence may be available; or

(iv) may dispose of the case administratively under chapter IV of these rules if competent to do so, or refer it to the competent authority for disposal, where he is of the opinion that the charge against a person is serious but the trial by Security Force Court is inexpedient or not reasonably practicable for the reasons to be recorded in writing; or

(v) may, after recording the reasons, dispose of the case administratively under chapter XIV A of these rules if competent to do so, or refer it to the competent authority for disposal, where he is of the opinion that the charge against the officer or the subordinate officer, as the case may be, does not deserve to be dismissed but also not so serious as to warrant trial by a Security Force Court.

(2) (a) In any other case he may either himself convene a Court or if he considers that a higher type of Court should be convened and he is not empowered to convene such a Court, forward the case to a higher authority with recommendation that such Court may be convened.

(b) The higher authority on receiving the case may exercise any of the powers given in sub-rule (1) of this rule:

Provided that a superior officer or higher authority before convening a General Security Force Court or a Petty Security Force Court shall take the advice of the Chief Law Officer or a Law officer.

Provided further that the superior authority or higher authority while convening a Court may reframe the charge sheet on which the accused is to be tried."

Clause (iii) of sub-rule (1) of Rule 59 indicates that one of the courses of action open to the superior authority is to return the case for recording evidence if the evidentiary record is considered to be insufficient but the superior authority considers that

further evidence may be available. The provisions of Rule 59(1)(iii) cannot be stretched to mean that absent the conferment of a specific or express power to the Commandant in similar terms, the Commandant had no jurisdiction to seek clarification or order an additional RoE. The power of the Commandant to do so is implicit, as noticed earlier in Rules 48 and 51, read with Rule 6. Hence, it cannot be postulated that by ordering an additional RoE, the Commandant had usurped the power of a superior authority or acted contrary to the jurisdiction conferred upon him.

C.2 Recording of reasons

25 The second ground on which the Division Bench of the High Court held the findings of the SSFC to be vitiated is that under Rule 148, the SSFC was required to furnish at least "a modicum of reasons". Rules 148 and 149 provide as follows:

> "**148. Verdict**.- The Court shall after the evidence for prosecution and defence has been heard, give its opinion as to whether the accused is guilty or not guilty of the charge or charges.
>
> **149. Finding.**- (1) **The finding on every charge upon which the accused is arraigned shall be recorded and except as mentioned in these rules shall be recorded simply as a finding of "Guilty" or of "Not Guilty"**.
>
> (2) When the Court is of opinion as regards any charge that the facts proved do not disclose the offence charged or any offence of which he might under the Act legally be found guilty on the charge as laid, the Court shall find the accused "Not Guilty" of that charge.
>
> (3) When the Court is of opinion as regards any charge that the facts found to be proved in evidence differ materially from the facts alleged in the statement of particulars in the charge, but are nevertheless sufficient to prove the offence stated in the charge, and that the difference is not so material as to have prejudiced the accused in his defence, it may, instead of a finding of "Not Guilty" record a special finding.

> (4) The special finding may find the accused guilty on a charge subject to the statement of exceptions or variations specified therein.
>
> (5) The Court shall not find the accused guilty on more than one of two or more charges laid in the alternative, even if conviction upon one charge necessarily connotes guilt upon the alternative charge or charges."
>
> (**emphasis supplied**)

The provisions of Rule 149 of the BSF Rules 1969 came up for interpretation before a two-judge Bench of this Court in **Union of India** v. **Dinesh Kumar**[14]. This Court was considering over sixty-two appeals from members of the BSF on the sole ground that orders of the SSFC were illegal since they did not state the reasons for arriving at their conclusion. Speaking on behalf of this Court, Justice V S Sirpurkar framed the issues for consideration as follows:

> **"**3. The common questions that falls for consideration in all these appeals can be stated as under:
>
> Whether the Summary Security Force Court (SSFC) is required to give reasons in support of its verdict?
>
> Similarly,
>
> Whether the appellate authority under Section 117(2) is required to give reasons while considering the correctness, legality or propriety of the order passed?"

The Court noted that under the scheme of the BSF Act 1968, Section 64 provides for three kinds of courts, namely: *(a)* General Security Force Courts; *(b)* Petty Security Force Courts; and *(c)* Summary Security Force Courts. Under Section 74(4) the SFCC may pass any sentence except the sentence of death or imprisonment for

[14] (2010) 3 SCC 161, ("**Dinesh Kumar**")

a term exceeding the time limits specified in sub-Section (5), which indicated that the SSFC had the jurisdiction to try all offences, but had limited powers with respect to the sentence[15]. This Court observed that Rule 149 forms a part of Chapter XI of the BSF Rules 1969 which deals with the procedure for the SSFC. In contradistinction, Chapter IX of the Rules deals with the procedure for all Security Force Courts. Chapter IX includes the amended Rule 99(1), which mandates the recording of reasons. After the amendment in 2003, the amended Rule 99(1) reads as follows:

> "99. *Record and announcement of finding*.—(1) The finding on every charge upon which the accused is arraigned shall be recorded and except as provided in these Rules, shall be recorded simply as a finding of 'Guilty' or of 'Not Guilty'. **After recording the finding on each charge, the Court shall give brief reasons in support thereof.** The Law Officer or, if there is none, the Presiding Officer shall record or cause to be recorded such brief reasons in the proceedings. The above record shall be signed and dated by the Presiding Officer and the Law Officer, if any."
>
> Therefore, under Rule 99(1), it became necessary for the SSFC to give brief reasons in support of the findings, where the procedure of the SSFC was being followed."
>
> (**emphasis supplied**)

Noting the lack of an amendment to Rule 149, this Court held:

> "17. **It is needless to mention that Rule 99 will not apply to SSFC. The procedure for the SSFC is provided in Chapter XI (Rules 133 to Rule 161), which alone is relevant here. It must be noted here that though Rule 99 was amended requiring authority of General Security Force Court or Petty Security Force Court to give reasons in support of their findings, no such amendment was made to Rule 149 which is applicable in the case of the SSFC.** Shri Malhotra, learned Additional Solicitor General, therefore, rightly argued that since Rule 149

[15] *Id.* at paras 7-10

> was left intact in contradistinction to Rule 99, the authorities of the SSFC were not required to give reasons in support of their findings in all these cases and the High Court has gravely erred in setting aside the orders of authorities on that count alone."
>
> (**emphasis supplied**)

While arriving at the above conclusion in **Dinesh Kumar** (supra), the Court also placed reliance on the decision of a Constitution Bench in **S N Mukherjee** v. **Union of India**[16].

26 The Constitution Bench in **S N Mukherjee** (supra) had affirmed and followed the decision of a Constitution Bench of this Court in **Som Datt Datta** v. **Union of India**[17] which had considered the duty of furnishing reasons on the Chief of Army Staff and the Union Government when confirming the proceedings of a Court-martial under the Army Act, 1950. The Court, in **Som Datt Datta** (supra), held that the requirement of furnishing reasons does not apply in every case concerning a finding by a statutory tribunal. Justice V Ramaswami (I), speaking on behalf of the Constitution Bench, held:

> "9. In the present case it is manifest that there is no express obligation imposed by Section 164 or by Section 165 of the Army Act on the confirming authority or upon the Central Government to give reasons in support of its decision to confirm the proceedings of the Court Martial. Mr Dutta has been unable to point out any other section of the Act or any of the Rule made therein from which necessary implication can be drawn that such a duty is cast upon the Central Government or upon the confirming authority. Apart from any requirement imposed by the statute or statutory rule either expressly or by necessary implication, we are unable to accept the contention of Mr Dutta that there is any general principle or any rule of natural justice

[16] (1990) 4 SCC 594 (**"S N Mukherjee"**)
[17] AIR 1969 SC 414 ("**Som Datt Datta**")

> that a statutory tribunal should always and in every case give reasons in support of its decision.
>
> […]
>
> As already stated, there is no express obligation imposed in the present case either by Section 164 or by Section 165 of the Indian Army Act on the confirming authority or on the Central Government to give reasons for its decision. We have also not been shown any other section of the Army Act or any other statutory rule from which the necessary implication can be drawn that such a duty is cast upon the Central Government or upon the confirming authority. We, therefore, reject the argument of the petitioner that the order of the Chief of the Army Staff, dated May 26, 1967 confirming the finding of the Court Martial under Section 164 of the Army Act or the order of the Central Government dismissing the appeal under Section 165 of the Army Act are in any way defective in law."

27 Following the decision in **Som Datt Datta** (supra), the Constitution Bench in **S N Mukherjee** (supra) considered the provisions of the Army Act and concluded that none of the provisions, either expressly or by necessary implication, confer a duty on the aforesaid authorities to furnish reasons. Justice S C Agrawal, speaking on behalf of the Constitution Bench, analysed the provisions of the Army Act 1950 on the anvil of the principles of natural justice:

> "36. Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision, are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion,

therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact whether the decision is subject to appeal, revision or judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge.

[…]

39. The object underlying the rules of natural justice "is to prevent miscarriage of justice" and secure "fair play in action". As pointed out earlier the requirement about recording of reasons for its decision by an administrative authority exercising quasi-judicial functions achieves this object by excluding chances of arbitrariness and ensuring a degree of fairness in the process of decision-making. Keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework whereunder jurisdiction has been conferred on the administrative authority. With regard to the exercise of a particular power by an administrative authority including exercise of judicial or quasi-judicial functions the legislature, while conferring the said power, may feel that it would not be in the larger public interest that the reasons for the order passed by the administrative authority be recorded in the order and be communicated to the aggrieved party and it may dispense with such a requirement. It may do so by making an express provision to that effect as those contained in the Administrative Procedure Act, 1946 of U.S.A. and the Administrative Decisions (Judicial Review) Act, 1977 of Australia whereby the orders passed by certain specified authorities are excluded from the ambit of the enactment. Such an exclusion can also arise by necessary implication from the nature of the subject matter, the scheme and the provisions of the enactment. The public interest underly-ing such a provision would outweigh the salutary purpose

> served by the requirement to record the reasons. The said requirement cannot, therefore, be insisted upon in such a case."

The Court conducted a detailed analysis of the provisions of the Army Act 1950 and held there was no requirement of furnishing reasons for the Chief of Army Staff or the Union Government when it confirmed proceedings of court-martial:

> 44. From the provisions referred to above it is evident that the judge-advocate plays an important role during the course of trial at a general court martial and he is enjoined to maintain an impartial position. The court martial records its findings after the judge-advocate has summed up the evidence and has given his opinion upon the legal bearing of the case. The members of the court have to express their opinion as to the finding by word of mouth on each charge separately and the finding on each charge is to be recorded simply as a finding of "guilty" or of "not guilty". It is also required that the sentence should be announced forthwith in open court. Moreover Rule 66(1) requires reasons to be recorded for its recommendation in cases where the court makes a recommendation to mercy. There is no such requirement in other provisions relating to recording of findings and sentence. Rule 66(1) proceeds on the basis that there is no such requirement because if such a requirement was there it would not have been necessary to make a specific provision for recording of reasons for the recommendation to mercy. The said provisions thus negative a requirement to give reasons for its finding and sentence by the court martial and reasons are required to be recorded only in cases where the court martial makes a recommendation to mercy. In our opinion, therefore, at the stage of recording of findings and sentence the court martial is not required to record its reasons and at that stage reasons are only required for the recommendation to mercy if the court martial makes such a recommendation."

Accordingly, on an analysis of the scope and statutory purpose of the Army Act, 1950, the Constitution Bench in **S N Mukherjee** (supra) concluded that there was no requirement of furnishing reasons.

28 After adverting to the principles enunciated by the Constitution Bench in **S N Mukherjee** (supra) and **Som Datt Datta** (supra), this Court in **Dinesh Kumar** (supra) in the context of Rule 149 of the BSF Rules 1969, held:

> **"**23. In this backdrop, it is clear that the provisions for the SSFC and the appellate authority are pari materia, more particularly in case of Rule 149 and Section 117(2) of the Act, with the provisions which were considered in both the above authorities. **Therefore, there cannot be any escape from the conclusion that as held by the Constitution Bench, the reasons would not be required to be given by the SSFC under Rule 149 or by the appellate authority under Section 117(2) of the Act. This position is all the more obtained in case of SSFC, particularly, as the legislature has chosen not to amend Rule 149, though it has specifically amended Rule 99 w.e.f. 9-7-2003.** It was pointed out that in spite of this, some other view was taken by the Delhi High Court in *Nirmal Lakra* v. *Union of India* [(2003) 102 DLT 415] . However, it need not detain us, since Rule 149 did not fall for consideration in that case. Even otherwise, we would be bound by law declared by the Constitution Bench in *S.N. Mukherjee* v. *Union of India* [(1990) 4 SCC 594 : 1990 SCC (Cri) 669 : 1991 SCC (L&S) 242 : (1991) 16 ATC 445] ."
>
> (**emphasis supplied**)

29 The decision in **Dinesh Kumar** (supra) which is based upon the view of the Constitution Bench in **S N Mukherjee** (supra) and **Som Datt Dutta** (supra) provides a clear answer and negates the finding of the High Court on the mandate of recording reasons by the SSFC when delivering its finding under Rule 149. Rule 149 does not either expressly or by necessary implication impose a mandate on the SSFC to record reasons when it renders its findings of guilt on a case referred to it.

D Conclusion

30 In the above circumstances, the High Court was in error on both the grounds which have weighed in its ultimate decision. There was no error of jurisdiction on the part of the Commandant in seeking clarification in regard to the date of the incident by calling for an additional RoE. As we have noted, the respondent was not prejudiced since he understood the allegations against him as pertaining to the events which transpired on the night when he was on duty, intervening 16 and 17 April 2006, and more specifically in the early hours of 17 April 2006.

31 On the second aspect, the decision of the High Court has failed to notice the judgment of this Court in **Dinesh Kumar** (supra) [which in turn is based on paragraph 40 of the principles enunciated by the Constitution Bench in **S N Mukherjee** (supra)]. The charge against the respondent was found to have been duly substantiated by evidence on the record. While dealing with the respondent's statutory petition under Section 117, the Director-General of BSF, reduced the quantum of sentence. He was empowered to do so in accordance with the provisions of Section 48 of the BSF Act 1968. Section 48 provides as follows:

> "**48. Punishments awardable by Security Force Courts**.— 1) Punishments may be inflicted in respect of offences committed by persons subject to this Act and convicted by Security Force Courts according to the scale following, that is to say,— (a) death; (b) imprisonment which may be for the term of life or any other lesser term but excluding imprisonment for a term not exceeding three months in Force custody; (c) dismissal from the service; (d) imprisonment for a term not exceeding three months in Force custody; (e) reduction to the ranks or to a lower rank or grade or place in the list of their rank in the case of an under-officer; (f) forfeiture of seniority of rank and forfeiture of all or any

> part of the service for the purpose of promotion; (g) forfeiture of service for the purpose of increased pay, pension or any other prescribed purpose; (h) fine, in respect of civil offences; (i) severe reprimand or reprimand except in the case of persons below the rank of an under-officer; (j) forfeiture of pay and allowances for a period not exceeding three months for an offence committed on active duty; (k) forfeiture in the case of person sentenced to dismissal from the service of all arrears of pay and allowances and other public money due to him at the time of such dismissal; (l) stoppage of pay and allowances until any proved loss or damage occasioned by the offence for which he is convicted is made good. (2) Each of the punishments specified in sub-section (1) shall be deemed to be inferior in degree to every punishment preceding it in the above scale."

Thus, the punishment which has been imposed on the respondent is in compliance with clauses (a) to (g) of Section 48(1). For the above reasons, we are of the view that the appeal should be allowed.

32 Before we conclude our analysis, we would also like to highlight a rising trend of invalidation of proceedings inquiring into sexual misconduct, on hyper-technical interpretations of the applicable service rules. For instance, the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act 2013 penalizes several misconducts of a sexual nature and imposes a mandate on all public and private organizations to create adequate mechanisms for redressal. However, the existence of transformative legislation may not come to the aid of persons aggrieved of sexual harassment if the appellate mechanisms turn the process into a punishment. It is important that courts uphold the spirit of the right against sexual harassment, which is vested in all persons as a part of their right to life and right to dignity under Article 21 of the Constitution. It is also important to be mindful of the

power dynamics that are mired in sexual harassment at the workplace. There are several considerations and deterrents that a subordinate aggrieved of sexual harassment has to face when they consider reporting sexual misconduct of their superior. In the present case, the complainant was a constable complaining against the respondent who was the head constable – his superior. Without commenting on the merits of the case, it is evident that the discrepancy regarding the date of occurrence was of a minor nature since the event occurred soon after midnight and on the next day. Deeming such a trivial aspect to be of monumental relevance, while invalidating the entirety of the disciplinary proceedings against the respondent and reinstating him to his position renders the complainant's remedy at nought. The history of legal proceedings such as these is a major factor that contributes to the deterrence that civil and criminal mechanisms pose to persons aggrieved of sexual harassment. The High Court, in this case, was not only incorrect in its interpretation of the jurisdiction of the Commandant and the obligation of the SSFC to furnish reasons under the BSF Act 1968 and Rules therein, but also demonstrated a callous attitude to the gravamen of the proceedings. We implore courts to interpret service rules and statutory regulations governing the prevention of sexual harassment at the workplace in a manner that metes out procedural and substantive justice to all the parties.

33 The appeal is accordingly allowed and the impugned judgment and order of the Division Bench of the Calcutta High Court of 18 December 2018 and of the

Single Judge of the Calcutta High Court on 7 May 2009 are set aside. In consequence, the writ petition filed by the respondent shall stand dismissed.

34 The appeal is disposed of in the above terms.

35 Pending application(s), if any, shall stand disposed of.

…….....J.
[Dr Dhananjaya Y Chandrachud]

…….....J.
[A S Bopanna]

New Delhi;
December 03, 2021