

W.M.P.Nos.10429 of 2019 in
W.M.P.No.8442 of 2019 in
W.P.No.7802 of 2019

S.MANIKUMAR, J.
AND
SUBRAMONIUM PRASAD, J.

Instant writ petition has been filed for a writ of declaration, declaring therein that Rule 6 of BSF Gr.A, B, C (Combined Ministerial Cadre) Recruitment Rule, 2005 reading as "A person appointed under the provisions of these rules shall retire from service on the afternoon of the last day of the month in which he attains the age of 57 years together with Rule 12 of BSF (General Duty Officers) Recruitment Rules, 2010 amended in 2015", to the extend it prescribes a condition reading as "officers of other ranks shall retire from service on the afternoon of the last day of the month in which they attain the age of fifty seven years" compared to "The officers holding posts higher than that of the rank of Commandant shall retire from service on the afternoon of the last day of the month in which they attain the age of sixty years" as arbitrary, unconstitutional, discriminatory, unjust, unreasonable classification, violation of Articles 14 & 16 of the Constitutional by striking out the same from the respective statutes mentioned hereinabove together with a consequential direction to the respondents to amend the respective Rules referred to hereinabove, by way

of enhancing the superannuation age from the present 57 years to 60 years, thus ensuring uniformity / non-discrimination.

2. Record of proceedings shows that on 20.03.2019, this Court has granted interim stay and the said order is extracted hereunder:

"2. Petitioner is due to retire on 31.03.2013, on attaining the age of 57 years. On the basis of the orders of the Delhi High Court, petitioner has sought for continuation of services and that his request dated 06.03.2019 made to the Director General, SHQ, BSF, New Delhi, has been forwarded for necessary action. The Deputy Inspector General, SHQ, BSF, BSF Chennai Circle has also recommended for continuation of service beyond the completion of 57 years of age.

No.Pers/GOs/Sup/2019/641-45
Dated: the 6 Mar 2019

From
K.Prabhakaran, Asst. Comdt (Min.)
IRLA No.41735329
SHQ BSF Chennai,
Villave Keerapakkam, Post:-Nallampakkam,
Chennai - 600 127 Email id: prabakaran83102@gmail.com

To
The Director General,
SHQ, BSF, CGO Complex,
Lodhi Road, New Delhi - 03.12.2012
(Through proper channel)

Sub: REQUEST TO YOUR GOODSELF NOT TO RETIRE THE
UNDERSIGNED ON 31 MAR 2019 ON COMPLETION OF

57 YEARS ON THE PRETEST OF SUPERANNUATION IN
THE LIGHT OF THE HON'BLE HIGH COURT, DELHI.

Ref: Order dated 31 Jan 2019 of the Hon'ble High Court
Delhi in the case of Dev SHARMA Versus INDO
TIBETAN BORDER POLICE & ANR.

2. I am to bring to your kind attention that prior to the Order dated 31 Jan 2019 in W.P.(C).1951/2012 of the above referred case of the Hon'ble High Court Delhi was supposed to retire w.e.f 31 Mar 2019 on completion of 57 years in exercise of the powers conferred by Sub-Section (i) read with clauses (b) and (c) of Sub-section (2) of Sections 141 of the Border Security Force Act 1968 and corresponding Rule 12 of BSF Group-A (General Duty Officer) Recruitment Rules 2015 (Notification dated 19 May 2015) as well as Rule 06 of BSF Group - A (Combatised Ministerial) Recruitment Rule 2011 (Notification dated 3 Feb 2011).

3. As the said rules have been struck down vide Para 68 of the Order 3 dated 31 Jan 2019 in the case under reference, I deem to continue in service beyond completion of 57 years age and would not deem to relieve w.e.f 31 March 2019, but would automatically continue in service till the issue of appropriate orders by Government of India in compliance with the orders of the Hon'ble High Court, Delhi.

4. In the light of above kindly no action may be initiated to issue Pension Payment Orders.

Thanking you,

Yours sincerely,

sd/-
(K.PRABHAKARAN)
ASSTT COMBT (MINISTERIAL)
IRLA NO.41735329
SHQ BSF CHENNAI.

Enclosures:

Copy of the order dated 31 Jan 2019 and 04 Feb 2019 of the Hon'ble High Court, Delhi in th case of Dev SHARMA Vs. INDO TIBETAN BORDER POLICE AND ANR.

No.98/10(MR)2018-Estt/2224-25

7 March 2019

To
Ftr HQ (Spl Ops) BSF,
Odisha (Bangalore)

FORWARDING OF APPLICATION ALONG WITH COURT ORDER

I have been directed to forward herein an application in respect of Shri K Prabakaran, AC (Min), IRLA No.41735329 of this HQ along with a copy of Court Order of Hon'ble High Court, New Delhi dated 31 Jan 2019 regarding to continue in service beyond completion of 57 years age and would not deem to relieve on 31 Mar 2019 and would automatically continue in service till the issue of appropriate order along with recommendation of DIG this HQ, for your further necessary action, please.

Encl. As above.

RAJESH T K LAKRA
ASSTT. COMDT. (OPS)
FOR DIG BSF CHENNAI.

RECOMMENDATION OF THE DEPUTY INSPECTOR GENERAL,

SHQ BSF, CHENNAI (SECTOR TAC HQ BSF, MALKANGIRI, ODISHA) ON THE APPLICATION OF SHRI K PRABAKARAN, AC (MIN), IRLA NO.41735329 OF SHG BSF, CHENNAI REGARDING TO CONTINUE IN SERVICE BEYOND COMPLETION OF 57 YEARS AGE

RECOMMENDED / NOT RECOMMENDED

Place: Malkangiri (Odisha)

(S P S SANDHU)

Dated, the 7 March 2019

DY INSPR GENERAL

SHQ BSF BSF CHENNAI

3. On an earlier occasion, while considering the very same Rules and the averments made in support of the prayer to quash Rule 43(a) of the Central Reserve Police Force Rules, 1955 together with the correspondent Rule 12 of the Central Reserve Police Force Group A (General Duty) Officers Recruitment Rules, 2001 amended in 2010, in WMP No.5672 & 5674 of 2019 in WP No.4969 of 2019 dated 28.02.2019, we have passed the following order.

"10. Though decision of the Delhi High Court, is not binding on other High Court but going through the said order, we are of the view that the petitioner has made out a prima facie case for admission of the instant W.P.No.4969 of 2019. We are also of the prima facie view that unless and until the proceedings No.M.V.- 2/2018 -Pers-DA-3, dated 14.06.2018 of the Director General, CRPF, New Delhi, is stayed, there would be a irreparable loss, prima facie, balance of convenience and the other important factor, irreparable loss are in favour of the writ petitioner. Hence, proceedings No.M.V.-2/2018-Pers-DA-3, dated 14.06.2018, is stayed."

4. We have further directed the learned Central Government Standing Counsel appearing for the respondents therein to communicate the orders of this Court to the respondents forthwith, for effective implementation. Petitioner therein was also permitted to communicate the orders of this Court, granting stay of the operation of the proceedings therein, to the respondents therein.

5. Instant writ petition is on the same grounds. Further, learned counsel for the petitioner submitted that recommendations have been made by the BSF in the minutes of meeting of the CAPFs dated 12.03.2019, for enhancing the age of retirement from 57 years to 60 years. 6. Therefore, following the order made in WMP No.5672 & 5674 of 2019 in WP No.4969 of 2019 dated 28.02.2019, there shall be an order of interim stay, in this writ petition also. It is also made clear that the writ petitioner should be allowed to continue, ie. From 01.04.2019."

3. The respondents have filed a detailed counter affidavit and sought for vacating the interim stay granted on 20.03.2019. The respondents have contended that the petitioner, Assistant Commandant (Min), IRLA No. 41735329 was enrolled in BSF as a Constable (GD) on 15/08/1983. Later, he qualified for appointment to the post of Direct Entry Assistant Sub Inspector (Clerk) Examination in 1987 and appointed as Assistant Sub Inspector (Clerk) w.e.f. 25/05/1988. He was appointed as Sub

Inspector (Min) w.e.f. 31/10/1996 and Inspector(Min) w.e.f. 01/04/2010 and further promoted as Assistant Commandant (Min) w.e.f. 31/03/2017. He would be completing 35 years 07 months and 16 days in BSF as on 31/03/2019. In terms of Rule 35 of CCS (Pension Rules), 1972, upon attaining the age of Superannuation i.e. on completion of 57 years of age, a superannuation order has been issued to the Officer(petitioner) as his date of birth is 13/03/1962, vide HQ Order No.6/5(Sup. Retire)/2017-Estt/9655-66, dated 13/14 September' 2019, with the direction to submit all relevant/essential documents to the Establishment Branch of the HQ to prepare the pension papers well in time i.e., before six months of superannuation for onward submission to the Pay & Account Division, BSF New Delhi for releasing of his Pension Payment Order (PPO), as well as other pensionary benefits in time. Moreover, in this regard, Force Head Quarters, BSF (PersDte: Pers Section) New Delhi has circulated the particulars of Group - 'A' BSF Officers of all the categories (Except Medical Officer), including petitioner, who are due for retirement, on attaining the age of superannuation, during the year 2019.

4. The respondents have further contended that vide SHQ BSF Chennai office order No. 5/1 (Gen Order) 2019-Estt/991-92 dated 30 January 2019(Annexure-C), the petitioner was entrusted to take over the

duties as Officer Commanding(OC) at rear Sector HQ, BSF Chennai, till his Superannuation retirement i.e., upto 31st March' 2019. During the period of entrusted duty, as OC Rear, Sector HQ BSF Chennai, the Officer submitted an application through proper channel addressed to The Director General, FHQ BSF New Delhi vide letter No.Pers/GOs/Sup/2019/641-45 dated 6th March' 2019, in which, petitioner referred to the order, dated 31st January' 2019 passed by the Delhi High Court in **W.P.(C)No.1951 of 2012 [Dev Sharma versus INDO-TIBETAN BORDER POLICE]** and stated that in view of the said judgment, the petitioner deems to continue in service beyond the completion of 57 years of age and would not be deemed to have been relieved w.e.f. 31 March 2019, but would continue in service, till the issue of appropriate orders by Government of India, in compliance with the Orders of Delhi High Court. The petitioner, in application, also requested that in the light of above, no action may be initiated to issue Pension Payment Orders (PPO). On receipt of aforesaid application of the petitioner, case was examined at HQ DG BSF New Delhi and FHQ BSF (Pers Dte-Staff Section), New Delhi, vide their signal No.R/3130, dated 20th March' 2019, has intimated that their HQ has received letter No.Pers/GOs/Sup/2019/641-45, dated 06th March' 2019 from the petitioner, Assistant Commandant (Min) IRLA No. 41735329 of this HQ., regarding continuation of service after 31st

March' 2019, in view of the Delhi High Court, dated 31st January' 2019 in WP(C) No.1951/2012. FHQ has further intimated that in this regard their signal No.R/3237, dated 19 February' 2019, has been communicated to all the field formations, that no direction has been received from MHA/DOP&T till date of the subject and therefore, status quo be maintained, till the decision is received from MHA and DOP&T and inform the Officer accordingly.

5. The respondents have further submitted that the order dated 31.01.2019 passed by Delhi High Court has been clarified by the said Court on 04.02.2019 in **Ram Chander Kasania & Anr. Vs. Union of India & Ors. [W.P.(C) 695/2019 & Appl.No. 3038/2019]**, wherein the application made by an officer therein, who was similarly situated to the petitioner herein, and due to retire on 28.02.2019, the Court directed as under:

“4. It is pointed out by Mr. Chibber, learned counsel for the Petitioners, that no Pension Payment Orders (PPOs) are being issued to those like the present Petitioners who have either superannuated during the pendency of the decision in **Dev Sharma v. ITBP** (supra) stating that it would have to await the

consequential steps to be taken pursuant to the said decision. Mr. Chibber points out that one administrative difficulty as a result of the said decision is that no PPO can be issued unless a final decision is taken by the Respondents on the uniform age of superannuation. This means that persons such as the Petitioners would receive no pension and other retrial benefits in the meanwhile.

9. In order to ensure that till such time the Respondents take the consequential steps for implementing the above judgment, no inconvenience is caused to such of those members of the CAPFs who superannuate in terms of the Rules as they existed prior to the judgment in Dev Sharma v. ITBP (supra), it is clarified that the Respondents will continue to issue PPOs in respect of such members of the CAPFs as and when they superannuate on the basis of Rules as they stood prior to the judgment. However, in the event that the Respondents decide, by way of implementation of the judgment, that the uniform age of superannuation would be 60 years or any age beyond 57 years, then depending on the date from which the change will take effect, the direction of this Court in para 72 of the judgment that it would not have the effect of reinstatement of those who have already retired would not come in the way of the Respondents deciding to reinstate such of those members of the CAPFs who would not have reached the uniform age of superannuation as determined. The Respondents will issue appropriate

consequential orders at that stage.

10. With the above clarification, the petition and application are disposed of in terms of the judgment dated 31st January, 2019 Dev Sharma v. ITBP (Supra). This clarification would apply to all those covered by the judgment of this Court in Dev Sharma v. ITBP (Supra)."

6. Respondents have further submitted that interim order dated 20/03/2019, passed by this Court, with the direction that petitioner would continue in service w.e.f. 01/04/2019, is not executable, because the order passed by the Delhi High Court in Dev Sharma case, does not state anything regarding extension of superannuation age upto 60 years, and the Delhi High Court has directed the UOI/Govt of India to take appropriate decision within a period of four months to bring uniformity in the age of superannuation in respect of CPOs. Till date, no such decision for extending the superannuation age upto 60 years for all employees of the CPOs has been taken by Government of India. Besides, in a similar case filed by R.C.Kasania v. UOI., the Delhi High Court did not give any such relief to the petitioner in the order, dated 04.02.2019. In another case of similar nature in Isub Ali Khan -v. UOI, filed before the Rajasthan High Court, the Court did not give any interim relief to the petitioner therein. Therefore, the respondents have prayed for vacating the interim order and dismissal the

above said Writ Petition.

7. Opposing the prayer for vacating the interim order, by inviting the attention of this Court to Paragraph 62 of the decision in **Dev Sharma v. ITBT [W.P.(C)No.1951 of 2012, dated 31.01.2019]**, by the Hon'ble Division Bench of the Delhi High Court, striking down Rule 43(a) of the CRPF Rules, the distinction, regarding the implemention of the order, for those in service and retired, made in Paragraphs 70 to 72 of the said decision and further inviting the attention of this Court to the final orders made in W.M.P.Nos.5672 and 5674 of 2019 in W.P.No.4969 of 2019, dated 28.02.2019, Mr.A.Irundayam, learned counsel for the writ petitioner submitted that when Rule 43(a) of the CRPF Rules has been struck down, the clarification issued pertains only to those, who have already retired from service on attaining the age of 57 years, before the date of passing of the order, i.e., on 31.01.2019 and those in service, are to be permitted to continue, otherwise it would amounting to keeping the judgment in abeyance. According to him, time granted is only to consider the case of those, who have already retired. For the abovesaid reasons, he prayed to sustain the interim order granted on 20.03.2019.

Heard Mr.G.Rajagopal, Additional Solicitor General of India, appearing for the respondents and Mr.A.Irudayam, learned counsel for the petitioner.

8. After considering the statutory provisions and catena of decisions, the Hon'ble Division Bench of the Delhi High Court in **Dev Sharma v. ITBT [W.P.(C)No.1951 of 2012, dated 31.01.2019]**, at Paragraph 69, has struck down Rule 43(a) of the CRPF Rules, 1955. As rightly pointed out by the learned counsel for the writ petitioner, the case of those in service, as on the date of passing of the order, ie., on 31.01.2019 and those, who have already retired, have been succinctly taken note of, by the Hon'ble Division Bench of Delhi High Court and in respect of those in service, the difficulties that would be faced by the department in retaining them, ie., those who have not completed 57 years of age, on the date of judgment, has been cateegorically recorded at Paragraph 70 of the said order, which is extracted hereunder:

"70. The Court recognises that there are bound to be implications- both organisationally and financially - as a result of the implementation of this decision. The Respondents shall, unless this judgment is further challenged and subject to any interim order in such proceedings, implement it across the board to all members of the CAPFs without insisting on each of them approaching the Court for identical relief. For that matter, even though the members of the SSB have not yet

approached this Court, if they are identically placed as these Petitioners, it should be implemented for them as well.

9. At Paragraph 71 of the said order, the Hon'ble Division Bench of the Delhi High Court has granted four months' time from the date of passing of the order, to the respondents, viz., MHA in consultation with the CAPFs concerned to take all the consequential steps by way of implementation of the judgment. For brevity, Paragraph 71 is reproduced hereunder:

"71. Accordingly a direction is hereby issued that within a period of four months from today the Respondents i.e. the MHA in consultation with the CAPFs concerned will take all consequential steps by way of implementation of this judgment. This will include arriving at a decision as regards the retirement age which will be uniform for all members of the CAPFs irrespective of their rank thus bringing all of them, including the CISF and the AR, on par and fixing the date from which such changed retirement age will take effect."

10. At Paragraph 72, the Delhi High Court has considered the case of those, who have retired, prior to the date of order and whether they could be reinstated or not. Paragraph 72 is extracted hereunder:

"72. The Court clarifies that this judgment will not have the effect of reinstatement of the Petitioners who have already retired. In view of the principle of „no work, no pay", it will also not have the effect of their being entitled to any arrears of pay for any further period beyond their retirement. However, for the purposes of calculation of retiral benefits, including pension and gratuity, the differential period (in the event of enhancement of the retirement age) will be added to period of service actually rendered by each of them. In other words, their notional date of retirement would be arrived at by adding the differential years to their actual date of retirement. On such calculation they would be entitled to the arrears of retirement benefits after adjusting the amount already paid."

11. Subsequently, when two persons, viz., Ram Chander Kasania, 1st petitioner therein, a Deputy Commandant (DC), who had attained the age of superannuation on 31.01.2019, on completion of 57 years of age and another Deputy Commandant (DC), due for retirement on attaining the age of superannuation on 28.02.2019, joined together and filed CM.Appl.No.3038 of 2019 in W.P.(C)No.695 of 2019. The Hon'ble Division Bench of Delhi High Court, at Paragraph 2 of the order, dated 04.02.2019, observed thus,

"2. Further, this Court has in Dev Sharma v. ITBP (supra) granted the Respondents four months' time to take all consequential steps by way of implementation of the judgment. In this period, the Respondents have to take a decision as regards the retirement age which will be uniform for all members of the CAPFs [including the CISF and the Assam Rifles (AR) where at present the uniform retirement age is 60 years] irrespective of their rank. This Court has further clarified that the said judgment would not have the effect of reinstatement of those who have already retired."

(emphasis supplied)

12. Reading of Paragraph 4 of the abovesaid order, dated 04.02.2019, further indicates that the learned counsel for the petitioners therein made submissions that no Pension Payment Orders (PPOs) are issued to those, who have either superannuated during the pendency of the decision in Dev Sharma's case, stating that they would have to await for the consequential steps to be taken, pursuant to the decision of MHA and that no PPOs can be issued, till a final decision is taken by the respondents therein, on the uniform age of superannuation. Submission has been made therein that in the event of not issuing PPOs, the petitioners therein would not receive pension and other retiral benefits in the meanwhile.

13. The Hon'ble Division Bench of the Delhi High Court, at Paragraph 5, has ordered as follows:

"5. In order to ensure that till such time the Respondents take the consequential steps for implementing the above judgment, no inconvenience is caused to such of those members of the CAPFs who superannuate in terms of the rules as they existed prior to the judgment in *Dev Sharma v. ITBP* (supra), it is clarified that the Respondents will continue to issue PPOs in respect of such members of the CAPFs as and when they superannuate on the basis of Rules as they stood prior to the judgment. However, in the event that the respondents decide, by way of implementation of the judgment, that the uniform age of superannuation would be 60 years or any age beyond 57 years, then depending on the date from which the change will take effect, the direction of this Court in para 72 of the judgment that it would not have the effect of reinstatement of those who have already retired would not come in the way of the Respondents deciding to reinstate such of those members of the CAPFs who would not have reached the uniform age of superannuation as determined. The Respondents will issue appropriate consequential orders at that stage."

14. Thus, with the above clarification, CM.Appl.No.3038 of 2019 in W.P.(C)No.695 of 2019, has been disposed of, in terms of the judgment in *Dev Sharma's* case, decided on 31.01.2019. The Hon'ble Division Bench has further observed that the clarification would apply to all those covered by the judgment of the Delhi High Court in *Dev Sharma v. ITRP* (supra).

15. From the reading of the final order and the subsequent clarificatory order, dated 04.02.2019, it could be deduced that Rule 43(a) of the CRPF Rules, 1955, has been struck down. The Hon'ble Division Bench of the Delhi High Court have categorised those, who were in service as on 31.01.2019 and those, who have retired on the said date. That is how, the Hon'ble Division of the Delhi High Court has ordered at Paragraphs 70 and 72 respectively.

16. As regards the decision to be taken in Paragraph 71, four months' time, has been taken and the said position is reiterated in Paragraph 2 of the order made in CM.Appl.No.3038 of 2019 in W.P.(C)No.695 of 2019, dated 04.02.2019. Reading of the last sentence in Paragraph 4 of the order, dated 04.02.2019, makes it clear that the Hon'ble Division Bench of the Delhi High Court has clarified the aspect that the order would be applied differently, in respect of those, who are in service, as on the date of judgment, ie., on 31.01.2019 and those retired. At the risk

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of repetition, we reproduce the last sentence in Paragraph 2 of the order in CM.Appl.No.3038 of 2019 in W.P.(C)No.695 of 2019, dated 04.02.2019,

"This Court has clarified that the said judgment would not have effect of reinstatement of those, who have already reinstated."

17. When the rule has been struck down and that there was difficulty in implementing the order in entirety, including those, who have already retired, as on the date of order, i.e., 31.01.2019, the Division Bench of the Delhi High Court has clarified the above, in the subsequent order. It should be noted that the clarification is only in respect of reinstatement of those retired and in considered view, not applicable to those, in service, after the date of passing of the order, ie., 31.01.2019.

18. Paragraph 5 of the order in CM.Appl.No.3038 of 2019 in W.P.(C)No.695 of 2019, dated 14.02.2019, has to be read in conjunction with what has been stated in Paragraphs 2 and 4 of the said clarificatory order. Again, at the end of Paragraph 5 of the order, dated 04.02.2019, the Hon'ble Division Bench of the Delhi High Court, has made it clear that,

"the direction of this Court in para 72 of the judgment that it would not have the effect of reinstatement of those who have already retired would not come in the way of the Respondents deciding to reinstate such of those members of the CAPFs who would not have reached the uniform age of

superannuation as determined. The Respondents will issue appropriate consequential orders at that stage."

19. It could be noticed that the Hon'ble Division Bench of the Delhi High Court has referred to Paragraph 72 of the final order in W.P.(C)No.1951 of 2012, dated 31.01.2019, and not Paragraph 70 of the said order, dealing with those in service, on the date of passing of the order. Thus, we are of the considered view that those, who are in service, after the date of final order made in **Dev Sharma's** case, ie., 31.01.2019, should be allowed to continue.

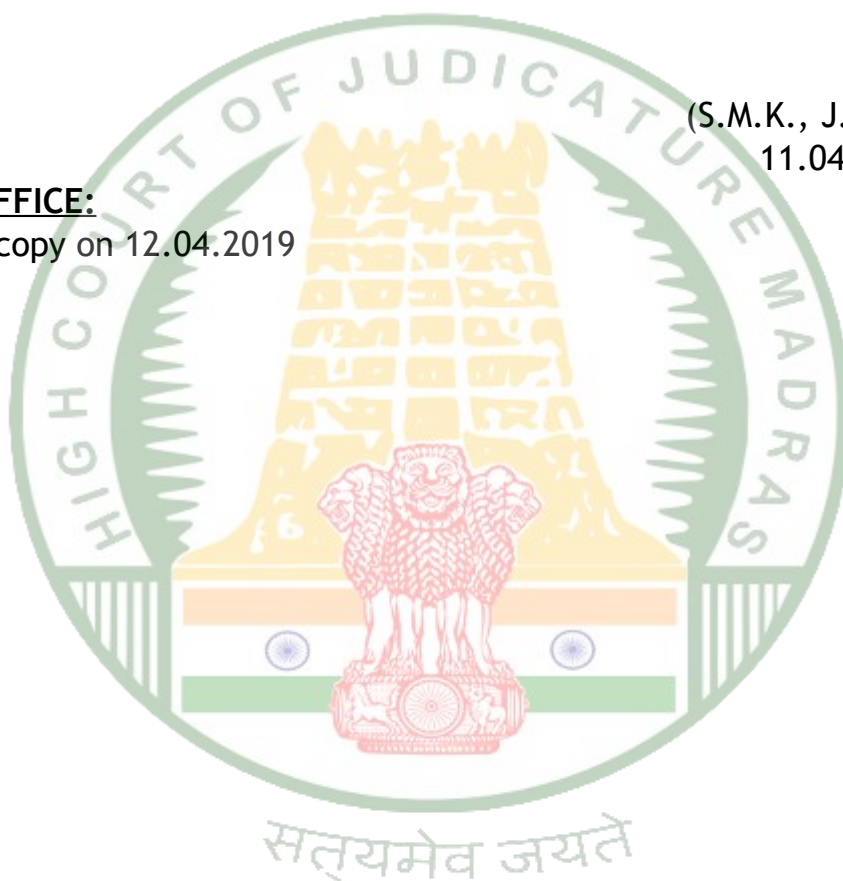
20. Directions issued in Paragraph 71 should not be construed to mean, discontinuation of those in service, after the date of passing of the order, ie., on 31.01.2019. If that interpretation is given, then Paragraphs 60 to 70 of the order, dated 31.01.2019, would become redundant, in-operative and virtually amounting to staying the operation of the order, which the Hon'ble Division of the Delhi High Court has struck down the provision in Rule 43(a) of the CRPF Rules, 1955. Admittedly, there are no materials, indicating that the order of the Hon'ble Division Bench of the Delhi High Court, has been challenged in appeal and that there is no interim order, granting stay of the same. If the arguments of the learned Additional Solicitor General, Government of India, is accepted, then it amount to, this Court staying the operation of the order. When the Hon'ble Division Bench of the Delhi High Court, has already clarified, as stated supra, contention of the respondents that the order, dated 28.02.2019, passed by us, is inexecutable, cannot be accepted.

21. For the abovesaid reasons, we are not inclined to vacate the interim order, dated 20.03.2019. Hence, W.M.P.Nos.10429 of 2019 in W.P.No.7802 of 2019 is dismissed. Stay is made absolute.

(S.M.K., J.) (S.P., J.)
11.04.2019

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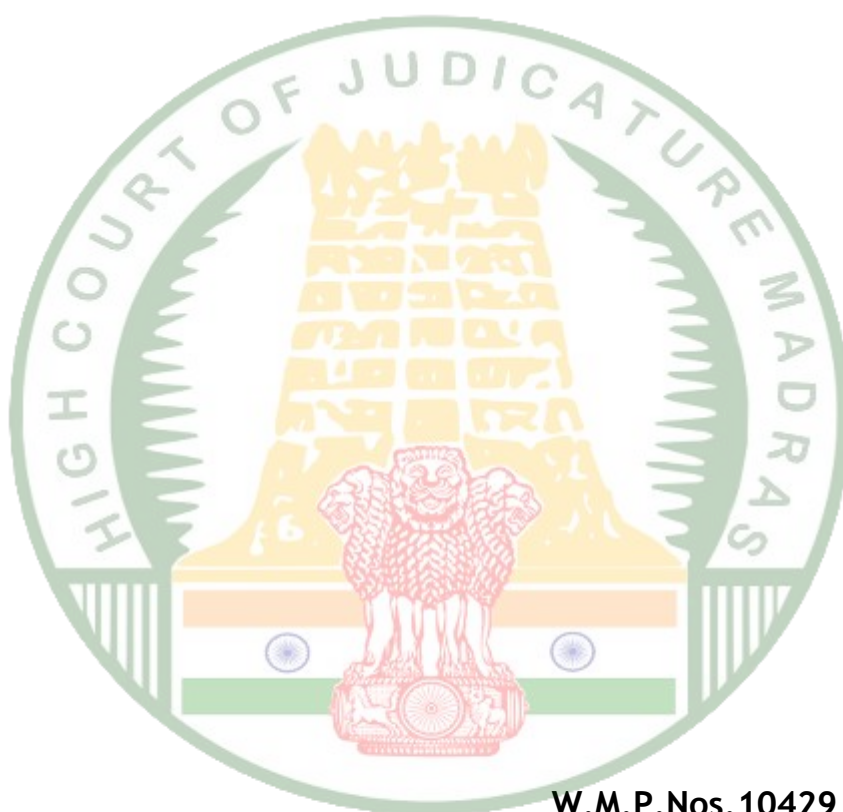
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S.MANIKUMAR, J.
AND
SUBRAMONIUM PRASAD, J.

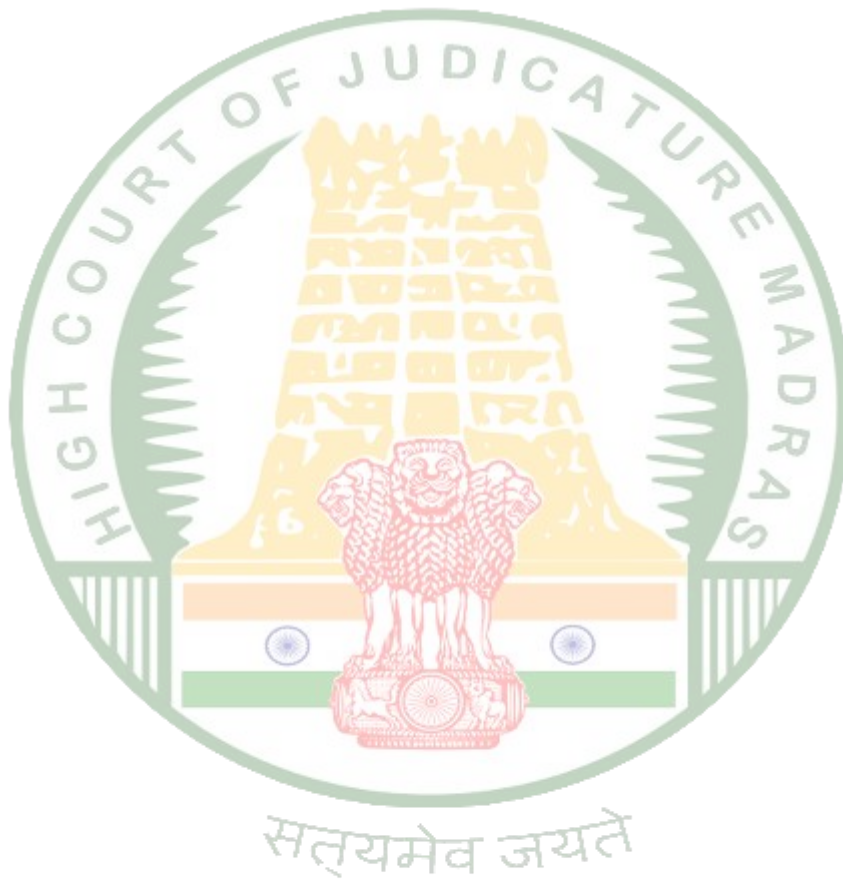
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W.P.No.7802 of 2019

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