

Radhakrishnan Vs. State of Tamil Nadu Rep by Its Secretary,

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SooperKanoon Citation : sooperkanoon.com/927053

Court : Chennai

Decided On : Apr-19-2012

Judge : K.Mohan Ram; G.M.Akbar Ali, Jj.

Acts : Code of Criminal Procedure (CPC) - Section 435, 151, 376, 396 to 400, 402, 467, 471, 472, 474, 489-A, 489-B and 489D ; Indian Penal Code (IPC) - Sections 224, 433-A, 432; C.L.A.Act - Section 7(1)(a); [Constitution of India](#) - Articles 226, 161, 19, 21; Tamil Nadu Prison Manual, Volume Rule 297(62)2 -

Appeal No. : Habeas Corpus Petition Nos.1856 of 2009 and 862 of 2010

Appellant : Radhakrishnan

Respondent : State of Tamil Nadu Rep by Its Secretary,

Advocate for Def. : Mr.A.N. Thambi Durai, Adv.

Advocate for Pet/Ap. : Mr.R. Sankara Subbu, Adv

Judgement :

HCP No.1856 of 2009:

Petition filed under Article 226 of the [Constitution of India](#) praying for the issuance of a Writ of Habeas Corpus directing the respondents to produce the detenu N.K. Gopal @ Kannan @ Mani, S/o Kolanthai Gounder, aged 52 years, Convict No.7298 now confined in Central Prison, Salem before this Court and set him at

liberty.

HCP No.862 of 2010:

Petition filed under Article 226 of the [Constitution of India](#) praying for the issuance of a Writ of Habeas Corpus directing the respondents to produce the detenu Radhakrishnan, S/o Periannan, now confined at Central Prison, Salem before this Court and set him at liberty.

COMMON ORDER

G.M. AKBAR ALI,J.,

HCP No.1856 of 2009:

1. The detenu in HCP in 1856 of 2009 is a convict now confined in the Central Prison, Salem. He was arrested on 5.3.1974 and sentenced to death by the trial court and on appeal, the same was commuted to life imprisonment on 7.1.1976 by this court. He is also undergoing a sentence for an offence under Sec.307 IPC which is ordered to run concurrently.

2. He served the sentences upto 12.5.1987. He was granted one month parole but he could not report to prison due to ill health and mental agony. He was re-arrested on 24.6.2009. Meanwhile, by G.O Ms No.1319 dated 2.9.93 the Government had ordered premature release of the convicted persons due to general amnesty to the life prisoners on the occasion of the Birthday of the then Hon'ble Chief Minister. However, the detenu was not considered for release since he was only later arrested and remanded. Therefore the detenu namely N.K.Gopal submitted a representation dated 9.7.2009, which was not considered. A Writ of Habeas Corpus petition in HCP No in 1318 of 2009 was filed and this court by Order dated 19.8.2009 directed the respondent to consider the case. After considering his case the Government rejected his representation. Therefore, the present petition has been filed by the friend of the detenu.

HCP No.862 of 2010:

3. The friend of the detenu viz., Radhakrishnan was also a co-accused along with the above detenu. His name was considered under the GO MS No.1319 of 1993 and he enjoyed the benefit.

4. However, the Government felt that the said Radhakrishnan was not entitled for the benefit by virtue of GO MS No.1762 dated 20.7.1987 and cancelled the premature release by passing an order in GO No.149 dated 23.3.2010

5. On cancellation of premature release, the said Radhakrishnan was again arrested and sent to prison. Challenging the order as well as terming it as a illegal detention, the petitioner who is a human right activist has filed HCP No.862 of 2010. Later on the orders of this court the detenu was directed to be impleaded as a Petitioner.

6. Since the issue involved in both the petitions are one and the same, both the matters are heard together and a common order is passed.

7. First let us consider the case of the detenu by name N.K. Gopal @ Kannan @ Mani, in HCP No.1856 of 2009.

8. Mr.R. Sankara Subbu, the learned counsel for the petitioner submitted that the detenu has so far served 13= years as a life convict and is entitled for the benefit of G.O. Ms. 1319 of 1993. The learned counsel pointed out that according to the said G.O., the Government had considered to release all the life convicts who were convicted before 18.12.1978 irrespective of their period already undergone, and all men convicts, convicted on or after 18.12.1978 who have undergone 12 years of actual imprisonment and all the women convicts who have undergone 10 years of actual imprisonment as on 24.2.1992.

9. The learned counsel for the petitioners pointed out that the detenu N.K. Gopal @ Kannan @ Mani was convicted before 18.12.1978 and he is entitled to be considered for pre-mature release. The learned counsel pointed out that the detenu came out on parole and he could not report to the Prison due to ill health. On the date of passing of the Government Order, though he was not actually in prison, the benefit has to be extended as the courts have held that those persons,

who are on bail or on parole, are also to be considered for pre-mature release.

10. The learned counsel pointed out that this court has directed the respondent to consider the representation dated 9.7.2009 submitted by the detenu, but so far the order has not been complied with. The learned counsel further submitted that GO MS No.1762 dated 20.7.1987 which created a different eligibility criteria is not applicable to those persons who were convicted before 18.12.1978. The learned counsel for the petitioners relied on the following case laws:

AIR 1980 SC 2147 (Maru Ram vs Union of India),

1987 LW CrI 398 (Babu alias Kurtan vs Rajakumar),

AIR 1938 Nagpore 513 (Venkatesh Yeshwant Deshpande vs Emperor),

1983 LW CRL 321 (Ragupathy, R.,) ,

1990 MLJ CrI 408 (State of Haryana and another vs Ram Diya),

2009 2 SCC 268 (State of Haryana vs Bhup Singh and Others),

2011 2 Supreme 375 (Delhi Development Authority vs Ram Prakash),

2011 10 SCC 398 (D. Ethiraj vs Secretary to Government and Others),

2010(2) SCC (CrI) 806 (State of Haryana and Others vs Jagdish),

2010(3) Crimes HC 197 (Makkan Singh vs State of Rajasthan),

1990 SCC (CrI) 44 (Nalamolu Appalaswamy and others vs State of Andhra Pradesh)

and unreported order passed in WP No.20511 of 2008 dated 24.11.2009.

11. Heard the learned Additional Public Prosecutor.

12. We have carefully considered the submissions made on either side and perused the materials available on record.

13. The detenu N.K. Gopal @ Kannan @ Mani was arrested on 5.3.1974 for an offence under Sec.302 IPC. He was convicted and sentenced to death by the Court of Sessions at Krishnagiri in S.C.No.34 of 1975 by order dated 30.6.1975. In a referred trial No.1919 of 1975, this Court modified the death sentence to life imprisonment by order dated 7.1.1976. He was also convicted in SC No.12 of 1976 and SC No.52 of 1976. From 5.3.1974, he was undergoing imprisonment.

14. On 12.5.1987, he was granted one month parole, but after one month, he did not return to prison. On 24.6.2009, he was re-arrested in Cr.No.269 of 2009 under Sec.151 Cr.P.C r/w 7(1)(a) of Criminal Law Amendment Act.

15. In the meantime, by a Telex message dated 23.2.1992 some of the life convicts were prematurely released. In the Government Telex dated 23.2.1992 the Government had released life convicts on the occasion of the Birthday celebration of the then Chief Minister, who were convicted before 18.12.1978 and all men convicts convicted on or after 18.12.1978 who have undergone 12 years of actual imprisonment and all women convicts who have undergone 10 years of actual imprisonment. However, such release was subject to the following conditions viz.,

- i) That their general behaviour in the prison should be satisfactory
- ii) That they are not ineligible for premature release as per G.O.Ms.No.1762, Home dated 20.7.1987.
- iii) That they are not ineligible as per section 435 of Criminal Procedure Code.
- iv) That there is safety for their life if released;
- v) That they will be accepted by the members of their family;
- vi) The Convicts convicted by the Courts of other States and the military Court are not eligible for premature release.

16. However, the name of the detenu did not find a place in the list. By G.O.Ms.No.1319 dated 2.9.93 the Government issued formal orders for the premature release of 20 life convicts, who were convicted before 18.12.1978, which included a similarly placed life convict viz., Radhakrishnan. Since similarly

placed co-accused was released as early as 1993, the detenu gave a representation on 9.7.2009 and Radhakrishnan, the petitioner in HCP No.1856 of 2009 also filed HCP No 1318 of 2009 and by an order dated 19.8.2008 this Court directed the Government to consider the representation. By a letter dated 1.12.2009, the Government rejected the request of the detenu. In the letter dated 1.12.2009, it is stated as follows:

3. While undergoing the above sentence, you were released on leave for one month on 12.5.1987 as per the orders of the High Court Order No.2854/87 in Cr.MP No.3882/87. You should have returned to prison on 08.06.87, on expiry of leave but, you did not return to prison, which amounts to violation of the Tamil Nadu Suspension of sentence Rules as well as Rule 297(62) of Tamil Nadu Prison Manual, Volume-II. A case was registered in Cr.No.58/87 in Nagarasampatty Police Station under Section 224 Indian Penal Code, and this case is still pending with the Judicial Magistrate, Pochampalli. You were recaptured after a gap of 22 years, on 25.06.2009 and remanded to prison by the Judicial Magistrate, Pochampalli under Section 151 Criminal Procedure Code read with 7(1)(a) C.L.A.Act. Apart from the above mentioned case, the case under Section 224 Indian Penal Code in Cr.58/87 for the absconding on leave is also pending.

17. The reason given for the rejection of the representation was stated in paragraph 6 of the above letter which reads as follows:

6. As you were not in prison undergoing the sentence at the time of issue of the above mentioned order and as you were absconding after your leave for one month as per the orders of the High Court No.2854/87 in Cr.M.P.No.3882/87 at the time of issue of the above said order and you were arrested by Police only on 25.6.2009 after lapse of 22 years and criminal cases are now pending against you, your request for premature release as per the orders mentioned in paras 4 and 5 above is rejected by the Government.

18. There are two reasons given for rejection. First one is the eligibility as required under G.O Ms No.1762 dated 20.7.87. Under the above said G.O, the Government has directed the following categories of prisoners should not be considered for premature release :

i) Prisoners convicted of rape, forgery, dacoity, terrorist crimes, offences against the State and prisoners sentenced under sections 224, 376, 396 to 400, 402, 467, 471, 472, 474, 489-A, 489-B and 489D of the Indian Penal Code

ii) Prisoners convicted of economic offences, black marketing, smuggling and misuse of power and authority; and

iii) Prisoners sentenced under prevention of Corruption Act, Suppression of Immoral Traffic in Women and Girls Act, Drugs Act and Prevention of Food Adulteration Act.

19. In clause - 1 an offence under Sec.224 IPC relates to resistance or obstruction by a person to his lawful apprehension which includes escape or attempt to escape from any custody in which he is lawfully detained for any such offence. The second reason is that the detenu was not undergoing the sentence at the time of issuing of the above mentioned order as he was absconding after the parole.

20. In the counter, it is stated that a case under Sec.224 of IPC in Cr.No.58 of 87 for absconding on leave was pending during the time when the Government ordered the release of the prisoners in 1992 and therefore, the detenu is not entitled to claim such premature release.

21. The argument of the learned counsel for the petitioner is two fold. One is that the detenu fulfills the condition laid down in GO Ms No.1319 dated 2.9.93 and the other is that the GO Ms No.1762 dated 20.7.1987 is not applicable as it has no retrospective effect, since the detenu was convicted before 18.12.1978.

22. Out of the 20 prisoners released, the name of the detenu was not found in GO Ms No.1319 dated 2.9.93. However, similarly placed convict viz., Radhakrishnan found a place in the list. Obviously, he was also not actually undergoing imprisonment at the time of issuance of the telex dated 23.2.1992 and also on the date of issuance of G.O M.S.No.1319 dated 2.9.93.

23. Different yardsticks cannot be applied for similarly placed persons. Therefore, the contention that the detenu was not undergoing imprisonment on the date of G.O Ms.No.1319 dated 2.9.93 is untenable.

24. The only criterion for premature release under the said Government Order was prisoners who were convicted before 18.12.1978 . Whether they were actually undergoing imprisonment or out of parole or did not report back on completion of parole did not matter. Otherwise they would not have considered the said Radhakrishnan for premature release.

25. In 1993 LW Cri 321 (R. Regupathy petitioner) a Division Bench of this Court has laid down certain guidelines which reads as follows:

35..

11. The orders of Government either granting or not granting remission should set out the reasons, which had weighed with the Government in passing the order in question. Similarly, whenever the Government directs that a case should be placed for re-consideration after the lapse of more than six months, viz., one year or two years, as the case may be, the Government should give reasons why it should be put up for consideration after the prescribed period of time.

12. If the Government is not inclined to grant remission to life convict, whose case is placed for consideration, the Government should afford an opportunity to the affected convict to make his representations, if any, in support of his claim for premature release.

13. Though the Government is the exclusive authority to grant remissions, yet its orders are liable to be challenged in a court of law, if the order is vitiated by the vice of arbitrariness or discrimination or if it had been passed on unintelligible grounds or with reference to extraneous or irrelevant materials.

14. Every person, who has been convicted by the sentencing court before 18th December, 1978 shall be entitled to the benefits accruing to him from the Remission Scheme or Short sentencing Project as if S.433-A did not stand in his way. Even in those cases, where the trial court acquits, but the higher Court conviction is after S.433-A came into force, it must be held that the appellate Court has exercised its power in the place of the original court and therefore, the appellate conviction will relate back to the date of the trial court's verdict and

substitute it and consequently, even in those cases, the convicts will be entitled to the benefit of the remission system prevailing prior to the coming into force of S 433-A of the Code.

26. It would also be helpful to refer to the case in 2011 (10) SCC 398 (D. Ethiraj vs Secretary to Government and Others, in which recently the Apex Court considered the case of an appellant who was convicted and sentenced to undergo imprisonment for three years and has prayed for his case being considered for remission of sentence in the light of a Government Order of remission, which was declined by the High Court on the ground that as the appellant was on bail on the date of issuance of Notification for remission of sentence his case for remission cannot be considered. Allowing the appeal, the Apex court has held as follows:

If during the period a convicted person has been on bail and has not suffered any imprisonment at all, he cannot get the benefit of remission in respect of that period. However, the same was admittedly not the position herein. The appellant had presently suffered a substantial portion of period in jail, which was about 17 months, which is undisputed. The reasoning of the High Court for not considering the appellant's case for remission cannot be approved. The prisoner may be on bail on a particular day. This is just a fortuitous circumstance. What the court has to consider is the actual period of sentence undergone by the prisoner and whether by reason of the period actually undergone, the prisoner qualifies for remission. Therefore, the appellant is entitled to get his case of remission of sentence considered in accordance with the GO. Hence the High Court's judgment is set aside .

27. It is also pertinent to point out that the detenu was arrested on 5.3.1974 and was in custody till 12.7.1987, almost for 13 = years. Therefore his premature release ought to have been considered by the authorities under the above said telex dated 23.2.1992 and also on the strength of G.O Ms.No.1319 dated 2.9.93. Therefore what is to be considered is whether the prisoner has undergone the actual period of sentence and whether by reason of the period actually undergone, the prisoner qualifies for remission.

28. At this juncture, regarding the second point, whether GO Ms No.1762 dated 20.7.1987 has retrospective effect, it is relevant to refer to the Constitutional Bench Judgment reported in AIR 1980 SC 2147 (Maru Ram vs Union of India), where the Hon'ble Apex Court has upheld the validity of Sec.433-A of Cr.P.C. But however, held as follows:

7. We declare that Section 433A, in both its limbs (i.e., both types of life imprisonment specified in it), is prospective in effect. To put the position beyond doubt, we direct that the mandatory minimum of 14years' actual imprisonment will not operate against those whose cases were decided by the trial court before the 18th December 1978 when Section 433A came into force .

29. In 1990 SCC Cri 44 (Nalamolu Appala Swamy and others vs State of Andhra Pradesh) the Hon'ble Supreme Court considered the effect of G.O.Ms No.580 dated 20.10.1984 issued by Government of Andhra Pradesh, wherein the remission was denied to the prisoners since they were not in jail at the time of issuance of the above said GO. The Hon'ble Supreme Court held as follows:

6. We do not feel called upon to go into the question whether the appellants would fall under clause (a) or clause (b) of para 2 of the GO as it is for the State Government to interpret the GO and decide the matter. We are confining our order to the limited question whether the ground set out in the counter-affidavit for denying remission to the appellants under the GO viz., that they were not in jail but were on bail at the time the GO is a tenable one.

30. In 2010 4 SCC 216 (State of Haryana and Others vs Jagdish) a Larger Bench of the Hon'ble Supreme Court took up the following question:

4. The question that has been posed before us is as to whether the policy which makes a provision for remission of sentence should be that which was existing on the date of the conviction of the accused or should it be the policy that exists on the date of consideration of his case for premature release by the appropriate authority?

31. After elaborate consideration of various decisions, the Larger Bench held as follows:

53. The right of the respondent prisoner, therefore, to get his case considered on a par with such of his inmates, who were entitled to the benefit of the said policy, cannot be taken away by the policy dated 13.8.2008. This is evident from a bare perusal of the recitals contained in the policies prior to the year 2008, which are referable to Article 161 of the Constitution. The High Court, therefore, in our opinion, was absolutely justified in arriving at the conclusion that the case of the respondent was to be considered on the strength of the policy that was existing on the date of his conviction.

54. The State authority is under an obligation to at least exercise its discretion in relation to an honest expectation perceived by the convict, at the time of conviction that his case for premature release would be considered after serving the sentence, prescribed in the short-sentencing policy existing on that date. The State has to exercise its power of remission also keeping in view any such benefit to be construed liberally in favour of a convict which may depend upon case to case and for that purpose, in our opinion, it should relate to a policy which, in the instant case, was in favour of the respondent. In case of a liberal policy prevails on the date of consideration of the case of a lifer for premature release, he should be given benefit thereof .

32. The Government keeping in mind the decision in Maru Ram's case reported in AIR 1980 SC 2147 (cited supra), had categorised two list of prisoners in GO MS No.1319 dated 2.9.93. One category of life convicts who were convicted before 18.12.1978 and another category who were convicted on or after 18.12.1978. (sec.433-A came into force on 18.12.1978).

33. Therefore, as far as the second point is concerned the GO MS No. 1762 dated 20.7.1987 cannot have a retrospective effect as the detenu was convicted as early as 30.6.1975. The punishment or conviction under Sec.224 of IPC is concerned, the GO MS No 1762 dated 20.7.1987 will not have retrospective effect as discussed above on the basis of various Apex court judgments. Even assuming that the case has been registered in Cr.No.58 of 1987 for the offence of

absconding on leave, the detenu was re-arrested on 24.6.2009 and the learned Additional Public Prosecutor fairly conceded that the case is not pending now and therefore, that disqualification has also been removed.

34. Therefore, as far as the detenu N.K. Gopal @ Kannan @ Mani, is concerned, the rejection of his representation is unacceptable and he is entitled to the benefits under G.O Ms.No.1319 dated 2.9.93. Now the detenu has undergone more than 15 years of incarceration and no purpose will be served by giving a direction to the State Government to consider his representation again for premature release.

35. Therefore We think it is a fit case to exercise the powers under Article 226 of the [Constitution of India](#) and to set the detenu at liberty. In the result HCP No 1856 of 2009 is to be allowed.

36. Now we come to the case of the detenu in HCP No.862 of 2010. He was, in fact, released under G.O.Ms.No.1319 dated 2.9.93. He came under the category of the prisoner convicted before 18.12.1978. He was convicted in SC No.12 of 1976 dated 24.1.1977 and sentenced to death. In a referred trial, this court reduced the sentence to Life Imprisonment by its order dated 21.7.1977. He was convicted for an offence under Sec.224 and 353 IPC and sentenced to 2 years R.I on 24.4.1978. He was released on parole on 9.11.1985 but did not report back to the prison and overstayed. However, he was arrested on 23.10.1992 and committed to Central Prison Salem.

37. In the meanwhile by a telex dated 23.2.1992 referred above, life convicts including the detenu were released under G.O Ms.No.1319 dated 2.9.93 and the Government had issued formal orders remitting the unexpired portion of sentence of the detenu. He came under the category of prisoners who were sentenced before 18.12.1978. He was released by the Government on 12.1.1993 as per the Go MS 1319 dated 2.9.93.

38. The detenu could have very well kept quiet and minded his own business. But he did something extraordinary. He took pity of a co-convict viz. N.K. Gopal @ Kannan @ Mani, and filed HCP No.1318 of 2009 citing similarly placed convict has been prematurely released and argued for the release of the above said detenu

Gopal.

39. This Court, directed the Government to consider the representation dated 9.7.2009 of the said N.K. Gopal @ Kannan @ Mani. But the Government rejected the representation. Relentless, the detenu filed a Habeas Corpus Petition in HCP No.1856 of 2009 for consideration of premature release. The Government suddenly woke up and found that the detenu himself was not entitled to be released prematurely for the following two reasons:

i) the detenu was not actually undergoing the imprisonment at the time of telex message dated 23.2.1992 and G.O.Ms.No. 1319 dated 2.9.93.

ii) he was convicted for an offence under Sec.224 IPC, due to which GO MS No.1762 dated 20.7.1987 is attracted. His premature release was cancelled by GO No.149 dated 23.3.2010. He was re-arrested near the jail gate of Central Prison, Salem on 22.4.2010 when he went to visit his friend N.K. Gopal @ Kannan @ Mani, (the detenu in HCP No.1856 of 2009) for whom he was fighting. Now he is under confinement.

40. The petitioner, who claims to be a Human Rights Activist, has come forward with the present application invoking the jurisdiction of this court under Article 226 of the Constitution with a prayer to set the detenu at liberty.

41. Mr.R.Sankara Subbu, learned counsel for the petitioners vehemently argued that once a remission has been granted the same cannot be recalled. He also submitted that GO MS No.1762 dated 20.7.1987 is not applicable to the present case and actually undergoing imprisonment at the time of the premature release is also not necessary as per the benevolent G.O Ms.No.1319 dated 2.9.93.

42. On the contrary, Mr.A.N. Thambi Durai, the learned Additional Public Prosecutor would submit that the detenu was wrongly released under the earlier Government Order and the Government have all the powers to cancel the premature release and detain him.

43. As far as the application of the conditions laid down under GO MS No.1762 dated 20.7.1987 is concerned, we have already held that it will not have

retrospective effect. Therefore, we refrain ourselves from reiterating the conclusion arrived by us in the matter of detenu named N.K. Gopal @ Kannan @ Mani, the detenu in HCP No.1856 of 2009.

44. Regarding the other point that the detenu was not actually undergoing imprisonment at the time of issuance of GO MS No.1319 dated 2.9.93 is concerned, we have held that it is not necessary that the detenu should have been undergoing imprisonment. What the court has to consider is the actual period of sentence undergone by the prisoner and whether by reason of the period actually undergone, the prisoner qualifies for remission.

45. In the result the only issue left to be decided is whether in the light of the cancellation order under G.O MS No. 149 dated 23.3.2010, the Government can revoke a remission granted to a convict.

46. In AIR 1938 Nagpur 513 (Venkatesh Yeshwant Deshpande vs Emperor), a Full bench of Nagpur High Court has held as follows:

In our opinion it is at least arguable that that means that the power of cancellation only applies in the case of orders of remission where the order of remission was conditional and where the condition has not been fulfilled. If it were the intention of the Legislature to apply to this kind of order the powers of cancellation conferred by S.21, General Clauses Act, this subsection was completely unnecessary for, clearly a conditional remission, where the condition is broken, could be rescinded under the general power. Having that provision in mind and the general sense, and purpose of this Section, we incline to the view that it is not open to Government after remitting a sentence unconditionally, to restore it. Different considerations would arise in cases of fraud or mistake. No such case is made out here.

and Vivian Bose, J., further held

the effect of an order of remission is to wipe out the remitted portion of the sentence altogether and not merely to suspend its operation; suspension is separately provided for..

That may not apply in full here but the effect of an order of remission is certainly to entitle the prisoner to his freedom on a certain date. Therefore, once that day arrives, he is entitled to release, and in the eyes of the law he is a free man from that moment and no free man can be deprived of his liberty or re-incarcerated or detained in custody without the order of a competent Court. He must be re-sentenced and only a competent Court can do that, not the executive Government, and in any case, in no event can it be done, as I read the constitution, without reasons being given and justification furnished on the face of the order itself. The prisoner must know, and the Court to which an application for a writ of habeas corpus (or as S.491 puts it in the nature of habeas corpus) is made, must know, on the face of the order itself, the justification for detaining him in custody. Otherwise he is entitled to immediate release. Think what the contention of the Crown in this case means. Pushed to its logical conclusion Government would be able to release a man sentenced to death and remit the whole of his sentence upon conditions. Years afterwards, perhaps half a century later, even after all the conditions imposed have been fulfilled, it would be entitled to haul him back to prison and hang him without being called upon to give even the semblance of a reason .

and ultimately held as follows:

It follows that the order of Government solemnly and legally made on 24th February 1938 had not been recalled on 16th April 1938. Under that order the prisoner was entitled to immediate and unconditional release on that day. He was therefore in the eyes of the law a free man from that moment. Thereafter he could not be kept in custody except in accordance with the due processes of law, that is to say except by being re-sentenced by a competent Court. He has not been so re-sentenced. He is therefore entitled to immediate and unconditional release. I concur in the order of my Lord The Chief Justice.

47. In 2010 3 Crimes HC 197 (Makkhan Singh Vs State of Rajasthan), a Division Bench of Rajasthan High Court following the decision of the Full Bench of Nagpur High Court reported in AIR 1938 Nagpur 513 (Venkatesh Yeshwant Deshpande vs Emperor), held as follows:

We hold that once the powers exercised by the Governor under Article 161 of the [Constitution of India](#) cannot be abrogated or taken away at a later stage under the garb of Section 432 Cr.P.C by the Department of the State or other delegated authority, as it will violate Articles 19 and 21 of the [Constitution of India](#) as discussed above

48. Before coming to the conclusion, the Division Bench has admired the Full Bench of Nagpur High Court as follows:

4. The Full Bench of the Nagpur High Court considered this aspect and came to the conclusion that once remission granted by the State, cannot be revoked by a department of the State. Though, at the relevant time, the [Constitution of India](#) was not in force as this judgment was of pre-independence. Now we have our Constitution and Right to freedom is guaranteed to a citizen under Articles 19 and 21 dealing with fundamental rights under Part III of the [Constitution of India](#) .

49. Therefore, following the Full Bench of Nagpur High Court reported in AIR 1938 Nagpur 513 (Venkatesh Yeshwant Deshpande vs Emperor), which is also followed in the Division Bench of Rajasthan Order reported in 2010 3 Crimes HC 197 (Makkhan Singh Vs State of Rajasthan), we are of the considered view that once a remission is granted and a convict is prematurely released, the same cannot be revoked. The principles of natural justice requires a fair hearing and in the case of the detenu, he was not given an opportunity for a hearing before the cancellation of premature release. Even otherwise, he is entitled for the benefit under the G.O.Ms.No.1319 dated 2.9.1993. The order of cancellation in G.O.No.149 dated 23.3.2010 is devoid of merits and we have no hesitation to hold that he is under illegal detention and should be set at liberty forthwith.

50. In the result, both the Habeas Corpus Petitions filed in HCP Nos.1856 of 2009 and 862 of 2010 are allowed and the the detenus by name N.K. Gopal @ Kannan @ Mani, S/o Kolanthai Gounder and Radhakrishnan, S/o Periannan are set at liberty forthwith unless they are required in connection with any other cause or causes.