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D. ETHIRAJ

v.

SECRETARY TO GOVT. & ORS.
(CRIMINAL APPEAL NO. 1949 OF 2011)

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OCTOBER 11, 2011

[ASOK KUMAR GANGULY AND
GYAN SUDHA MISRA, JJ.]

REMISSION OF SENTENCE:

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Claim for remission of sentence as per Government of Tamil Nadu, G.O. dated 23.2.1992 – Rejected by High Court on the ground that on the date of notification, the prisoner was on bail – Held: In the instant case, the prisoner is entitled to get his case of remission of sentence considered in accordance with the G.O. – A prisoner being on bail on a particular day 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 – Order of High Court is set aside – Prisoner directed to make a representation afresh – State Government directed to consider the case of the prisoner in the light of the observations made in the judgment – Constitution of India, 1950 – Article 161, Article 141 – Precedent – Tamil Nadu, Home (Prison C) Department GOMs No. 279 dated 23.2.1992.

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The appellant was convicted and sentenced to undergo three years rigorous imprisonment u/s 366 read with s. 109 and s. 119 IPC by the trial court by judgment and order dated 14.1.1992. His appeal before the High Court and the special leave petition before the Supreme Court were dismissed and, consequently, he was readmitted to Central Prison on 7.9.2010. The High Court declined the appellant's prayer for having his case for remission of sentence considered in accordance with the

Tamil Nadu, Home (prison C) Department G.O.Ms. No. 279, dated 23.2.1992, on the ground that he was on bail on the date of issuance of the notification. A

Allowing the appeal, the Court

HELD: 1.1. A prisoner being on bail on a particular day 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. [Para 20] [1056-E-F] B

Nalamolu Appala Swamy & Ors. Vs. State of Andhra Pradesh (1989) Supp (2) SCC 192 – relied on. C

1.2. However, during the period the petitioner was on bail and had not at all suffered by imprisonment, he cannot get the benefit of remission in respect of that period. [para 18] [1056-B] D

State of Haryana Vs. Nauratta Singh & Ors. 2000 (2) SCR 246 = (2000) 3 SCC 514; and *Joginder Singh Vs. State of Punjab & Ors.* (2001) 8 SCC 306 – relied on E

1.3. In the instant case, the appellant had undergone a total sentence of 1 year and 140 days as on 5.10.2010 and applied for consideration of remission of his sentence in accordance with the said notification. Admittedly, the G.O. No. 279, dated 23.2.1992, which was issued in exercise of the powers conferred by Article 161 of the Constitution of India, is still subsisting and the State is bound by the same. The G.O. does not speak that in order to get the benefit of remission, the prisoner must actually be in jail on the date when the G.O. was issued. The appellant is entitled to have his case of remission considered under the said G.O. since he admittedly suffered more than six months of imprisonment prior to the date of judgment rendered by the High Court on 25.3.2011. [para 4-5 and 9] [1051-C-E; 1053-C-E] F G

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A 1.4. Despite the clear position settled by a three
Judge Bench of this Court in *Nalamolu Appala Swamy's*
case and despite the fact that the said judgment was
placed before the High Court, it unfortunately came to a
decision which is contrary to the reason given by this
Court. The judgment of the High Court is, therefore, set
B aside. The appellant is directed to make a representation
afresh praying for remission attaching a copy of the
instant judgment. The State Government is directed to
consider the case of the appellant in the light of the
observations made in the instant judgment. [Para 13, 14,
C 20 and 21] [1054-B-C; F-G; 1056-E-G]

Case Law Reference:

	(1989) Supp (2) SCC 192	relied on	para 13
	2000 (2) SCR 246	relied on	para 15
D	(2001) 8 SCC 306	relied on	para 16

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 1949 of 2011.

E From the Judgment & Order dated 25.3.2011 of the High
Court of Judicature at Madras in H.C.P. No. 2323 of 2010.

A.L. Somayajee, V. Padmanabhan, Shailendra Kishore,
Krishna Dev, Senthil Jagadeesan for the Appellant.

F Gurukrishna Kumar, AAG, Akshat Hansaria, B. Balaji, M.
Yogesh Kana (for Subramonium Prasad) for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. Heard learned counsel for the parties.

G 3. When the matter was listed on 26th September, 2011,
this Court directed learned counsel for the State to furnish an
affidavit stating therein what is the actual period of sentence
undergone by the appellant. However, the affidavit has not been
filed, but learned counsel appearing for the State has filed a
H statement showing the period of sentence undergone by the

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[ASOK KUMAR GANGULY, J.]

petitioner at different stages and the said statement has not been denied by the counsel appearing for the petitioner. We take that statement on record. **A**

On a perusal of the same, the following position is clear:

S.No.	From	To	No. of days
1	16.05.1987	19.05.1987	04 days
2	14.01.1992	24.01.1992	11 days
3	22.11.2002	26.02.2003	96 days
4	07.09.2010	Till Date (05.10.2011)	1 year 29 days

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4. It is clear from the above table that the appellant had undergone sentence of 1 year and 140 days as on 5.10.2011.

5. The subject matter of challenge in this case is an order passed by the Division Bench of the High Court dated 25th March, 2011 whereby the High Court has, while referring to various judgments, by a reasoned order declined the appellant's prayer for having his case for remission of sentence considered in the light of Government Orders (Gos) issued by the Government from time to time. **D**

6. The crux of the ratio in High Court's judgment is that as the petitioner was on bail on the date of issuance of various notifications for remission of sentence, his case for remission cannot be considered. **E**

7. We are unable to accept the aforesaid reasoning of the High Court for the reasons discussed below: **F**

8. Various notifications have been issued in connection with remission of sentence by the Government. Learned counsel appearing for both the parties have relied in support of their case on a notification being G.O. Ms. No. 279, Dated 23rd February, 1992 issued by the Government. We set out the said notification since this Court is to interpret the same in the judgment. **G**

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A GOVERNMENT OF TAMIL NADU

ABSTRACT

Prisoners - Remission of sentence - Special remission on occasion of newly elected Government assuming office in Tamil Nadu -ordered.

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HOME (PRISON C) DEPARTMENT

G.O.Ms.NO. 279, Dated 23.2.92.

ORDER

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On the occasion of the assumption of office of the newly elected Government in Tamil Nadu, the Government have decided to grant remission to certain classes of prisoners who have been convicted for various offences by the courts in this State and sentenced to various terms of imprisonment other than life imprisonment.

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2. In exercise of the powers conferred by Article 161 of the Constitution of India, the Government of Tamil Nadu hereby remits;

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a. In the case of women who have been sentenced to punishment for offences other than those relating to murder, robbery and smuggling activities, the whole of the unexpired portion of the punishment to which they have been sentenced, and

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b. In the case of men who have been sentenced to punishment for various offences other than those relating to murder; robbery and smuggling activities, six months out of their imprisonment.

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3. The special remission sanctioned above will not be admissible in the cases of civil prisoners and detenus under the law relating to detention and also in the cases of persons convicted for offences under Sections 3 to 10 of the Official Secrets Act, 1923, Sections 2 and 3 of the Criminal Law Amendment Act 1961, Sections 121 to 130 of the Indian Penal Code, Foreigners and Passport Acts and persons convicted by Courts of criminal jurisdiction of other States.

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[ASOK KUMAR GANGULY, J.]

4. The remission ordered herein shall be made applicable to those prisoners also who have been convicted in this State but are undergoing their sentence in the jails of other States or Union Territories. A

5. The remission ordered herein shall take effect from the 24th February, 1992 namely the birth day of the Honorable Chief Minister of Tamil Nadu. B

(BY ORDER OF THE GOVERNOR)
K. MALAISAMY,
SECRETARY TO GOVERNMENT.

9. Admittedly the said notification is still subsisting and the State is bound by the same. The said notification, as it is clear from its text, was issued in exercise of the powers conferred by Article 161 of the Constitution of India. The petitioner applied his case for remission of sentence to be considered under the said notification. The appellant was convicted by learned District and Sessions Judge, Ooty by judgment dated 14th January, 1992 in Sessions Case No. 11 of 1989 and sentenced to undergo three years rigorous imprisonment for an offence under Section 366 read with Section 109, IPC and one year rigorous imprisonment for an offence under Section 119, IPC. The sentences were however to run concurrently. C
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10. On an appeal being filed by the appellant vide C.A. No. 64 of 1992, the High Court by its judgment dated 7th June, 2002 dismissed the same confirming the conviction and sentence of the appellant. The special leave petition preferred by the appellant in this Court against the said judgment of the High Court came to be dismissed on 20th July, 2010. F

11. As a result of the above, the appellant was readmitted in Central Prison, Coimbatore on 7th September, 2010 and has been undergoing sentence even today. G

12. In view of the aforesaid admitted facts, the appellant, in our judgment, is entitled to have his case of remission considered under the aforesaid notification since he admittedly suffered more than six months of imprisonment prior to the date of judgment rendered by the High Court on 25th March, 2011, H

A but the High Court, for the reasons discussed in the judgment, refused to consider the same on the ground that on the date of issuance of notification for remission of sentence, the petitioner was on bail.

B 13. Mr. A.L. Somayajee, learned senior counsel appearing for the appellant cited before us a decision of this Court in *Nalamolu Appala Swamy & Ors. Vs. State of Andhra Pradesh* (1989) Supp (2) SCC 192. The learned counsel has drawn our attention to para 3 of the said judgment and submitted that similar plea was taken by the State of Andhra Pradesh in that case. Para 3 of the said judgment would show that and is set out below:

"3 In a brief affidavit-in-reply filed by the State, it has been stated in para 4 as follows:

D "It is respectfully submitted that the said GO is not applicable after November 1, 1984 and further the remission can only be granted to the prisoners who are actually in jail at the time of issuance of the said GO. The appellants herein were on bail by virtue of the order of this Hon'ble Court. Since they were not in jail at the time of issuance of the above GO they cannot claim to be released by applying this GO to them."

F 14. Here also, we find that the G.O. does not speak that in order to get the benefit of remission, the prisoner must actually be in jail on the date when the G.O. was issued. Despite the aforesaid clear position settled by this Court and despite the fact that the same judgment was placed before the High Court, the High Court, unfortunately, came to a decision which is contrary to the reason given by the aforesaid three Judge Bench decision of this Court in *Nalamolu Appala* (supra).

H 15. Learned counsel for the State has made a very strenuous effort to sustain the High Court's reasoning by referring to two decisions of this Court. First of all, he has drawn our attention to the decision rendered by this Court in the case of *State of Haryana Vs. Nauratta Singh & Ors.* (2000) 3 SCC

514. The facts of that case are succinctly narrated in the Head Note which is set out below: A

"The respondent was acquitted on 5-1-1978 by the trial Court, for the offence under Sections 302/34 IPC. The High Court, although allowed the respondent to remain on bail during the pendency of appeal, ultimately convicted him on 23-4-1980 under the said provisions. Consequently, the respondent surrendered on 7-6-1980. During the pendency of his appeal before Supreme Court he was again released on bail on 2-8-1980. The Supreme Court, ultimately, upheld the conviction and, consequently, he was again taken to jail on 22-8-1994. In such circumstances, the Punjab and Haryana High Court, upholding the respondent's contention that his conviction related back to the date of the trial court's decision, i.e. 5-1-1978, allowed his claim that the period during which he was on bail (from 5-1-1978 to 7-6-1980 and from 2-8-1980 to 21-8-1994) should be included within the period of his entitlement for remission. The respondent's claim was based on the instructions issued by the State of Haryana postulating that remission would "be also granted to all the convicts who were on parole/furlough from the jail on 25-1-1988". B C D E

16. The Court found that an accused cannot claim the period during which he was on bail towards his remission. We are in respectful agreement with that interpretation by this Court in Nauratta Singh. Any other interpretation will render criminal justice system to a mockery. This Court clarified the same by giving illustration in para 18 of the report in Nauratta Singh, which we set out here: F

"18. The clear fallacy of the approach made by the High Court can be demonstrated through an illustration. An accused was tried for an offence under Section 326 IPC. During trial period he was allowed to remain on bail and the trial prolonged up to, say, 3 years. Finally the court convicted him and sentenced him to imprisonment for three years. Should not the convicted person go to jail at all on the premise that he was on bail for three years and H

A is hence entitled to remission of that period?"

17. Similar views have been expressed by this Court in the subsequent decision of *Joginder Singh Vs. State of Punjab & Ors.* (2001) 8 SCC 306. In *Joginder Singh*, the aforesaid para of Nauratta has been quoted.

B 18. We are in entire agreement with the aforesaid views taken by this Court that if it is clear from the facts of a given case that during the period the petitioner was on bail and had not at all suffered any imprisonment, he cannot get the benefit of remission in respect of that period.

C 19. The same is admittedly not the position in this case. Here, the appellant had suffered substantial portion of the period in jail which is more than 17 months. On this, there is no dispute. In that view of the matter, the appellant's case is covered by the ratio of the three Judge Bench decision of this Court in *Nalamolu Appala Swamy* (supra).

D 20. We are unable to approve the reasoning given by the High Court that the appellant's case for remission cannot be considered in terms of the said notification as on the date of the notification, he was on bail. This is a wrong approach. A 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. We are, therefore, constrained to set aside the judgment of the High Court.

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F 21. We direct the appellant to make a representation afresh praying for remission attaching a copy of this judgment. In our view, the appellant is entitled to get his case of remission of sentence considered in accordance with the above mentioned G.O. We also direct the State to consider the case of the appellant in the light of the observations made in this judgment and pass an order within a period of six weeks from the date of receipt of the representation.

G 22. The appeal is accordingly allowed.

H R.P.

Appeal allowed.