

## STATE OF BIHAR

1962

April 17.

v.

## KAMESHWAR PRASAD VERMA

(J. L. KAPUR, K. C. DAS GUPTA and  
RAGHUBAR DAYAL, JJ.)*Habeas Corpus—Release and rearrest—Legality—Principles applicable—Code of Criminal Procedure, 1898 (V of 1898), s. 491.*

Bipat Gope was convicted under ss. 323 and 324 read with s. 511 of the Indian Penal Code and sentenced to six months rigorous imprisonment by the High Court on appeal against acquittal, but, was not taken into custody and on the ground of serious illness was kept in the Hospital under Armed Guards. On application moved by the respondent and on recommendation of the medical authority he was released by the District Magistrate under the Jail Manual Rules. The Appellant contended that his release was conditional under r. 549 of the Jail Manual Rules, which was challenged by the respondent. A nonbailable warrant for arrest was issued against him upon which he moved the High Court under Art. 226 of the constitution and was directed to appear at the preliminary hearing. He presented an application before the District Magistrate praying for his appearance and an opportunity to present his case before the High Court. The District Magistrate passed no order but from the respondent's petition in the High Court, it appeared that Senior Deputy Collector, Patna, ordered his arrest and sent him to jail and his petition in the High Court was withdrawn. The High Court allowed the respondent's petition and ordered his release from custody. The High Court held, that the order of release passed by the District Magistrate was an unconditional release and therefore, he could not be rearrested. Against that order, State came in appeal by special leave. The appellant contended that the release must have been under Rule 549 of the Jail Manual Rules and not under any other rule.

*Held*, that the State did not make it clear under which rule he was released and under what lawful authority he was rearrested and thus in absence of such lawful authority, the detention was illegal and the appeal must fail.

*Eshugbayi Eleko v. Officer Administering the Government of Nigeria and Anr., (1931) A. C. 662, applied.*

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CRIMINAL APPELLATE JURISDICTION : Criminal  
Appeal No. 242 of 1960.

Appeal by special leave from the judgment  
and order dated June 2, 1958, of the Patna High  
Court in Cr. Misc. 124/58.

*S. P. Verma* for the appellant.

*A. S. R. Chari, D. P. Singh, R. K. Garg, S. C.  
Agarwal, and M. K. Ramamurthi*, for the respon-  
dent.

1962. April 17. The Judgment of the Court  
was delivered by

*Kapur J.*

KAPUR, J.—The State of Bihar has brought  
this appeal against the judgment and order of the  
High Court of Patna and it arises out of proceedings  
under Art. 226 of the Constitution and s. 491 of the  
Criminal Procedure Code for a writ of *habeas corpus*  
in the matter of detention of one Bipat Gope. The  
present respondent was the petitioner in the High  
Court.

Bipat Gope, a resident of the district of Patna,  
was convicted under s. 323 & s. 324 read with s. 511  
of the Indian Penal Code and sentenced on  
November 29, 1957, to six months' rigorous  
imprisonment by the High Court on appeal against  
acquittal under s. 417 of the Code of Criminal  
Procedure but he was not taken into custody till  
January 6, 1958 and even then he was kept under  
armed guard in the Patna Medical College Hospital  
in one of the paying wards, on the ground that he  
was seriously ill. On an application by the respon-  
dent and on the recommendation of the appropriate  
medical authority Bipat Gope was released by the  
District Magistrate on March 11, 1958 under the  
rules of the Jail Manual when his unexpired period  
of imprisonment was four months and three days.  
The contention of the appellant State is that he was

released under R. 549 which is the rule providing for conditional release of prisoners but the respondent challenges the factum of release under this Rule. The sureties for Bipat Gope were called upon to produce him but as they had failed to do so notices were issued to them by an order dated April 27, 1958, to show cause why their surety bonds should not be forfeited. By the same order non-bailable warrant for arrest was ordered to be issued.

On April 29, 1958, Bipat Gope moved a petition under Art. 226 against the order of the District Magistrate and the High Court directed on May 1, 1958, that Bipat Gope should appear on Monday following which was May 5, 1958, when the petition was to be taken up for preliminary hearing.

On May 1, 1958, Bipat Gope appeared in the Court of the District Magistrate, Patna and made an application stating that he had filed the above mentioned petition in the High Court and that he had to appear there on Monday and he prayed that he be allowed an opportunity to present his case to the High Court and to avoid his maltreatment at the hands of the police of which he was apprehensive. There is no order on the record showing what the District Magistrate did but from the respondent's petition in the High Court it appears that the application before District Magistrate was taken up by the Senior Deputy Collector, Patna, who ordered Bipat Gope to be taken into custody and sent him to jail. The earlier petition of Bipat Gope filed in the High Court was withdrawn on May 2, 1958.

The High Court heard the petition filed by the respondent on May 5, 1958, and after some amendments were made the petition was allowed and Bipat Gope was ordered to be released from custody. The High Court held that the order of release by the District Magistrate of Patna above referred to was an order for his unconditional release and therefore he could not be rearrested. It

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is against that order that the State has come to this Court by special leave, its application under Art. 134 (1)(c) having been dismissed by the High Court.

On the petition under Art. 226 filed by the respondent, the High Court issued a rule calling upon the appellant State to show cause why a writ of *habeas corpus* should not issue. It is unfortunate that no return was filed by the State and it is not clear from the record as to how exactly or under what authority Bipat Gope was taken into custody and under what authority the jailor was detaining him in jail. The order of the District Magistrate shows that a non-bailable warrant was ordered to be issued. The petition of the respondent shows that Bipat Gope was arrested under the order of the Senior Deputy Collector; what authority the Senior Deputy Collector had of ordering Bipat Gope's rearrest is not clear from this record. The High Court has stated that Bipat Gope surrendered on May 1, 1958, to whom he surrendered is not clear. It is also stated in the petition that non-bailable warrant of arrest was ordered to be withdrawn and the record was sent to the District Magistrate for confirmation who withdrew the non-bailable warrant ordered to be issued. When the record was sent to the District Magistrate for confirmation and that was done by the District Magistrate thereafter is also not shown. In the absence of a properly drawn up return accompanied by proper documents it is not possible to find out what exactly happened in regard to the rearrest of Bipat Gope and it is for that reason that the filing of a proper return is necessary and is insisted upon in most jurisdictions.

It was argued on behalf of the appellant that the release of Bipat Gope was under R. 549 of the Jail Manual Rules which are issued under the Prisons Act and that releases thereunder are conditional. The appellant was anxious to get the

opinion of this Court as to the true meaning and extent of Rule 549 under which, according to the appellant, Bipat Gope was released. On this record it is not clear as to the rule under which he was released. It appears from the petition of the respondent under Art. 226 that the respondent made an application for the release of Bipat Gope on the ground that he was seriously ill. There are on the record certificates by Dr. V. N. Sinha, F. R. C. S., Professor of Clinical Surgery at the Patna Medical College stating the disease Bipat Gope was suffering from and that he was not improving under the treatment he was being given. It was also stated therein that he would improve if he was released. This was on February 21, 1958. The Civil Surgeon of Patna on March 1, 1958, again enquired from Dr. V. N. Sinha if the prisoner (Bipat Gope) was in danger of death from illness. Upon this on March 3, 1958, Dr. V. N. Sinha said :—

“The complications of the disease i. e. of ventral hernia, peptic ulcer and stress and strain syndrome sometime prove fatal”.

and on March 5, 1958, it was stated that he was in danger of death but was likely to improve if released. The superintendent of District Jail, Patna, sent a letter to the District Magistrate giving all these various particulars. Upon that a note was made by Judicial Peshkar in which he stated :

“ In this connection Jail Manual Rule 548(1) and (2) and (3) and Rule 549 may be seen. The District Magistrate has power to pass order for the release of the prisoner, if the petitioner's sentence does not exceed six months under the above Rules. From the sentence sheet of release from the Jail authority it appears that the prisoner has only 4 (four) months and 3 (three) days unexpired period of sentence. These rules may kindly be seen and necessary orders passed”.

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The order of the District Magistrate was "Allowed release in the circumstances". It is not clear from this as to the Rule under which Bipat Gope was released. It was contended on behalf of the appellant that the release must have been under R. 549 and not under any other Rule and in support reliance is placed on the release order of Bipat Gope which is in Form No. 105. That Form mentions Rules 548, 549 and 552 and the Rule which was not appropriate had to be scored out but none of these Rules was scored out. But at the bottom of the Form there is a declaration of two persons who stated that they are willing to take charge of Bipat Gope and bound themselves to surrender him at any time before the date of his expiry i. e. July 9, 1958 if required to do so. Here it may be stated that the support of the relevant Rules is set out in Form 105 as follows:—

"(i) Rule 549—There is no hope of his recovery either in or out of Jail; I consider it desirable that he be allowed the comfort of dying at home.

(ii) Rule 549—The prisoner is in danger of death from illness and there is probability of his recovery if he is released".

On the basis of the order of the District Magistrate which is referred to above dated March 7, 1958 and Form 105 it was submitted that the release must have been under R. 549. The orders on the record do not make that clear. Neither the order of the District Magistrate nor the Form 105 shows that Bipat Gope was released under R. 549 and not under any other Rule. The State has not cared to make it clear in any return made on an affidavit filed as to the Rule under which Bipat Gope was released and then it is not shown as to what lawful authority there was for his rearrest.

In this connection the observations of Lord Atkin in *Eshugbayi Eleko v. The Officer Administering The Government of Nigeria* (1) are appropriate and applicable :

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“In accordance with Britain jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice. And it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the executive”

It is the same jurisprudence which has been adopted in this country on the basis of which the courts of this country exercise jurisdiction. It has not been shown in this case that there was any lawful authority under which Bipat Gope was rearrested and in the absence of such lawful authority Bipat Gope's detention cannot be supported and is illegal. In the circumstances the remedy under Art. 226 is rightly applicable to the facts of this case.

We therefore dismiss this appeal.

*Appeal dismissed.*

(1) (1931) A.C. 662 670