Talab Haji Hussain vs Madhukar Purshottam Mondkarand ... on 7 February, 1958

Equivalent citations: 1958 AIR 376, 1958 SCR 1226, AIR 1958 SUPREME COURT 376, 1958 SCJ 672, 1958 MADLJ(CRI) 512, 1958 ALLCRIR 391, 1960 BOM LR 937

Author: P.B. Gajendragadkar

Bench: P.B. Gajendragadkar, Natwarlal H. Bhagwati, Syed Jaffer Imam

PETITIONER:
TALAB HAJI HUSSAIN

Vs.

RESPONDENT:
MADHUKAR PURSHOTTAM MONDKARAND ANOTHER

DATE OF JUDGMENT:
07/02/1958

BENCH:
GAJENDRAGADKAR, P.B.
BENCH:
GAJENDRAGADKAR, P.B.
BHAGWATI, NATWARLAL H.
IMAM, SYED JAFFER

CITATION:
1958 AIR 376 1958 SCR 1226

ACT:
Criminal Law-Bail-Cancellation-High Court's inherent power-Bailable offence-Accused released on bail by Magistrate-Subsequent Prejudicial conduct of accused-High Court's Power to cancel bail-Code of Criminal Procedure (Act 5 Of 1898), ss. 426, 496,497,498,56 1A.

HEADNOTE:
The appellant was charged under s. 120 B of the Indian Penal Code and s. 167(8i) of the Sea Customs Act, i878, which were bailable offences, and was released on bail by the Chief Presidency Magistrate under s. 496 of the Code of Criminal Procedure. An application made subsequently by the complainant for cancellation of the bail was dismissed by

the Magistrate on the ground that under s. 496 he had no jurisdiction to cancel the bail. The complainant invoked the inherent power of the High Court under s. 561A of the Code and the High Court took the view that under that section it had inherent power to cancel the bail,and finding that on the material produced before the Court it would not be safe to permit the appellant to be at large, it cancelled the bail. On appeal to the Supreme Court:--
Held, that though under s. 496 of the Code of Criminal Procedure a person accused of a bailable offence is entitled to be released on bail pending his trial, if his conduct subsequent to his release is found to be prejudicial to a fair trial, he forfeits his right to be released on bail and such forfeiture can be made effective by invoking the inherent power of the High Court under S. 561A of the Code. But the inherent power has to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down in the section itself.
Lala jairam Das & Others v. King Emperor, (1945) L.R. 72 I.A. 120, distinguished.

JUDGMENT:

CRIMINAL APPELLATE, JURISDICTION: Criminal Appeal No. 16 of 1958.

Appeal by special leave from the Judgment and order dated January 14, 1958, of the Bombay High Court in Criminal Application No. 60 of 1958 arising out of the judgment and order dated January 9, 1958, of the Court of Chief Presidency Magistrate at Bombay in an application for cancellation of bail in Case No. 608/W of 1957.

Purshottam Tricumdas, Rajni Patel and I. N. Shroff, for the appellant.

K. J. Khandalwala and R. H. Dhebar, for respondent No. 1. 1958. February 7. The Judgment of the Court was delivered by GAJENDRAGADKAR J.-The appellant, along with(others, has been charged under s. 120B of the Indian Penal Code and s. 167(81) of the Sea Customs Act (8 of 1878). There is no doubt that the offences charged against the appellant are bailable offences. Under s. 496 of the Code of Criminal Procedure the appellant was released on bail of Rs. 75,000 with one surety for like amount on December 9, 1957, by the learned Chief Presidency Magistrate at Bombay. On January 4, 1958, an application was made by the complainant before the learned Magistrate for cancellation of the bail; the learned Magistrate, however, dismissed the application on the ground that under s. 496 be had no jurisdiction to cancel the bail. Against this order, the complainant preferred a revisional application before the High Court of Bombay. Another application was preferred by the complainant before the same Court invoking its inherent power under S. 561 A of the Code of Criminal Procedure. Chagla C. J. and Datar J. who heard these applications took the view that, under s. 561A of the Code of Criminal Procedure the High Court had inherent power to cancel the bail granted to a

person accused of a bailable offence and that, in a proper case, such power can and must be exercised in the interests of justice. The learned Judges then considered the material produced before the Court and came to the conclusion that, in the present case, it would not be safe to permit the appellant to be at large. That is why the application made by the complainant invoking the High Court's inherent power under s. 561 A of the Code of Criminal Procedure was allowed, the bail-bond executed by the appellant was cancelled and an order was passed directing that the appellant be arrested forthwith and committed to custody. It is against this order that the appellant has come to this Court in appeal by special leave. Special leave granted to the appellant has, however, been limited to the question of the construction of s. 496 read with s. 561A of the Code of Criminal Procedure. Thus the point of law which falls to be considered in the present appeal is whether, in the case of a person accused of a bailable offence where bail has been granted to him under s. 496 of the Code of Criminal Procedure, it can be cancelled in a proper case by the High Court in exercise of its inherent power under s. 561A of the Code of Criminal Procedure? This question is no doubt of considerable importance and its decision would depend upon the construction of the relevant sections of the Code.

The material provisions on the subject of bail are contained in ss. 496 to 498 of the Code of Criminal Procedure. Section 496 deals with persons accused of bailable offences. It provides that " when a person charged with the commission of a bailable offence is arrested or detained without warrant by an officer in charge of a police station or is brought before a court and is prepared at any time, while in the custody of such officer or at any stage of the proceedings before such court, to give bail, such person shall be released on bail." The section further leaves it to the discretion of the police officer or the court if he or it thinks fit to discharge the accused person on his executing a bond without sureties for his appearance and not to take bail from him. Section 497 deals with the question of granting bail in the case of non-bailable offences. A person accused of a non-bailable offence may be released on bail but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. This is the effect of s. 497(1). Sub-section (2) deals with cases where it appears to the officer or the court that there are not reasonable grounds for believing that the accused has committed a non-bailable offence but there are sufficient grounds for further enquiry into his guilt and it lays down that in such cases the accused shall, pending such enquiry, be released, on bail or at the discretion of the officer or court, on the execution by him of a bond without sureties for his appearance as hereinafter provided. Sub-section (3) requires that, when jurisdiction under sub-s. (2) is exercised in favour of an accused person, reasons for exercising such jurisdiction shall be recorded in writing. Sub-section (3A) which has been added in 1955 deals with cases where the' trial of a person accused of any non- bailable offence is not concluded within a period of sixty days from the first day fixed for taking evidence in the case and it provides that such person shall, if he is in custody during the whole of the aid period, be released on bail unless for reasons to be recorded in writing the magistrate otherwise directs. The last sub-section confers oil the High Court and the Court of Session, and on any other court in the case of a person released by itself, power to direct that a person who hap, been released on bail under any of the provisions of this section should be arrested and committed to custody. Section 498(1) confers on the High Court or the Court of Session power to direct admission to bail or reduction of bail in all cases where bail is admissible under ss. 496 and 497 whether in such cases there be an appeal against conviction or not. Sub- section (2) of s. 498 empowers the High Court or

the Court of Session to cause any person who has been admitted to bail under sub-s. (1) to be arrested and committed to custody. There is one more section to which reference must be made in this connection and that is s. 426 of the Code. This section incidentally deals with the power to grant bail to persons who have been convicted of non-bailable offences when such convicted persons satisfy the court that they intend to present appeals against their orders of conviction. That is the effect of s. 426(2A) which has been added in 1955. A similar power has been conferred on the High Court under sub-s. (2B) of s. 426 where the High Court is satisfied that the convicted person has been granted special leave to appeal to the Supreme Court against any sentence which the High Court has imposed or maintained. Sub-section (3) provides that, if the appellant who is released on bail under said sub-s. (2) or (2B) is ultimately sentenced to imprisonment, the time during which he is so released shall be excluded in computing the term for which he is so sentenced. That briefly is -the scheme of the Code on the subject of bail.

There is no doubt that under s. 496 a person accused of a bailable offence is entitled to be released on bail pending his trial. As soon as it appears that the accused person is prepared to give bail, the police officer or the court, before whom he offers to give bail, is bound to release him on such terms as to bail as may appear to the officer or the court to be reasonable. It would even be open to the officer or the court to discharge such person on executing his bond as provided in the section instead of taking bail from him. The position of persons accused of non-bailable offences is entirely different. Though the recent amendments made in the provisions of s. 497 have made definite improvement in favour of persons accused of non- bailable offences, it would nevertheless be correct to say that the grant of bail in such cases is generally a matter in the discretion of the authorities in question. The classification of offences into the two categories of bailable and non-bailable offences may perhaps be explained on the basis that bailable offences are generally regarded as less grave and serious than non-bailable offences. On this basis it may not be easy to explain why, for instance offences under ss. 477, 477A, 475 and 506 of the Indian Penal Code should be regarded as bailable whereas offences under s. 379 should be non-bailable. How. ever, it cannot be disputed that s. 496 recognizes that a person accused of a bailable offence has a right to be enlarged on bail and that is a consideration on which Shri Purushottam, for the appellant, has very strongly relied.

Shri Purushottam has also emphasized the fact that, whereas legislature has specifically conferred power on the specified courts to cancel the bail granted to a person accused of a non-bailable offence by the provisions of s. 497 (5), no such power has been conferred on any court in regard to persons accused of bailable offences. If legislature had intended to confer such a power it would have been very easy for it to add an appropriate sub-section under s. 496. The omission to make such a provision is, according to Shri Parushottam, not the result of inadvertence but, is deliberate; and if that is so, it would not be legitimate or reasonable to clothe the High Courts with the power to cancel bails in such cases under s. 561 A. It is this aspect of the matter which needs careful examination in the present case.

Section 561A was added to the Code in 1923 and it purports to save the inherent power of the High Courts. It provides that nothing in the Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. It appears

that doubts were expressed in some judicial decisions about the existence of such inherent power in the High Courts prior to 1923. That is why legislature enacted this section to clarify the position that the provisions of the Code were not intended to limit or affect the inherent power of the High Courts as mentioned in s. 561A. It is obvious that this inherent power can be exercised only for either of the three purposes specifically mentioned in the section. This inherent power cannot naturally be invoked in respect of any matter covered by the specific provisions of the Code. It cannot also be invoked if its exercise would be inconsistent with any of the specific provisions of the Code. It is only if the matter in question is not covered by any specific provisions of the Code that s. 561A can come into operation, subject further to the requirement that the exercise of such power must serve either of the three purposes mentioned in the said section. In prescribing rules of procedure legislature undoubtedly attempts to provide for all cases that are likely to arise; but it is not possible that any legislative enactment dealing with procedure, however carefully it may be drafted, would succeed in providing for all cases that may possibly arise in future. Lacunae are sometimes discovered in procedural law and it is to cover such lacunae and to deal with cases where such lacunae are discovered that procedural law invariably recognizes the existence of inherent power in courts. It would be noticed that it is only the High Courts whose inherent power is recognized by s. 561A; and even in regard to the High Courts' inherent power definite salutary safeguards have been laid down as to its exercise. It is only where the High Court is satisfied either that an order passed under the Code would be rendered ineffective or that the process of any court would be abused or that the ends of justice would riot be secured that the High Court can and must exercise its inherent power under s. 561A. There can thus be no dispute about the scope and nature of the inherent power of the High Courts and the extent of its exercise.

Now it is obvious that the primary object of criminal procedure is to ensure a fair trial of accused persons. Every criminal trial begins with the presumption of innocence in favour of the accused ; and provisions of the Code are so framed that a criminal trial should begin with and be throughout governed by this essential presumption ; but a fair trial has naturally two objects in view; it must be fair to the accused and must also be fair to the prosecution. The test of fairness in a criminal trial must be judged from this dual point of view. It is therefore of the utmost importance that, in a criminal trial, witnesses should be able to give evidence without any inducement or threat either from the prosecution or the defence. A criminal trial must never be so conducted by the prosecution as would lead to the conviction of an innocent person; similarly the progress of a criminal trial must not be obstructed by the accused so as to lead to the acquittal of a really guilty offender. The acquittal of the innocent and the conviction of the guilty are the objects of a criminal trial and so there can be no possible doubt that, if any conduct on the part of an accused person is likely to obstruct a fair trial, there is occasion for the exercise of the inherent power of the High Courts to secure the ends of justice. There can be no more important requirement of the ends of justice than the uninterrupted progress of a fair trial; and it is for the continuance of such a fair trial that the inherent powers of the High Courts are sought to be invoked by the prosecution in cases where it is alleged that accused persons, either by suborning or intimidating witnesses, are obstructing the smooth progress of a fair trial. Similarly, if an accused person who is released on bail jumps bail and attempts to run to a foreign country to escape the trial, that again would be a case where the exercise of the inherent power would be justified in order to compel the accused to submit to a fair trial and not to escape its consequences by taking advantage of the fact that he has been released on bail and

by absconding to another country. In other words, if the conduct of the accused person subsequent to his release on bail puts in jeopardy the progress of a fair trial itself and if there is no other remedy which can be effectively used against the accused person, in such a case the inherent power of the High Court can be legitimately invoked. In regard to non-bailable offences there is no need to invoke such power because s. 497 (5) specifically deals with such cases. The question which we have to decide in this case is whether exercise of inherent power under s. 561A against persons accused of bailable offences, who have been released on bail, is contrary to or inconsistent with the provisions of s. 496 of the Code of Criminal Procedure.

Shri Purushottam contends that the provisions of s. 496 are plainly inconsistent with the exercise of inherent power under s. 561A against the appellant in the present case and; he argues that, despite the order which has been passed by the High (Court, he would be entitled to move the trial court for bail again and the trial court would be bound to release him on bail because the right to be released on bail recognized by s. 496 is an absolute and an indefeasible right; and despite the order of the High Court, that right would still be available to the appellant. If that be the true position, the order passed under s. 561A would be rendered ineffective and that itself would show that there is a conflict between the exercise of the said power and the provisions of s. 496. Thus presented, the argument no doubt is prima facie attractive; but a close examination of the provisions of s. 496 would show that there is no conflict between its provisions and the exercise of the jurisdiction under s. 561A. In dealing with this argument it is necessary to remember that, if the power under s. 561 A is exercised by the High Court, the bail offered by the accused and accepted by the trial court would be cancelled and the accused would be ordered to be arrested forthwith and committed to custody. In other words, the effect of the order passed under s. 561A, just like the effect of an order passed under s. 497 (5) and s. 498 (2), would be not only that the bail is cancelled but that the accused is ordered to be arrested and committed to custody. The order committing the accused to custody is a judicial order passed by a criminal court of competent jurisdiction. His commitment to custody thereafter is not by reason of the fact that he is alleged to have committed a bailable offence at all; his commitment to custody is the result of a judicial order passed on the ground that he has forfeited his bail and that his subsequent conduct showed that, pending the trial, he cannot be allowed to be at large. Now, where a person is committed to custody under such an order, it would not be open to him to fall back upon his rights under s. 496, for s. 496 would in such circumstances be inapplicable to his case. It may be that there is no specific provision for the cancellation of the bond and the re-arrest of a person accused of a bailable offence; but that does not mean that s. 496 entitles such an accused person to be released on bail, even though it may be shown that he is guilty of conduct entirely subversive of a fair trial in the court. We do not read s. 496 as conferring on a person accused of a bailable offence such an unqualified, absolute and an indefeasible right to be released on bail, In this connection, it would be relevant to consider the effect of the provisions of s. 498. Under s. 498(1), the High Court or the Court of Sessions may, even in the case of persons accused of bailable offences, admit such accused persons to bail or reduce the amount of A bail demanded by the prescribed authorities under s. 496. Shri Purushottam no doubt' attempted to, argue that the operative part of the provisions of s. 498(1) does not apply to persons accused of bailable offences; but in our opinion, there can be no doubt that this sub-section deals with cases of persons accused of bailable as well as non-bailable offences. We have no doubt that, even in regard to persons accused of bailable offences, if the amount of bail fixed under s. 496 is unreasonably high the accused person

can move the High Court or the Court of Sessions for reduction of that amount. Similarly, a person accused of a bailable offence may move the High Court or the Court of Sessions to be released on bail and the High Court or the Court of Sessions may direct either that the amount should be reduced or that the person may be admitted to bail. If a person accused of a bailable offence is admitted to bail by an order passed by the High Court or the Court of Sessions, the provisions of sub-s. (2) become applicable to his case; and under these provisions the High Court or the Court of Sessions is expressly empowered to cancel the bail granted by it and to arrest the accused and commit him to custody. This sub-section, as we have already pointed out, has been added in 1955 and now there is no doubt that legislature has conferred upon the High Court or the Court of Sessions power to cancel bail in regard to cases of persons accused of bailable offences where such persons have been admitted to bail by the High Court or the Court of Sessions under s. 498(1). The result is that with regard to a class of cases of bailable offences failing under s. 498(1), even after the accused persons are admitted to bail, express power has been conferred on the High Court or the Court of Sessions to arrest them and commit them to custody. Clearly then it cannot be said that the right of a person accused of a bailable offence to be released on bail cannot be forfeited even if his conduct subsequent to the grant of bail is found to be prejudicial to a fair trial.

It would also be interesting to notice that, even before s. 498(2) was enacted, there was consensus of judicial opinion in favour of the view that, if accused persons were released on bail under s. 498(1), their bail-bond could be cancelled and they could be ordered to be arrested and committed to custody under the provisions of s. 561 A of the Code [Mirza Mohammad Ibrahim v. Emperor (1), Seoti v. Rex (2), Bachchu Lal v. State (3), Muunshi Singh v. State (4) and The Crown Prosecutor, Madras v. Krishnan (5)]. These decisions would show that the exercise of inherent power to cancel bail under s. 561A was not regarded as inconsistent with the provisions of s. 498(1) of the Code. It is true that all these decisions referred to cases of persons charged with non-bailable offences; but it is significant that the provisions of s. 497(5) did not apply to these cases and the appropriate orders were passed under the purported exercise of inherent power under s. 561A. On principle then these decisions proceed on the assumption, and we think rightly, that the exercise of inherent power in that behalf was not inconsistent with the provisions of s. 498 as it then stood. It would now be relevant to enquire whether, on principle, a distinction can be made between bailable and non-bailable offences in regard to the effect of the prejudicial conduct of accused persons subsequent to their release on bail. As we have already observed, if a fair trial is the main objective of the criminal procedure, any threat to the continuance of a fair trial must be immediately arrested and the smooth progress of a fair trial must be ensured; and this can be done, if necessary, by the exercise of inherent power. The classification of offences into bailable and non-bailable on which are based the different provisions as to the grant of bail would not, in our opinion, have any (1) A.I.R. 1932All.534. (2) A.I. R. 1948 All. 366. (3) A.I.R. 1951 All. 836. (4) A.I.R. 1952 All. 39. (5)I.L.R. 1946 Mad. 62.

material bearing in dealing with the effect of the sub- sequent conduct of accused persons on the continuance of a fair trial itself. If an accused person, by his conduct, puts the fair trial into jeopardy, it would be the primary and paramount duty of criminal courts to ensure that the risk to the fair trial is removed and criminal courts are allowed to proceed with the trial, smoothly and without any interruption or obstruction ; and this would be equally true in cases of both bailable as

well as non-bailable offences. We, therefore, feel no difficulty in holding that, if, by his subsequent conduct, a person accused of a bailable offence forfeits his right to be released on bail, that forfeiture must be made effective by invoking the inherent power of the High Court under s. 561A. Omission of legislature to make a specific provision in that behalf is clearly due to oversight or inadvertence and cannot be regarded as deliberate. If the appellant's contention is sound, it would lead to fantastic results. The argument is that a person accused of a bailable offence has such an unqualified right to be released on bail that even if he does his worst to obstruct or to defeat a fair trial, his bail-bond cannot be cancelled and a threat to a fair trial cannot be arrested or prevented. Indeed Shree Purushottam went the length of suggesting that in such a case the impugned subsequent conduct of the accused may give rise to some other charges under the Indian Penal Code, but it cannot justify his re-arrest. Fortunately that does not appear to be the true legal position if the relevant provisions of the Code in regard to the grant of bail are considered as a whole along with the provisions of s. 561A of the Code.

It now remains to consider the decision of the Privy Council in Lala Jairam Das & Others v. King Emperor (1), because Shri Purushottam' has very strongly relied on some of the observations made in that case. According to that decision, the provisions of the Code of Criminal Procedure confer no power on High Courts to grant bail to a person who has been convicted and sentenced to imprisonment and to whom His Majesty (1) (1945) L.R. 72 I.A. 120,132.

in Council has given special leave to appeal against his sentence and conviction. Divergent views had been expressed by the High Courts in this country on the question as to the High Courts' power to grant -bail to convicted persons who had been given special leave to appeal to the Privy Council; these views and the scheme of the Code in regard to the grant of bail were examined by Lord Russel of Killowen who delivered the judgment of the Board in Lala Jairam Das's case (1). The decision has thus no application to the facts before us; but Shri Purushottam relies on certain observations made in the judgment. It has been observed in that judgment that " their Lordships take the view that Ch. XXXIX of the Code together with s. 426 is, and was intend to contain, a complete and exhaustive statement of the powers of a High Court in India to grant bail, and excludes the existence of any additional inherent power in a High Court relating to the subject of bail ". The judgment further shows their Lordships' opinion, like the High Court of Justice in England, High Courts in India would not have inherent power to grant bail to a convicted person. It would be clear from the judgment that their Lordships were not called upon to consider the question about the inherent power of the High Courts to cancel bail under s. 561A. That point did not obviously arise in the case before them. Even so, in dealing with the question as to whether inherent power could be exercised for granting bail to a convicted person, their Lordships did refer to S. 561A of the Code and they pointed out that such a power ,,cannot be properly Attributed to the High Courts because it would, if exercised, interrupt the serving of the sentence; and, besides it would, in the event of the appeal being unsuccessful, result in defeating the ends of justice. It was also pointed out that if the bail was allowed in such a case, the exercise of the inherent power would result in -an alteration by the High Court of its judgment which is prohibited by s. 369 of the Code. In other words, their Lordships examined the provisions of s. 561A and came to the (1) (1945) L.R. 72 I.A. 120, 132, conclusion that the power to grant bail to a convicted person would not fit in :with the scheme of Chapter XXXIX of the Code read with s. 561A. In our opinion, neither this decision nor even the observations on which

Shri Purushottam relied can afford any assistance in deciding the point which this appeal has raised before us. Incidentally we may add that it was as a result of the observations made by the Privy Council in that case that s. 426 of the Code was amended in 1945 and power has been conferred on appropriate courts either to suspend the sentence or to grant bail as mentioned in the several subsections of s. 426. That is how s. 426(2A) and (2B) now deal with the subject of bail even though the main section is a part of Chapter XXXI which deals with appeals, references and revisions. We must accordingly hold that the view taken by the Bombay High Court about its inherent power to act in this case under s. 561 A is right and must be confirmed. It is hardly necessary to add that the inherent power conferred on High Courts under s. 561A has to be exercised sparingly., carefully and with caution and only where such exercise is justified "by the tests specifically laid down in the section itself. After all, procedure, whether criminal or civil, must serve the higher purpose of justice; and it is only when the ends of justice are put in jeopardy by the conduct of the accused that the inherent power can and should be exercised in cases like the present. The result is that the appeal fails and must be dismissed. Appeal dismissed.