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A Critical Analysis on Detention of Undertrial Prisoners for an Indefinite Period with reference to Tarun Dutt v Govt. NCT of Delhi

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This article talks about the status and rights of undertrial prisoners examined from the perspective of the Code of Criminal Procedure and Judicial Precedents. The right to bail and the right to be released of undertrial prisoners are also looked into. Undertrial prisoners account for a huge percentage of the total prison population, unable to furnish surety and denied access to legal aid, they are kept in prison for years together. The law deems 2,45,244 persons inside prisons to be innocent and under trial. Is there any way a system that claims to be just and fair can justify depriving the liberty of such innocent people? The article further deals with views of various Court which upheld the rights of Undertrial prisoners laying down guidelines to be followed by the Criminal legal system administration, its agencies, and other stakeholders, and the recent Judgment of the Delhi High Court in the case of Tarun Dutt v Govt, NCT of Delhi¹, where the Court provided for bail on bond and also held that the undertrial prisoners should not be held in detention for an indefinite period.

Keywords: *undertrial prisoners, crpc, bail, detention, custody.*

¹ Tarun Dutt v Govt, NCT of Delhi (2022) SCC OnLine Del 4564

INTRODUCTION

'Justice delayed is justice denied' means justice will have no value and significance if it is put off for a longer period. An important part of our criminal system is that there must be speed in the process of providing justice also known as speedy trials. In very simple words, under-trial prisoners are those people who are facing trial in any court and during the said trial are kept in judicial custody in a prison. They are such prisoners who have been arrested for some crime and are waiting to appear before the magistrate.² Under-trial prisoners constitute a significant majority of the prison population (65.7%). All the 2,45,244 persons who are in prison as under-trials are deemed to be innocent in the eyes of the law.

The Code of Criminal Procedure 1973 (Cr.P.C.) does not define the term "bail" although offenses are classified as bailable and non-bailable. The former are less serious offenses and any person accused of committing these is entitled to be released on bail as soon as s/he is willing to furnish bail.³ When accused of committing non-bailable offenses, a person can only be released on bail by the court if it is satisfied that the person shall attend the court to stand trial; will not tamper with evidence or influence witnesses, or obstruct police investigation in any manner; will not commit any other offense or hinder the interest of justice. Despite sounding fair, the bail provisions and their implementation is highly discriminatory. As far back as 1971, the Legal Aid Committee appointed by the Government of Gujarat noted⁴:

"The bail system causes discrimination against the poor since the poor would not be able to furnish bail on account of their poverty while the wealthier persons otherwise similarly situated would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount of the bail fixed by the Magistrate is not high, for a large majority of those who are brought before the Courts in criminal cases are so poor that they

² Payal Singh, 'A Deep-Dive Into Under-Trial Prisoners' Long Wait For Justice' (*Youthkiawaaz*, 8 December 2022) <<https://www.youthkiawaaz.com/2022/12/under-trial-prisoners-a-long-wait-for-justice/>> accessed 20 January 2023

³ Code of Criminal Procedure 1973, s 436A

⁴ Madhurima Dhanuka, 'Undertrial Prisoners and the Criminal Justice System' <<https://www.humanrightsinitiative.org/download/1457162682Undertrial%20Prisoners%20and%20the%20Criminal%20Justice%20System.pdf>> accessed 19 January 2023

would find it difficult to furnish bail even in a small amount.”⁵ The criminal justice delivery system in our country has seen more than 0.2 million undertrial prisoners being neglected for several years and in many cases, it even exceeded the maximum sentence for the crime they allegedly committed. This is due to the lack of coordination between the Centre, Judiciary & State Governments. Another reason is that they did not have anyone to stand as guarantors or assets to furnish as bail bonds.

There have been several cases where the amount of bail was disproportionately high due to which the poor kept on suffering. These people need protection and consideration of the law and criminal justice system more than anyone else.⁶ Due to these reasons, undertrial prisoners have to be beyond bars for an indefinite period until their trial begins or they get a date for a hearing in the Court concerning their bail application. And this issue has to be redressed and dealt with more seriously. Further, amendments should be made to the relevant legislation, rules, and regulations to remedy the plight of these prisoners.

UNDERTRIAL PRISONERS

The 78th Report of the Law Commission of India (1979) defines 'undertrial' as a person who is in judicial custody or remand during the investigation. An undertrial or a pre-trial detainee denotes an unconvicted prisoner, i.e., one who has been detained in prison during the period of investigation, inquiry, or trial for the offense they are accused to have committed. India's undertrials constitute a whopping two-thirds of the country's total inmates. In purely statistical terms, out of some 3.81 lakh prisoners across the country, 2.78 lakhs are undertrials. Notwithstanding a slew of legislations and court judgments that have been passed over the years, the number of undertrials prisoners has increased by 9.3 percent from 254,857 in 2012 to 278,503 in 2013.⁷

⁵ P N Bhagwati, *Report of the Legal Aid Committee : appointed by the Government of Gujarat under government resolution, Legal Department* (Govt. Central Press, Govt. of Gujarat 1971)

⁶ Payal Singh (n 2)

⁷ Niranjana Sahoo & Vivek Jain, 'Justice System in Crisis: The Case of India's Undertrial Prisoners' (*ORF Issue Brief*, August 2015) <https://www.orfonline.org/wp-content/uploads/2015/08/IssueBrief_103.pdf> accessed 21 January 2023

LEGAL FRAMEWORK

Section 436A⁸ of CrPC was inserted by the Amendment Act of 2005. It provides the provision for the release of undertrial prisoners after a certain period during the investigation, inquiry, or trial under the Code or releases them on bail on certain conditions. This section states as follows;

436A. The maximum period for which an undertrial prisoner can be detained - Where a person has, during the period of investigation, inquiry, or trial under this Code of an offense under any law (not being an offense for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offense under that law, he shall be released by the Court on his bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such a person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties: Provided further that no such person shall, in any case, be detained during the period of investigation, inquiry, or trial for more than the maximum period of imprisonment provided for the said offense under that law.

Explanation.--In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded."⁹

Undertrial prisoners have certain rights under the Code of Criminal Procedure, such as the right to bail¹⁰, the right to be taken to a Magistrate without delay¹¹, the right to have a Legal

⁸ Code of Criminal Procedure 1973, s 436A

⁹ Code of Criminal Procedure 1973, s 436A

¹⁰ Code of Criminal Procedure 1973, s 50

¹¹ Code of Criminal Procedure 1973, s 56

practitioner¹², the right to free legal aid¹³, the right to be present during the trial¹⁴, right to appeal,¹⁵ etc.

VIEW OF THE JUDICIARY

Judiciary and authorities play a great role in bettering the condition of under-trial prisoners. Time and again judiciary has tried to improve the condition of the undertrials by laying down various directives in its judgments. Indian authorities and the judiciary themselves have seen the problem of undertrial prisoners as being against the concept of liberty, as such prisoners without a conviction is still deemed innocent in the eyes of the law.¹⁶ The Indian Judiciary has pondered upon, discussed, and has given various decisions regarding the rights of Undertrial prisoners, the matter of their indefinite detention, and other issues relating to the same. They have given various guidelines on how to treat the Undertrial prisoners and provide them a fair trial, the opportunity to be heard and released in case found innocent and not guilty of the allegations and charges put on them. The views and decisions of the Indian Judiciary on various aspects concerning Undertrial prisoners and their issues are as follows;

In *Shri Rama Murthy v State of Karnataka*¹⁷, Supreme Court mentioned that the State had 193,240 people incarcerated out of which 137,838 were undertrials. In the 2000s the Supreme Court also continued to emphasize the need to protect undertrial prisoners.

In *Moti Ram and Ors. v State of Madhya Pradesh*¹⁸ the court stated the following– *“The consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the*

¹² Code of Criminal Procedure 1973, s 41D

¹³ Code of Criminal Procedure 1973, s 304

¹⁴ Code of Criminal Procedure 1973, s 273

¹⁵ Code of Criminal Procedure 1973, Ch XXIX

¹⁶ Payal Singh (n 2)

¹⁷ *Shri Rama Murthy v State of Karnataka* (1997) SCC (Cri) 386

¹⁸ *Moti Ram and Ors v State of Madhya Pradesh* (1979) SCR (1) 335

preparation of his defense. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family."

In *Sheela Barse v State of Maharashtra*¹⁹, the Apex court dealt with the issue of the treatment of female prisoners in police lockups. It issued various directions to improve their conditions and also provided adequate protection to the arrested people.

The Supreme Court in the case of *Sharifbai v Abdul Razak*²⁰ held that –*"If the accused person is not produced before the magistrate within the stipulated time, then such detention would be wrongful. Also, the accused person so arrested cannot be detained in custody by a police officer without informing him of the grounds for such arrest. He shall also be informed about his legal right to bail. Such a right gives the arrested person an opportunity to apply for bail and to prepare any other defense in time."*

The Supreme Court further in the case of *Prem Shankar Shukla v Delhi Administration*²¹ condemn the use of handcuffs in chaining prisoners and held that no prisoner shall be handcuffed routinely or merely for the convenience of the custodian or escort.

In *the State of Rajasthan v Balchand alias Baliay*²², the Supreme Court ruled that it is not necessary to detain the accused person in court if the appearance of the accused can be secured by other means. The court also stated that bail and not jail should be the norm.

In the case of *Sunil Batra*,²³ the court observed that if a prisoner is subjected to bar fetters for a long period without having due regard for his safety, then this would violate his basic human dignity which is a violation of our constitution. The court also mentioned that solitary confinement has a dehumanizing effect on the prisoner which violates their right under Article 21²⁴ of the Constitution.²⁵

¹⁹ *Sheela Barse v State of Maharashtra* (1983) AIR 378

²⁰ *Sharifbai v Abdul Razak* AIR (1961) Bom 42

²¹ *Prem Shankar Shukla v Delhi Administration* (1980) AIR 1535

²² *State of Rajasthan v Balchand alias Baliay* (1978) SCR (1) 535

²³ *Sunil Batra v Delhi Administration* (1980) SCR (2) 557

²⁴ Constitution of India 1950, art 21

²⁵ Payal Singh (n 2)

Failure to provide legal assistance to poor persons violates constitutional guarantees. Article 39A²⁶ of the constitution casts a duty on the state to secure the operation of a legal system that promotes justice based on equal opportunity. The right to legal aid is also a fundamental right under Articles 14²⁷ and 21²⁸ of the constitution. The Court expressed serious concern about the plight of prisoners who are unable to afford legal counsel to defend themselves or themselves. It observed that the lack of access to a lawyer was responsible for individual rights against harassment and torture not being enforced. Stressing the urgent need to provide legal aid not only to women prisoners but also to all prisoners whether they were under trial or were serving sentences, the Court said that an essential requirement of justice is that a lawyer should defend every accused person. Denial of adequate legal representation is likely to result in injustice, and every act of injustice corrodes the foundations of democracy and rule of law.²⁹

*Bhim Singh v Union of India and Ors*³⁰ - This judgment addresses the need for the immediate implementation of Section 436A and the release of large numbers of undertrials detained in prisons as mandated by the section. The Court reiterated the imperativeness of the need to take steps to fast-track all types of criminal cases to ensure that criminal justice is delivered timely and expeditiously. To provide immediate relief to undertrial prisoners, the Court passed an interim order directing the setting up of a mechanism for the proper implementation of Section 436A³¹ and the release of undertrial prisoners (UTPs) from jails by the provisions of the section.

Facts of the Case -

- This is an ongoing Writ Petition in which the Court has passed orders from time to time. During an earlier hearing of the petition on 01.08.2014, the Court asked the Attorney General, Mr. Mukul Rohatgi, about the Central Government's plan for fast-tracking the

²⁶ Constitution of India 1950, art 39A

²⁷ Constitution of India 1950, art 14

²⁸ Constitution of India 1950, art 21

²⁹ Dr. N. Bhagya Lakshmi, 'Detention of Under Trial Prisoners: A Bird's Eye View of the Judiciary' (2019) 6 PenAcclaims <<http://www.penacclaims.com/wp-content/uploads/2019/07/Dr-N.-Bhagya-Lakshmi.pdf>> accessed 20 January 2023

³⁰ *Bhim Singh v Union of India and Ors* WP (Crl) No 310/2005

³¹ Code of Criminal Procedure 1973, s 436A

criminal justice system. The Attorney General sought three months to place a roadmap before the Court for fast-tracking criminal cases.

- The Attorney General further informed the Court that more than 50% of prisoners are undertrials and many may have served the maximum sentence for the offenses they have been charged with.
- Considering the gravity of injustice caused by the prolonged detention of undertrials, the Court passed directions for the immediate implementation of Section 436A to ensure that undertrial prisoners do not continue to be detained in prison beyond the maximum period provided under the section.

The issue before the Court -

The need for implementation of Section 436 A of the Code and fast-tracking criminal justice in the country to ensure that no undertrial remains in prison beyond half of the maximum sentence prescribed for that offense.

The decision of the Court -

Setting up the review mechanism for the implementation of Section 436A, the Court passed the following directions:

Composition - The Jurisdictional Magistrate/Judicial Magistrate/Sessions Judge will have the authority to review undertrial prisoners for purposes of implementation of Section 436A.

Frequency - The concerned authority shall hold one sitting every week in each jail for two months, commencing from 1st October 2014.

Function - The concerned judicial officer will identify undertrial prisoners who have spent half of their maximum sentences in jail or the maximum period of imprisonment provided for the said offense under the law. The judicial officer will pass an order in the jail itself for the release of such undertrial prisoners who fulfill the requirement of Section 436A³².

³² Code of Criminal Procedure 1973, s 436A

Monitoring Mechanism – The report of each sitting will be forwarded to the Registrar General of the concerned High Court, and at the end of two months, the Registrar General of each High Court will submit the report to the Secretary General of the Supreme Court. The Jail Superintendent has to provide all necessary facilities for holding the court sittings. commencing from 1st October 2014.³³ In 2012, a set of directives³⁴ was issued by the Ministry of Home Affairs to deal with overcrowded prisons. This can be ensured by periodic monitoring conducted by the states to identify undertrial prisoners eligible for release under section 436A³⁵. These are some of the major recommendations given by our judicial system to date –

1. Provisions of Section 167³⁶ about the time limit for police investigation in case of accused undertrial prisoners should be strictly followed.
2. The possibility of producing prisoners at various stages of investigation and trial, in shifts should be considered.
3. Institutions which are meant for lodging undertrial prisoners should be close to the courts.
4. Undertrial prisoners must be produced effectively before the presiding magistrates on the dates of their respective hearings.
5. Police functions should be separated and sufficient strength shall be provided to complete investigations on time.
6. When it comes to undertrial prisoners, adjournments should not be granted unless necessary.
7. The class of Compoundable offenses under the IPC should be widened.
8. Alternatives to imprisonment should be incorporated into the IPC.

³³ *Bhim Singh v Union of India and Ors* WP (Crl) No 310/2005

³⁴ *Ibid*

³⁵ Code of Criminal Procedure 1973, s 436A

³⁶ Code of Criminal Procedure 1973, s 167

9. The criminal courts should exercise their available powers under Sections 258³⁷, 309,³⁸ and 311³⁹ to effectuate the right to a speedy trial.
10. Remand orders should be self-limiting and indicate the date on which the undertrial prisoners would be automatically entitled to apply for bail.
11. Computerize the handling of criminal cases with the help of the National Informatics Centre and develop programs that would help in managing the pendency or delay of cases.
12. Undertrial prisoners must be lodged in separate institutions such that they are away from the convicted prisoners.
13. There shall be an immediate increase in the number of judges and magistrates as proportionate to the general population.
14. In case of violation of any fundamental right of the prisoner, the state shall give adequate compensation.⁴⁰

Recently, in *Hussain and another v Union of India*⁴¹, the Hon'ble Supreme Court has directed: 'As a supplement to Section 436-A⁴² but consistent with the spirit thereof, if an under trial has completed the period of custody over the sentence likely to be awarded if the conviction is recorded such under trial must be released on personal bond. Such an assessment must be made by the concerned trial courts from time to time.'⁴³

*Tarun Dutt v Govt, NCT of Delhi*⁴⁴: This Judgment was passed on 26th December 2022. Here the Delhi High Court held that undertrial prisoners should not be kept in Detention for an indefinite period. A Single Judge Bench of Amit Mahajan, J. granted bail to a man accused of cheating and

³⁷ Code of Criminal Procedure 1973, s 258

³⁸ Code of Criminal Procedure 1973, s 309

³⁹ Code of Criminal Procedure 1973, s 311

⁴⁰ Payal Singh (n 2)

⁴¹ *Hussain and Anr v Union of India* (2017) 5 SCC 702

⁴² Code of Criminal Procedure 1973, s 436A

⁴³ Dr. N. Bhagya Lakshmi (n 29)

⁴⁴ *Tarun Dutt v Govt, NCT of Delhi* (2022) SCC OnLine Del 4564

held that undertrial prisoners cannot be placed in custody for indefinite periods when the trial was likely to take a considerable time. Further, the Court held that the apprehension that the applicant would abscond was only a 'bald assertion'.

Facts

The present application was filed under Section 439⁴⁵ of the Criminal Procedure Code, 1973 (CrPC), seeking regular bail in FIR registered under Sections 420⁴⁶, 120-B,⁴⁷ and 34⁴⁸ and Section 66(D)⁴⁹. The FIR was registered by the complainant, who alleged that he had been dishonestly induced on the pretext of receiving the insurance policy bonus amount and the insurance gratuity value on the lapsed insurance policies from the year 2013 till date.

The complainant claimed that a group of people had called him from different mobile numbers claiming to be senior officials of the insurance regulatory body and induced him by stating that the unclaimed insurance amount could be released to the complainant. On the allurements, the complainant deposited a sum of Rs. 80 lakhs during the years 2016 to 2018. In 2020, the complainant received calls that there were around Rs. 1.5 crores had been matured and the file was pending with the Ministry of Consumer Affairs and the Income Tax Department. The complainant was again induced to deposit a sum of Rs. 39 lakhs in the bank account provided by the accused persons.

During the investigation, it was found that around Rs. 1.2 Crores had been transferred in various accounts by the complainant since 2015. It was claimed that the applicant had joined the other accused persons in a fake insurance bonus scam and had cheated innocent victims/persons on the pretext of receiving huge insurance policy bonuses and the applicant impersonated himself as the Senior Director of the Income Tax Department and the Ministry of Consumer Affairs.

⁴⁵ Code of Criminal Procedure 1973, s 439

⁴⁶ Indian Penal Code 1860, s 420

⁴⁷ Indian Penal Code 1860, s 120B

⁴⁸ Indian Penal Code 1860, s 34

⁴⁹ Information Technology Act 2000, s 66D

Submissions on behalf of the Applicant

The applicant submitted that the other co-accused were already enlarged on bail and despite that, the applicant was languishing in jail and his application for grant of bail was dismissed by the Trial Court on an erroneous presumption that the applicant was likely to tinker with the ongoing investigation. Further, it was submitted that the trial was not likely to proceed and would take a long period before it got over and the applicant was in custody for the last two years and had a family to look after, including a six-year-old daughter and an eleven-month-old son. Therefore, the applicant submitted that he was also entitled to bail on the grounds of parity.

Decision

The Court opined that even though it was alleged that the applicant would influence the witnesses or tamper with the evidence or would abscond or that he was a flight risk if released on bail but the same was only a 'bald assertion'. Further, the Court held that the undertrial prisoners could not be detained in custody for an indefinite period. The Court noted that *'the speedy trial in the present case did not seem a possibility and keeping the applicant in further incarceration would cause deprivation of his right to legal defense. The maximum punishment for offenses alleged against the applicant was seven years, and the object of jail was to secure the accused person's appearance during the trial. The object was neither punitive nor preventive, and the deprivation of liberty was considered a punishment. The applicant could not be made to spend the entire period of trial in custody especially when the trial was likely to take a considerable time.'*

The Court also noted that the co-accused persons who had similar roles, had already been admitted on bail and the State had not challenged the orders granting Bail to those co-accused persons. Moreover, once most of the co-accused were out on bail, it could not be argued that only the applicant against whom there was apprehension would tamper with the evidence and influence the witnesses. Therefore, the Court held that the applicant has made out a case for a

grant of regular bail and was directed to be released on bail on furnishing a bail bond for a sum of Rs. 50,000 with one surety of the like amount.⁵⁰

Analysis

As observed by the Judiciary, undertrial prisoners should have the opportunity to apply for bail and also be released if satisfied of no proper evidence or procedures carried on to detain that person. These prisoners should also have the right not to be detained in custody for an indefinite period during the period of investigation, inquiry, or trial, without any rationale. They should also have the right to appeal. All these rights are reflected in the Code of Criminal Procedure, but its implementation is the one which should be considered as grave and worked upon by the equal efforts of the Judiciary, Legislature, Executive, Prison authorities, agencies of Criminal legal administration, and other stakeholders.

CONCLUSION

The importance of bail provisions and their underutilization has been reiterated on many occasions. No person should be made to suffer the deprivations of incarceration before s/he has been proven guilty in the eyes of law. By depriving them of their right to liberty through unnecessary detention, the existing system punishes the accused in violation of the basic principle of criminal jurisprudence that every person shall be presumed innocent till proven guilty. To ensure justice for under-trial prisoners, it is essential to effectively implement the existing provisions of the Cr. P.C. All the agencies of the criminal justice system including the police, the judiciary, the prosecution, the defense lawyers, and the prison department must adopt a concerted and well-coordinated approach to ameliorate the plight of the 'forgotten souls' i.e. under-trial prisoners, who languish in prisons unnecessarily.⁵¹

As per the views of the Judiciary, the rights of undertrial prisoners have to be taken seriously and protected. The guidelines given by the Judiciary concerning how undertrial prisoners have

⁵⁰ 'Undertrial prisoners cannot be detained in custody for an indefinite period: Delhi High Court' (SCC Online, 31 December 2022) <<https://www.sconline.com/blog/post/2022/12/31/undertrial-prisoners-cannot-be-detained-in-custody-for-an-indefinite-period-delhi-high-court/>> accessed 18 January 2023

⁵¹ Dr. N. Bhagya Lakshmi (n 29)

to be treated, their rights secured, etc have to be implemented by the Government, Police, Prison authorities, and other stakeholders. The Legislature and the Executive have to come together in making amendments, rules, and regulations about this matter and implement those and the directions of the Court fairly and properly to fulfill the purpose of such directions and legislation to secure the Rights of the Undertrial Prisoners and bring justice to them. As the saying in the Criminal Legal System goes, Innocent until proven guilty, this should be considered significant and sine qua non for a Fair Criminal Legal System and its Functioning.